No. 92972-6

IN THE SUPREME COURT OF
WASHINGTON

(Court of Appeals No. 72416-9-I)

ESTATE OF VIRGIL VICTOR BECKER, JR., by its Personal Representative, Nancy A. Becker,

Petitioner,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

Defendant Forward Technologies, Inc. (FTI) assembled and welded a defective carburetor float that caused a fatal airplane crash, resulting in three deaths, including plaintiff's decedent Dr. Virgil Becker, Jr. The carburetor float was supposed to be leak-proof, but the seams were improperly welded, and the aircraft's engine flooded, with tragic consequences.

But plaintiff's claim against FTI will not be going to trial. Despite compelling evidence of a manufacturing defect and expert opinions supporting causation, the Court of Appeals has immunized FTI from liability by affirming a summary judgment in FTI's favor.

According to the court, the 1958 Federal Aviation Act, 49 U.S.C. §§40101 et seq. (FAA) impliedly occupies the field of airplane engine fuel systems and preempts Washington state from applying its own products liability standards even though FTI does not fall within the FAA's regulatory structure. The court reasoned that federal regulations of the airplane's engine were so pervasive as to leave no room for Washington State to apply its own laws to areas not covered by federal standards. Opinion, p. 9.

While the court conceded that federal regulations "necessarily require an engine's component parts to function properly" (*Id.* at p. 11), the court

inconsistently concluded that no federal regulations prohibited FTI from producing and distributing leaky carburetor floats.

Here, the opinion becomes remarkably murky. Although federal regulations presumably require FTI's carburetor float to function properly (i.e., not to leak) and perform safely, FTI cannot be held to this performance standard, because those general standards only apply to "aircraft operations" (*Id.* at p. 12-13) and not to manufacturing defects caused by an outside supplier like FTI, which is not required to hold a FAA permit or certificate for its work. According to the court, "it is elusive to determine whether there is an applicable parallel federal standard of care, especially as to a noncertificated contractor who assembles and welds parts." *Id.* at p. 12.

Elusive, indeed. The court has constructed a Catch 22 of mythic proportions. Although field preemption is supposed to be the exception, not the rule, the court has found federal regulation to be pervasive enough to supplant Washington tort law, but not so pervasive as to create any manufacturing or performance standards that apply to FTI. FTI apparently occupies a liability-free zone where it can manufacture defective parts with impunity, and with no duty to warn.

The policy ramifications of the court's blanket immunity for manufacturing defects are staggering. The adverse impacts apply not only to tort lawsuits by airplane crash victims, but also to subrogation, indemnity,

and contribution actions involving aircraft manufacturers. Contrary to fundamental principles of Washington tort law, which applies liability according to fault, FTI, as the responsible actor, may escape scot-free pursuant to the court's newly created judicial immunity.

The court has taken the law down an evolutionary dead end. No Washington decision has applied field preemption to aviation tort claims until this case, and no case in the country has applied preemption to unregulated aviation manufacturers as to whom there are no federal manufacturing standards.

This Court should grant review and set the applicable standard of care for a fair apportionment of liability of fault among *all* parties whose violations of those standards caused the airplane crash resulting in Dr. Becker's death. Those standards exist under well-settled Washington products law.

II. PETITIONER

Nancy A. Becker, as personal representative of the Estate of Virgil Victor Becker, Jr. (Becker).

III. COURT OF APPEALS DECISION

Estate of Virgil V. Becker v. Forward Technology Industries, ---Wn. App.---, 365 P.3d 1273 (Div. 1 Dec. 28, 2015), No. 72416-9-I, 2015 WL

9461623, (Appx. A)(Opinion); and Order Denying Motion for Reconsideration, February 18, 2016 (Appx. B).

IV. ISSUES PRESENTED FOR REVIEW

1. Is a noncertificated manufacturer of aircraft parts who creates a manufacturing defect entitle to preemption when it is not subject to federal law, and should it be immune because no standard of care applies?

2. Do the Washington state standards of care parallel the federal standards of care for defectively manufactured aircraft parts?

3. Should a noncertificated aircraft manufacturer which fails to raise federal preemption as an affirmative defense in its answer to a complaint under the Washington Product Liability Act be able to obtain summary judgment without first giving the accident victims the opportunity to amend their complaint to allege specific federal regulatory violations?

V. STATEMENT OF THE CASE

A. Factual Background

Dr. Virgil Becker, an orthopedic surgeon from Auburn, was killed the small airplane in which he was travelling crashed into wooded terrain near McMurray, Washington on July 28, 2008. Dr. Becker was survived by four daughters and his wife Nancy, who is the personal representative of his estate. Post-accident examination revealed that a component part of the aircraft's carburetor, the carburetor float, had two manufacturing defects:

the sealed float leaked and filled with fuel, and the part was out of dimensional specification.[1] CP 547-550, 642-646, 812-813, 1276-1277.

The aircraft's engine was manufactured by Lycoming (AVCO), and the engine's carburetor was manufactured by Precision Airmotive (Precision), which are both certified by the FAA and must comply with the Federal Aviation Regulations (14 CFR *et seq*).

FTI, a self-described expert in polymer welding and assembly, manufactured the defective carburetor float pursuant to its contract with Precision. CP 262, 342. In supplying tens of thousands of carburetor floats to Precision, FTI certified that the floats met all plans and specifications called for in the contract, including having leak free sealed pontoons and meeting strict dimensional specifications. CP 571. FTI is not federally certified, and not required to comply with the Federal Aviation Regulations.

The failure of the carburetor float allowed unregulated fuel into the engine, causing it to flood and fail, resulting in the accident. CP 547-550, 642-646, 812-813, 1276-1277. There is no dispute that FTI created the two manufacturing defects in the subject carburetor float. CP 642-646.

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[1] An engine carburetor provides the appropriate fuel/air mixture to the engine, which is required for proper operation. If the mixture is too rich (too much fuel), the engine may flood and fail. If the mixture is too lean (not enough fuel), the engine may starve and fail.

Before the underlying accident, there was a known and significant history of many FTI floats leaking and failing. CP 264, 369. So many, in fact, that FTI commonly referred to them as "leakers."[2] CP 346, 379.

B. Procedural History

In 2010, Becker filed suit in King County Superior Court against numerous defendants including FTI. FTI did not raise federal preemption as a defense in its answer. CP 42-45. After two years of active litigation, and near the end of discovery, FTI filed a motion for summary judgment raising federal preemption for the first time. CP 234-260.

In its motion, FTI argued that the federal aviation regulations preempt the Washington Product Liability Act. CP 242. FTI also claimed that the standard of care was not contained in the regulations because the regulations do not apply to FTI. FTI later confirmed "[t]here are no federal regulations . . . that apply to FTI".[3] CP 1123. FTI failed to cite any specific federal regulations that it claimed set the standard of care for its conduct.

Becker opposed FTI's preemption argument, citing legal authority that Becker's aviation product liability claims are not subject to implied federal

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[2] FTI defined "leaker" as "a float that is leaking at the weld." CP 361. FTI knew that a "leaker" did not meet the hermetically sealed standard that FTI was required to meet. CP 265. FTI was aware that it was selling defective floats to Precision, and that its floats were being used in aircraft carburetors. CP 123-126.

[3] In opposition to Becker's Motion for Reconsideration, FTI stated: "Allowing Becker to amend his [sic] complaint would be in vain, as there are no federal regulations – either cited by Becker or anywhere else in the Federal Aviation Regulations – that apply to FTI." CP 1123.

preemption. CP 278-284. Becker also submitted numerous expert declarations reflecting that the carburetor float which contained manufacturing defects did not comply with the contract plans and specifications, was not airworthy, and did not comply with any federal regulations. CP 528-532, 547-550, 642-646, 812-813, 1276-1277.

The trial court granted FTI's motion, without analysis. CP 666. Becker filed a motion for reconsideration and a motion for leave to amend her complaint to raise specific violations of federal regulatory standards.[4] CP 798-805, 828-838. The trial court denied Becker's motion to reconsider, and denied her motion to amend as to FTI, but allowed Becker to file an amended complaint as to the other defendants. CP 1224-1225.

Precision filed for bankruptcy shortly before trial, and was voluntarily dismissed. Becker ultimately settled with and dismissed the remaining

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[4] Becker submitted the declaration of aviation expert Donald Sommer, P.E., which stated in part:

> [t]he carburetor float was not airworthy in that it did not conform to its type design and was not in a condition for safe operation on any aircraft under the federal regulations. It contained a manufacturing defect in the weld seam, created by FTI, which caused it to leak and which allowed the carburetor to deliver an inappropriately rich fuel mixture to the engine, causing it to flood and fail. It did not conform to its design requirements which required that the float be impermeable to fuel and not leak...
>
> The subject carburetor float does not meet the requirements of any federal aviation regulation because it leaked. The float contained a manufacturing defect. There is no federal aviation regulation which allows use of this or any defective part on an aircraft.

CP 812-813.

defendants. Once a final judgment was entered, Becker appealed from the summary judgment in FTI's favor.

The Court of Appeals affirmed the summary judgment. The court determined the FAA and accompanying regulations evinced a Congressional intent to preempt state standards of care in favor of uniform federal standards of aviation safety as to the engine's fuel system even though there were no specific federal regulations regarding defective carburetor floats. The court accordingly determined that Becker raised but a "hypothetical state remedy based on an unsupported federal standard of care..." Op., p. 14.

The court also held that FTI's failure to plead preemption as an affirmative defense was "harmless error". *Id.* The court refused Becker leave to amend her complaint after the trial court ruled on summary judgment that preemption applied, claiming Becker's motion to amend was "untimely." *Id.* at 15. The court did not consider as a contributing factor FTI's failure to plead field preemption as an affirmative defense.

VI. THIS COURT SHOULD GRANT REVIEW OF THE PUBLISHED APPELLATE OPINION WHICH TURNS THE LAW OF PREEMPTION ON ITS HEAD AND IMMUNIZES NON-REGULATED COMPONENT PARTS MANUFACTURERS FROM LIABILITY FOR MANUFACTURING DEFECTS.

The Court of Appeals' decision creates a new judicial immunity for aircraft parts manufacturers by misapplying federal preemption law. Federal

law does not occupy the field insofar as manufacturing defects caused by uncertificated parts manufacturers. There are no federal standards as to manufacturing defects. Instead, federal law wisely preserves state tort remedies for manufacturing defects and post-sale failure to warn. By leaving FTI in a netherworld without state liability and without federal regulation, the court has upended a well-established and logically sound harmonious legal framework.

A. FTI, Not Becker, Has the Burden to Plead and Prove Federal Preemption of Washington State Tort Standards for Manufacturing Defects in its Component Parts.

Federal aviation regulations do not automatically preempt Washington state aviation product liability actions. The FAA does not contain any express preemption clause. To the contrary, the FAA expressly preserves state tort remedies, stating that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. §40120(c). Likewise, there is no conflict preemption. FTI does not claim that Becker's state product liability standards conflict with any federal standards or regulations, nor does FTI claim that it would be impossible to comply with multiple standards, even if they did apply.[5]

[5] Nowhere does FTI contend that application of Washington tort standards makes it impossible for it to comply with any federal mandates. Indeed, FTI says that are no federal standards which apply to manufacturing defects in its component parts, and no regulations that require FTI, as an uncertificated contractor, to warn consumers about dangers, defects or safety issues with its product.

As a result, FTI's judgment stands or falls upon the issue of field preemption. Field preemption applies where Congress has created a regulatory scheme so pervasive in a particular subject area as to occupy the entire field, leaving no room for the states to supplement it. *See, Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009); *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 809 (2009).

But here too, the starting point is *against* field preemption. Preemption requires more than the mere existence of a detailed or federal regulatory scheme. "To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause Jurisprudence." *English v. Gen. Elec. Co.*, 496 U.S. 72, 87, 110 S. Ct. 2270, 2279, 110 L. Ed. 2d 65 (U.S. 1990); *see also*, *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 78-79, 896 P.2d 682 (1995) ("[T]he presumption against preemption is 'even stronger with state regulation regarding matters of health and safety,' in which states have traditionally exercised their sovereignty").

FTI, as the party claiming preemption of Washington state law involving public health and safety, has the burden to establish why federal

regulations wholly occupy the field and leave no room for the Washington products law to supplement it. *See*, *Inlandboatmen's Union of the Pac. v. Dep't of Transp.*, 119 Wn.2d 697, 702, 836 P.2d 823 (1992).

When regulations are silent as to specific relevant areas, there is no field preemption. "[S]ilence cannot overcome the presumption against preemption. Occupation of a field is shown by what is present, not what is absent." *L&I v. Brugh,* 135 Wn. App. 808, 816, 147 P.3d 588, 592 (2006); *see also, Becker v. U.S. Marine Co.*, 88 Wn. App. 103, 943 P.2d 700 (1997) (Coast Guard's silence on boat design safety is insufficient for preemption).

B. FTI Has Not Met Its Burden of Establishing a Clear Congressional Intent for Federal Preemption When FTI Itself Claims That Its Manufacturing Defects Are Not Subject to FAA Regulation or Any Specific Federal Standards.

The Court of Appeals implicitly recognized that it is on shaky ground in applying field preemption to override Becker's products claims for the failure of FTI's component parts to properly perform according to their intended use. The opinion begins with the observation that "[t]he scope of implied preemption in aviation law is evolving and elusive." Op., p. 1.

The court extensively discussed —and relied upon —a Ninth Circuit opinion, *Martin v. Midwest Express Holdings, Inc*, to support this evolutionary detour. Citing *Martin* and a litany of federal regulations involving fuel systems, the court determined that federal regulations were so

extensive and pervasive as to the airplane engine's fuel system as to crowd out Washington tort law, even though they did not apply to FTI or to carburetor floats. The court concluded:

> The lack of a specific regulation expressly directed to carburetor floats is of no consequence because the specific area at issue for purposes of implied field preemption is the engine's fuel system. Op., p. 11.

Far from supporting FTI's claim of field preemption, *Martin* establishes its limited reach. In *Martin,* a pregnant passenger on a commercial aircraft sued the company which manufactured the aircraft stairs on which she was injured. *Martin,* 555 F.3d at 808. As here, there were no specific federal acts or regulations pertaining to the stairs; the manufacturer only relied on field preemption, arguing that the federal standards regarding aircraft and its component parts pervasively occupied the entire field, including a regulation precluding airstairs from blocking emergency exits. *Id.* at 811-812.

Martin rejected this expansive view and looked to the silence of the federal regulations on other matters concerning airstair safety as evidence *against* a finding of field preemption:

> In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable. *Id.* at 811.
>
> This conclusion accords with the decisions of other circuits, refusing to find various defective product claims impliedly preempted by the FAA in the absence of relevant and pervasive regulations *on the allegedly defective part. Id.* (emphasis added).

The court has taken the wrong lesson from *Martin.* As *Martin* holds, even where there is pervasive regulation by the FAA, the states nonetheless can apply traditional tort standards of care as to those claims for which "there are no relevant federal regulations." *Id.* "In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable." *Id.*

Martin gives the following example of a specific defect as to which there is no field preemption:

> The regulations say nothing about maintaining [aircraft] stairs free of slippery substances, or fixing loose steps before passengers catch their heels and trip. It's hard to imagine that any and all state tort claims involving airplane stairs are preempted by federal law. *Id.* at 812.

Martin is more than instructive; it is dispositive. As in *Martin*, a lack of pervasive regulations *related to the part at issue in the case* (FTI's carburetor float), precludes preemption, because it does not defeat the presumption against preemption, and fails to reflect any clear and manifest intent of Congress to preempt.

Martin's reasoning is compelling in products liability claims involving manufacturing defects and post-sale failure to warn, as in the case at bar. Manufacturing defects involve parts that do not conform to design plans and specifications. Here, the regulations provide nothing more than general safety and performance standards for "fuel systems." FAA regulations do

not set forth any manufacturing standards, nor do the regulations address what reasonable care must be used in manufacturing.

Thus, the regulations set no specific standards to prevent a manufacturing defect. Nonetheless, the Court of Appeals holds that absent a specific standard of care regarding manufacturing defects to a specific product, a manufacturer is entitled to immunity.

> [I]t is elusive to determine whether there is an applicable parallel federal standard of care, especially as to a noncertificated contractor who assembles and welds parts. 'The FAA itself does not clearly establish a federal standard of care; the Code of Federal Regulations does, but only as applied to "aircraft operations."' Becker provides no authority or argument that the assembly of a carburetor float is a part of airplane operations. Op., pp.12-13 (footnotes omitted).

But just as there is no federal regulation against slippery airplane stairs, so too there is no federal regulation against leaky carburetor floats. As *Martin* insists, this does not mean that a company that makes leaky carburetor floats can do so with impunity simply because federal regulations are silent, and there is no federal common law. Instead, as *Martin* holds, state tort law fills the gap. Field preemption "neither precludes all claims except those based on violations of specific federal regulations, nor requires federal courts to independently develop a standard of care when there are no relevant federal regulations." *Martin,* 555 F.3d at 811.[6]

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[6] *Martin*'s concern about federal regulatory gaps also applies to Becker's failure to warn claims against FTI. There are no federal regulations requiring a component parts manufacturer to warn of known defects in its leaky carburetor floats. While 14 C.F.R.

Precisely for this reason, in *Lewis v. Lycoming*, 957 F. Supp. 2d 552 (E.D. Pa. 2013), the court denied a motion for judgment on the pleadings by various defendants who were sued for their role in manufacturing, assembling or selling a defective part (a fuel servo) in the fuel supply system of an aircraft. *Id.* at 553. The fuel servo failed to provide proper fuel supply to the helicopter's engine, resulting in a fatal crash. *Id.*

Like here, there were numerous federal regulations regarding the helicopter's fuel system, but no federal regulations specifically applying to the defective part at issue: the fuel servos. The *Lewis* court rejected the defendants' attempts to use field preemption arguments:

> State products liability, negligence and breach of warranty claims for aircraft design or manufacture will only help, not harm, Congress in obtaining its goal of maximum safety. Moreover, state products liability law is not inconsistent with the scheme of aviation regulation under the circumstances posited here. Although there are federal regulations addressing fuel delivery systems generally, no standard specifically addresses the design and manufacture of the fuel servo at issue in this action...
>
> In any analysis, we must always keep in mind the caution expressed by the Supreme Court about field preemption. Simply because Congress has enacted comprehensive legislation does not mean that field preemption should supersede state law, particularly in a field such as that here which the states have traditionally occupied. . . . There is no evidence that it was the 'clear and manifest purpose of

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section 21.3 sets a general standard of reporting certain types of product problems and defects, it only applies to certificate holders making reports to the FAA. Section 21.3 does not apply to FTI, and even if it did, section 21.3 (nor any other regulation) does not require warning users and consumers of defective aircraft parts. While FTI may point a finger at Precision and cite Precision's obligations under 21.3, that does not relieve FTI of its own obligations to warn of dangers with defects in its own products.

> Congress' for the Act to supersede state products liability, negligence, or breach of warranty law as applied to aircraft design and manufacture. *Id.* (citations omitted).

Rather than deferring to Congressional intent behind the FAA, the Court of Appeals' opinion eviscerates it. There are hundreds of thousands of component parts and sub-component parts to aircraft that are not addressed by federal regulations, such as carburetor floats, and thus subject to no specific federal standard of care.

This federal regulatory silence reflects a Congressional intent to use state tort law to supplement federal regulations, not the opposite. The court's decision endangers aviation safety by shielding manufacturers of defective component parts from liability simply because they are not formally regulated within the FAA.

The court's decision prejudices victim's rights to recover for injuries caused by defective aircraft products in Washington, especially when certificate holders (like Precision) file for bankruptcy and the at-fault component part suppliers are immune. The decision also interferes with certified manufacturers' subrogation, contribution, and indemnity claims against at-fault suppliers, who likewise will be expected to raise implied field preemption, not just as a choice of law issue, but as a blanket immunity.

Field preemption is intended to protect regulated FAA industry players from being subject to more than one standard, when state law and federal law provide differing standards. There is no rationale to apply field preemption to FTI, especially when it is not subject to more than one law or standard, and when it seeks to misuse preemption to exempt it from compliance to any standard.

C. FTI Should Not Be Immunized from Liability for Defectively Manufactured Parts When the WPLA Standards of Care Parallel Federal Standards, In That Both Require Aircraft Parts to be Safe and Free of Defects.

Even if FTI met the high threshold burden of establishing field preemption over *all* aspects of aircraft fuel systems, including its carburetor and component parts (a position with which Becker does not agree), the Court of Appeals nonetheless impermissibly refused to bring FTI under the umbrella of the federal airworthiness standards.

Even if the court found FTI entitled to the benefit of field preemption because of the pervasiveness of federal regulations as to fuel systems, the court should have subjected FTI to the burdens of the same federal regulations. It did not: "Because Becker cites no compelling authority for an

applicable parallel federal standard of care, the claims against FTI fail." Op., pp. 2-3.[7]

This Court should grant review to provide the compelling authority that has eluded the Court of Appeals, but which is essential to effectuate Congress' concern for aviation safety. If the decision is allowed to stand, component part manufacturers will have no liability for severe injuries caused by a part that contains a manufacturing defect even though it is indisputable that the part is not airworthy, is not safe for use on aircraft, and does not comply with aviation regulations, even those that parallel Washington product liability law.

Under the Federal Aviation Regulations, airworthiness is not a general concept but is a specific regulation with definable standards. 14 CFR §3.5 sets out the definition of airworthiness: "*Airworthy* means the aircraft conforms to its type design and is in a condition for safe operation." In like fashion, 14 CFR §33.35(a) provides that the fuel system "must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine. . ."

Airworthy standards like 14 C.F.R §§3.5 and 33.35(a) are designed to fill in federal regulatory gaps to further the overall goal of aviation safety.

[7] There is no case precedent on this point only because the appellate opinion is the first judicial decision in the country which has applied field preemption to product defect claims against noncertificated component parts manufacturers.

As such they mirror the WPLA standards, which require products to be "reasonably safe in construction." RCW 7.72.030.[8]

D. FTI Should Not Be Able to Raise the Unpleaded Defense of Federal Preemption for the First Time on Summary Judgment Without Giving Becker the Opportunity to File an Amended Pleading to Allege Violations of Federal Standards.

At a minimum, Becker should have been allowed to amend her complaint to allege that any pervasive regulatory scheme involving airplane engine fuel systems should govern FTI's manufacture of defective carburetor floats, and subject FTI to liability under such federal standards of care. The Court of Appeals' determination that Becker waited too long to amend cannot be sustained alongside the court's contradictory ruling that FTI could wait until its summary judgment motion to raise field preemption as a defense for the first time in the litigation.

To hold otherwise would be unjust: federal preemption emerged as an issue at the summary judgment stage because that was the first time FTI sought to assert it as a defense. It is difficult to fathom how it can be timely

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[8] The standard of care for "reasonably safe in construction" is as follows:

> (a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line. RCW § 7.72.030.

Becker submitted undisputed evidence that the carburetor float did not conform to the specifications required by the type design because it leaked and was not in dimensional compliance. CP 812, ¶ 4; CP 643-644, ¶ 2; CP 549-550. It is also undisputed that the subject carburetor float was not in a condition for safe operation. CP 812.

for FTI to assert field preemption as a sword at this point in the litigation while simultaneously ruling it is untimely for Becker to amend her pleadings as a shield.

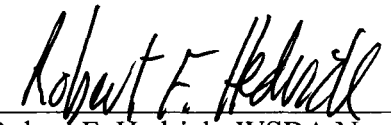
VII. CONCLUSION

Washington is an aviation state, with a well-deserved reputation for expertise and leadership in airplane design, manufacture and safety. That is why the court's opinion is such an anomaly: it effectively has placed uncertificated component parts manufacturers outside the legal system when their component parts are incorporated into regulated aviation systems. Field preemption has been applied to supplant any state products standards, even when there are no corresponding federal standards to take their place. The result: a blanket immunity from any standards, state or federal.

This cannot be the law. This Court should grant review to restore the proper federal-state balance, which will prevent culpable manufacturers from escaping liability, and more importantly, ensure a remedy for persons injured by defective products.

Respectfully submitted this 21st Day of March, 2016.

AVIATION LAW GROUP, PS

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that the foregoing and following documents were served upon the interested parties, on the date signed, and in the manner indicated, below, and were also filed Washington Court of Appeals, Division 1:

1. Petition for Review

Francis S. Floyd Floyd, Pflueger& Ringer, P.S. 200 West Thomas Street, Suite 500 Seattle, Washington 98119 *Attorneys for Defendant Forward Technologies Industries, Inc.*	(X) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile ( ) Via U.S. Mail ( ) Via E-mail ( ) Via E-Service

Signed this 21st day of March, 2016, at Seattle, Washington

James T. Anderson III

Appendix A: *Estate of Virgil V. Becker v. Forward Technology Industries*, ---Wn. App.--, 365 P.3d 1273 (Div. 1 Dec. 28, 2015), No. 72416-9-I, 2015 WL 9461623.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ESTATE OF VIRGIL VICTOR BECKER, JR., by its Personal Representative, Jennifer L. White, Appellant, v. FORWARD TECHNOLOGY INDUSTRIES, INC., Respondent.	)	No. 72416-9-I PUBLISHED OPINION FILED: December 28, 2015

VERELLEN, A.C.J. — The scope of implied field preemption in aviation law is evolving and elusive. But under recent Ninth Circuit case law, the key consideration is whether the area at issue is pervasively regulated.

This action arises from a fatal airplane crash linked to a defective carburetor float. The primary question on appeal concerns implied field preemption of state tort standards of care applicable to the contractor who assembled the float.

The Federal Aviation Act (FAA) broadly regulates the area of aviation safety.[1] The FAA's regulatory scheme requires manufacturers of airplane engines and their components to obtain certificates from the Federal Aviation Administration approving their design and manufacture. Here, Avco Corporation, a type certificate holder, built

[1] 49 U.S.C. §§ 44701-44735.

the airplane's engine. Precision Airmotive Corporation, a "parts manufacturer approval" (PMA) holder, built the carburetor and its component parts, including the float. Precision contracted with Forward Technology Industries (FTI) to assemble and weld the float's component parts. The FAA and related regulations do not require FTI to hold a certificate or permit for this work.

In addition to suing Avco and Precision on a variety of theories, the Estate of Virgil Becker (Becker) sued FTI, alleging state causes of action for strict liability, negligence, and breach of warranty.

This appeal raises the narrow question whether the FAA and regulations adopted by the Federal Aviation Administration pervasively regulate the area of aircraft fuel systems, thereby preempting any state standard of care for defects in the assembly and welding of the carburetor float as to claims against FTI, a noncertificated contractor.[2] We conclude the FAA and related regulations pervasively regulate the "area" of an airplane engine's fuel system, including carburetors and their component parts. Therefore, implied field preemption bars the state tort standards of care alleged against FTI. Because Becker cites no compelling authority for an applicable parallel federal

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[2] This appeal does not present any question regarding the viability of manufacturing defect claims brought against a certificate or PMA holder. See, e.g., Godfrey v. Precision Airmotive Corp., 46 So.3d 1020, 1023 (Fla. Dist. Ct. App. 2010) ("[I]f FAA regulations require an airplane engine manufacturer to report known engine defects to the public, this disclosure requirement would necessarily include a duty to disclose a known defect in a carburetor or other part certified by the engine manufacturer for use with the engine that will cause the engine itself to fail."); Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money is Gone, That is Permanent, Irreparable Damage to You,"* 42 STETSON L. REV. 457, 480 n.169 (2013) ("Under FAA regulations, an engine manufacturer can be held liable for defects in the carburetor by virtue of being the type certificate holder of the engine." (citing 14 C.F.R. §§ 21.11-21.55)).

standard of care, the claims against FTI fail.

We affirm the trial court's order dismissing all claims against FTI.

FACTS

In July 2008, an airplane crashed in the Cascades near McMurray, Washington. The pilot, Brenda Houston, her daughter, Elizabeth Crews, and Dr. Virgil Becker all died in the crash.

Becker sued multiple defendants involved in the manufacture and care of the airplane. As to FTI, Becker alleged state law strict liability, negligence, and breach of warranty causes of action.

The Federal Aviation Administration issues a "type certificate" when it has found that an airplane is "properly designed and manufactured" and meets minimum federal safety standards.[3] The Federal Aviation Administration issued a type certificate to Avco, authorizing Avco to manufacture the airplane's engine. A type-certificated product (e.g., an engine) often includes component parts (e.g., a carburetor) purchased from outside suppliers. A certificate holder must establish procedures for ensuring the quality and conformity of all components integrated in the certificated product.[4] Once a type certificate is issued, the certificate holder may seek a production certificate authorizing the holder to manufacture a duplicate of the certificated product.[5] Avco

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[3] 49 U.S.C. § 44704(a)(1); Hetzer-Young v. Precision Airmotive Corp., 184 Ohio App. 3d 516, 522, 921 N.E.2d 683 (2009) (the certification process ensures that "the aircraft meets the minimum standards for performance and safety" set forth by the Federal Aviation Administration).

[4] 14 C.F.R. § 21.137.

[5] 49 U.S.C. § 44704(c).

obtained the type certificate by ensuring that the engine "conforms to its approved design and is in a condition for safe operation."[6]

The airplane's engine included a carburetor built by Precision. The carburetor's function is to deliver an appropriate mixture of fuel and air to the engine. Precision obtained a PMA from the Federal Aviation Administration that permitted Precision to build and supply carburetors and their component parts to Avco. As a PMA holder, Precision was required to ensure that "each PMA article conforms to its approved design and is in a condition for safe operation."[7] Precision developed the plastic carburetor float which helps maintain the correct fuel level in the carburetor, and the Federal Aviation Administration approved it.

Precision contracted with FTI to assemble and weld the float's plastic component parts. Precision provided FTI with the float components. Using its own test specification, Precision independently tested every float it installed in a carburetor or sold as a replacement part. FTI conducted its own testing of the floats and knew some floats did not pass Precision's testing. FTI knew Precision used the floats for airplane engines, but did not know that any defective floats were installed on airplanes.[8]

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[6] 14 C.F.R. § 21.146(c).

[7] 14 C.F.R. § 21.316(c).

[8] Contrary to Becker's arguments, although FTI knew the floats it welded "were going onto aircraft engines" and some of the floats that FTI sold to Precision were defective, FTI did not know that those defective floats were being installed on aircraft engines. Appellant's Br. at 11; see Clerk's Papers (CP) at 125 ("[FTI] did not know . . . that a certain amount of defective carburetor floats were out there in the field on aircraft engines."); CP at 1897 ("I did not know that [Precision was] selling those specific [defective] carburetor floats. I don't know what became of them once [Precision] delivered [them] to [its] customer[s].").

Becker's second amended complaint is limited to three state law causes of action against FTI based upon a state law standard of care.[9]

FTI sought summary judgment, arguing that federal law preempts the state law standard of care for all of Becker's claims, that FTI is not liable under the Washington Product Liability Act, chapter 7.72 RCW, because it is not a product seller or manufacturer, and that Becker's negligence claim fails because the risk that leaky floats would end up in the field was unforeseeable. The trial court granted FTI summary judgment and dismissed all of Becker's claims, concluding that "federal aviation law and concomitant federal regulations preempt state law standards of care."[10]

Becker filed a motion for reconsideration, arguing for the first time that FTI waived the federal preemption defense by failing to timely raise it. The trial court denied

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[9] Becker's strict liability claim alleged that FTI "created a defective and unsafe product . . . in that the design, manufacture, assembly, testing, marketing, installing, selling and delivery of the subject product and/or components thereof were unreasonably dangerous" and that the design and construction of the carburetor float "was not in compliance with specific mandatory government specifications relating to safe design and construction, including the Federal Aviation Regulations (14 CFR *et seq*)." CP at 76-77. Becker's negligence claim alleged (1) the plane crash "was caused by the negligence, carelessness, and recklessness" of FTI, and that the carburetor float was "negligently, carelessly and recklessly designed, manufactured, assembled, tested, installed, marketed, sold, and delivered"; (2) FTI "negligently overhauled, rebuilt, supplied parts for, sold, and/or maintained" the carburetor float, and "failed to warn of known defects and/or unreasonably safe aspects" of the carburetor float; and (3) FTI "failed to issue proper and adequate warnings, guidelines, instructions, and cautions related to the maintenance and use" of the carburetor float; it was therefore "not reasonably safe." CP at 77-78. Becker's breach of warranty claim alleged FTI "warranted" that the carburetor float was "airworthy, of merchantable quality, fit and safe for purposes for which [it] was designed, manufactured, assembled, tested, marketed, sold, maintained, overhauled, and rebuilt, and [was] free of defects[,] and that the guidelines, instructions, cautions and warnings pertaining to the use of the [carburetor float] were proper, sufficient, adequate and complete." CP at 78-79.

[10] CP at 666 (citing Montalvo v. Spirit Airlines, 508 F.3d 464, 473 (9th Cir. 2007)).

that motion. Becker also sought to file a third amended complaint as to all defendants, which the trial court granted except as to FTI.

After the trial court dismissed FTI on summary judgment, six defendants remained. Four of the six defendants were voluntarily dismissed before trial. In July 2013, Becker voluntarily dismissed Avco upon reaching a settlement during trial. One year later, on July 10, 2014, Becker also voluntarily dismissed the Estate of Brenda Houston, the last remaining defendant, by stipulated order. The trial court entered a final judgment on August 1, 2014. Becker filed a notice of appeal on August 28, 2014.

ANALYSIS

Implied Field Preemption

Becker contends the FAA and related regulations do not preempt state law standards of care in airplane product liability and negligence actions involving a defective carburetor float. We disagree.

We review a summary judgment order de novo, performing the same inquiry as the trial court.[11] We view the facts and all reasonable inferences in the light most favorable to the nonmoving party.[12] Summary judgment is proper if there are no genuine issues of material fact.[13]

Congress adopted the FAA to create a "uniform and exclusive system of federal regulation" in the area of aviation safety and commerce.[14] The FAA gave the Federal

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[11] McDevitt v. Harborview Med. Ctr., 179 Wn.2d 59, 64, 316 P.3d 469 (2013).

[12] Fulton v. State, Dep't of Soc. & Health Servs., 169 Wn. App. 137, 147, 279 P.3d 500 (2012).

[13] Lowman v. Wilbur, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013).

[14] City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973).

Aviation Administration the authority to establish minimum standards "for the design, material, construction, quality of work, and performance of aircraft, *aircraft engines*, and propellers."[15]

Congressional intent is the touchstone of preemption.[16] We must assume that "Congress does not intend to supplant state law."[17] "State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress."[18] The FAA has no express preemption clause, and FTI does not assert any implied conflict preemption. Therefore, only implied field preemption is at issue.[19]

Field preemption "exists when federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"[20] The comprehensiveness of federal law in a field and "pervasiveness of the regulations" are "indication[s] of preemptive intent."[21] Where an agency promulgates "'regulations to carry out the purposes of a statute,'" we "'must consider

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[15] 49 U.S.C. § 44701(a)(1) (emphasis added).

[16] Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009).

[17] N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995).

[18] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 327, 858 P.2d 1054 (1993).

[19] Two statutory amendments "added limited preemption provisions," neither of which apply here. Martin ex rel. Heckman v. Midwest Express Holdings, Inc., 555 F.3d 806, 808 (9th Cir. 2009). First, in 1978, the Airline Deregulation Act preempted any statutes or regulations "related to a price, route or service" of airlines. Id. (citing 49 U.S.C. § 41713(b)(1)). Second, in 1994, the General Aviation Revitalization Act adopted an 18-year statute of repose for product liability claims against airplane manufacturers. Id. (citing 49 U.S.C. § 40101).

[20] Montalvo, 508 F.3d at 470 (quoting Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)).

[21] Id.

whether the regulations evidence a desire to occupy a field completely'" to the exclusion of state law.[22] The purpose of implied field preemption under the FAA is to advance the goal of uniform standards in the field of aviation safety and commerce.[23]

In this setting, implied field preemption first turns on the critical question of the "area" of aviation safety at issue. Federal circuit courts "have generally analyzed FAA preemption by looking to the pervasiveness of federal regulations *in the specific area* covered by the tort claim or state law at issue."[24] We then consider whether there are pervasive regulations governing the area at issue.[25]

The Ninth Circuit decision in Martin ex. rel Heckman v. Midwest Express Holdings, Inc. is instructive.[26] A woman fell from an airplane's stairs. She sued the airline and the airplane's manufacturer, alleging that the stairs were defectively designed because they had only one handrail. In determining the specific area at issue for purposes of field preemption, the Ninth Circuit analyzed airplane stairs in general, not merely handrails for stairs.[27] The Martin court concluded:

> Airstairs are not pervasively regulated; the only regulation on airstairs is that they can't be designed in a way that might block the emergency exits. 14 C.F.R. § 25.810. The regulations have nothing to say about handrails, or even stairs at all, except in emergency landings. No federal regulation prohibits airstairs that are prone to ice over, or that tend to collapse under passengers' weight. The regulations say nothing about maintaining the stairs free of slippery substances, or fixing loose steps before passengers catch their heels and trip. It's hard to imagine

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[22] Id. at 470-71 (quoting R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 149, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986)).

[23] Ventress v. Japan Airlines, 747 F.3d 716, 721 (9th Cir. 2014).

[24] Martin, 555 F.3d at 809 (emphasis added).

[25] Gilstrap v. United Air Lines, Inc., 709 F.3d 995, 1006-07 (9th Cir. 2013).

[26] 555 F.3d 806 (9th Cir. 2009).

[27] Id. at 811-12.

> that any and all state tort claims involving airplane stairs are preempted by federal law. Because the agency has not comprehensively regulated airstairs, the FAA has not preempted state law claims that the stairs are defective.[28]

If "pervasive regulations" govern a specific area of aviation safety, implied preemption applies, but *only to that particular area.*[29] Because federal regulations did not establish any requirements for airplane stairs, the Martin court held that federal law did not preempt state tort claims involving airplane stairs.[30]

We conclude the specific area at issue here is the engine's fuel system, which includes the carburetor and its component parts. We also conclude airplane engine fuel systems are pervasively regulated. Unlike Martin, where federal regulations had "nothing to say about handrails, or even stairs at all,"[31] there are many federal regulations focused upon performance and safety standards for engine fuel systems, including the carburetor and its component parts. These regulations include:

- 14 C.F.R. § 33.35(a) ("The fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.").
- 14 C.F.R. § 23.951(a) ("Each fuel system must be constructed and arranged to ensure fuel flow at a rate and pressure established for proper engine and auxiliary power unit functioning under each likely operating condition, including any maneuver for which certification is requested and during which the engine or auxiliary power unit is permitted to be in operation.").
- 14 C.F.R. § 23.955(a) ("The ability of the fuel system to provide fuel at the rates specified in this section and at a pressure sufficient for proper engine operation must be shown in the attitude that is most critical with respect to fuel feed and

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[28] Id. at 812.

[29] Id. at 810-11.

[30] Id. at 812.

[31] Id.

quantity of unusable fuel. These conditions may be simulated in a suitable mockup.").

- 14 C.F.R. § 23.1093(a)(1)-(2) ("Each reciprocating engine air induction system must have means to prevent and eliminate icing. Unless this is done by other means, it must be shown that, in air free of visible moisture at a temperature of 30° F—(1) Each airplane with sea level engines using conventional venturi carburetors has a preheater that can provide a heat rise of 90° F. with the engines at 75 percent of maximum continuous power; [and] (2) Each airplane with altitude engines using conventional venturi carburetors has a preheater that can provide a heat rise of 120° F. with the engines at 75 percent of maximum continuous power.").

- 14 C.F.R. § 23.1095(a) ("If a carburetor deicing fluid system is used, it must be able to simultaneously supply each engine with a rate of fluid flow, expressed in pounds per hour, of not less than 2.5 times the square root of the maximum continuous power of the engine.").

- 14 C.F.R. § 33.67(a) ("With fuel supplied to the engine at the flow and pressure specified by the applicant, the engine must function properly under each operating condition required by this part.").

- 14 C.F.R. § 23.1099 ("Each carburetor deicing fluid system must meet the applicable requirements for the design of a fuel system.").

- 14 C.F.R. § 25.1337(c) ("If a fuel flowmeter system is installed, each metering component must have a means for bypassing the fuel supply if malfunction of that component severely restricts fuel flow.").

- 14 C.F.R. § 25.1337(f)(1)-(2) ("There must be means to measure fuel pressure, in each system supplying reciprocating engines, at a point downstream of any fuel pump except fuel injection pumps. In addition—(1) If necessary for the maintenance of proper fuel delivery pressure, there must be a connection to transmit the carburetor air intake static pressure to the proper pump relief valve connection; and (2) If a connection is required under paragraph (f)(1) of this section, the gauge balance lines must be independently connected to the carburetor inlet pressure to avoid erroneous readings.").

- 14 C.F.R. § 25.951(a) ("Each fuel system must be constructed and arranged to ensure a flow of fuel at a rate and pressure established for proper engine and auxiliary power unit functioning under each likely operating condition, including any maneuver for which certification is requested and during which the engine or auxiliary power unit is permitted to be in operation.").

- 14 C.F.R. § 25.951(b) ("Each fuel system must be arranged so that any air which is introduced into the system will not result in—(1) Power interruption for more than 20 seconds for reciprocating engines; or (2) Flameout for turbine engines.").

- 14 C.F.R. § 25.951(c) ("Each fuel system for a turbine engine must be capable of sustained operation throughout its flow and pressure range with fuel initially saturated with water at 80° F and having 0.75cc of free water per gallon added and cooled to the most critical condition for icing likely to be encountered in operation.").

These federal regulations reveal a pervasive regulation of a fuel system's delivery of the appropriate mixture of air and fuel necessary for the proper operation of the engine under any conditions. These regulations also set performance standards that necessarily require an engine's component parts to function properly. The lack of a specific regulation expressly directed to carburetor floats is of no consequence because the specific area at issue for purposes of implied field preemption is the engine's fuel system.[32]

Because federal regulations pervasively regulate an airplane engine's fuel system, including its carburetor and component parts, implied field preemption precludes applying a state law standard of care to Becker's claims.

In several jurisdictions, even in those areas that are pervasively regulated, "the scope of field preemption extends only to the [state] standard of care."[33] State law still

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[32] See Sikkelee v. Precision Airmotive Corp., 45 F. Supp. 3d 431, 446 (M.D. Pa. 2014) (concluding that implied field preemption "of the field of aviation safety does not necessarily imply that there must be a regulation 'at hand' for [the defendant] to have violated" (boldface omitted)).

[33] Gilstrap, 709 F.3d at 1007. In some jurisdictions, the scope of implied field preemption is even broader. See, e.g., U.S. Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1326 (10th Cir. 2010) (holding that "federal regulation occupies the field of aviation safety to the exclusion of state regulations"); Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 795 (6th Cir. 2005) (holding that because federal aviation law preempts the field from state regulations, the plaintiff's state law failure-to-warn claim was preempted by federal aviation law); Witty v. Delta Air Lines, Inc., 366 F.3d 380, 385 (5th Cir. 2004) (holding that because "Congress enacted a pervasive regulatory scheme covering air safety concerns," "federal regulatory requirements for passenger safety warnings and instructions are exclusive and preempt all state standards and requirements."); see also Alexander T. Simpson, *Standard of Care vs. Claim*

governs "the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies."[34] A state remedy "may survive even if the standard of care is so preempted," provided there is an applicable "parallel" federal standard of care.[35] Even if we follow the Ninth Circuit's approach that only state standards of care are subject to implied field preemption, it is elusive to determine whether there is an applicable parallel federal standard of care, especially as to a noncertificated contractor who assembles and welds parts.[36] "The FAA itself does not

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Preemption Under the Federal Aviation Act, 27 NO. 4 AIR & SPACE LAW. 4, 4 (2014) ("[F]ederal appeals courts have adopted different approaches regarding the reach of implied preemption under the Act as it relates to aviation safety."); Jared L. Watkins & Evan Katin-Borland, *Recent Developments in Aviation Law*, 79 J. AIR L. & COM. 213, 214-15 (2014) ("There remains a split between federal circuit courts regarding federal preemption of products liability claims.").

[34] Gilstrap, 709 F.3d at 1006.

[35] Id.

[36] Additionally, in Ventress, the Ninth Circuit held that implied field preemption precludes a flight engineer's state law claims of retaliation and constructive discharge because those claims would require factual determinations regarding pilot qualifications and medical standards for "airmen," a field pervasively regulated under federal aviation law. Ventress, 747 F.3d at 719, 721-23. In a footnote, the court observed that "even if state remedies hypothetically remain available," the flight engineer had failed to allege "a cognizable legal claim under any applicable federal standard." Id. at 723 n.7. In Gilstrap, with very limited discussion, the Ninth Circuit concluded that, although state standards of care were preempted, a disabled passenger's state law claims that an airline failed to provide her adequate assistance to move through the airport could proceed to trial based upon a federal standard of care under the federal Air Carrier Access Act. Gilstrap, 709 F.3d at 1007-08, 1010-11. In Sikkelee, a carburetor defect case, the court rejected deriving a federal standard of care from general federal aviation regulations, even if specific federal regulations leave gaps as to particular defects. "'[C]onstruing and applying FAA safety regulations as federal standards of care in [aircraft product liability cases] will be arduous and impractical.'" Sikkelee, 45 F. Supp. 3d at 447 (alterations in original) (quoting Pease v. Lycoming Engines, 2011 WL 6339833, at *23 (M.D. Pa. 2011)). In a footnote, the court observed that "[d]eciding how federal regulations should translate into a standard of care has proven a bedeviling task in other contexts as well." Id. n.15 (citing In re TMI, 67 F.3d 1103, 1107 (3d Cir. 1995) ("Although it is clear that federal law governs the standard of care for tort claims arising

clearly establish a federal standard of care; the Code of Federal Regulations does, but only as applied to 'aircraft operations.'"[37] Becker provides no authority or argument that the assembly of a carburetor float is a part of airplane operations.

Becker points to the FAA's general airworthiness provisions, but cites no authority that the general concept of airworthiness or any specific federal standard of care applies to Becker's state law manufacturing defect claims against FTI.[38] Becker cites no authority that the general reference to "the Federal Aviation Regulations (14 CFR *et seq*)" in Becker's second amended complaint provides a parallel federal standard of care for Becker's state law manufacturing defect claims.[39] In addition, because the FAA does not create a federal cause of action for personal injury suits, it must "only contemplate tort suits brought under state law."[40] Absent briefing supporting a specific parallel federal standard of care, we read Becker's complaint as limited to state law claims based upon state standards of care.

Therefore, on this briefing, we agree with the trial court that all of Becker's claims against FTI fail. No one disputes that Becker was able to pursue manufacturing defect claims against both Avco, the type certificate holder for the engine, and Precision, the

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from nuclear accidents, it is more difficult to discern the precise contours of that federal duty.")).

[37] Keum v. Virgin America Inc., 781 F. Supp. 2d 944, 948-49 (N.D. Cal. 2011) (quoting 14 C.F.R. § 91.13, the federal "careless or reckless" standard for aircraft operations).

[38] See RAP 10.3(a)(6); Regan v. McLachlan, 163 Wn. App. 171, 178, 257 P.3d 1122 (2011) ("We will not address issues raised without proper citation to legal authority.").

[39] CP at 77, ¶ 7.4.

[40] Martin, 555 F.3d at 808.

PMA holder for the carburetor. But a hypothetical state remedy based on an unsupported federal standard of care does not warrant a trial as to FTI.

Waiver of Federal Preemption Defense

Becker contends FTI waived preemption by failing to plead preemption as an affirmative defense. We disagree.

Since 1975, Washington courts have recognized that if a failure to plead an affirmative defense under CR 8(c) "does not affect the substantial rights of the parties, the noncompliance will be considered harmless."[41] This policy is to avoid surprise.[42] Any objection to a failure to plead an affirmative defenses is "waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense."[43] And raising an affirmative defense for the first time in a motion for summary judgment has been recognized as harmless error.[44]

Becker does not establish any surprise or prejudice affecting any substantial right. Neither in Becker's response to FTI's motion for summary judgment nor in oral argument of that motion did Becker object that federal preemption had not been pleaded or argue that Becker was surprised by the preemption argument. Becker offered the trial court extensive briefing on field preemption.[45] Becker did not raise the

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[41] Mahoney v. Tingley, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975); see also Hogan v. Sacred Heart Med. Ctr., 101 Wn. App. 43, 54-55, 2 P.3d 968 (2000); Henderson v. Tyrrell, 80 Wn. App. 592, 624, 910 P.2d 522 (1996).

[42] Bickford v. City of Seattle, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001).

[43] Mahoney, 85 Wn.2d at 100.

[44] See id. at 100-01.

[45] See CP at 278.

failure to plead preemption until Becker's motion to reconsider the order granting summary judgment. Therefore, we conclude FTI did not waive its preemption defense.

Leave to Amend to Allege Violations of Federal Law

Becker contends the trial court erred in denying Becker's motion to file a third amended complaint identifying specific federal regulations as to FTI. We disagree.

The decision to grant leave to amend the pleadings is within the trial court's discretion.[46] Absent an abuse of discretion, the trial court's decision will not be disturbed on appeal.[47] In determining whether prejudice would result, we may consider potential delay, unfair surprise, and the probable merit or futility of the amendments requested.[48]

In August 2012, the trial court denied Becker's motion to file a third amended complaint after FTI had already been dismissed from the case on summary judgment. "When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation."[49] Becker's motion to amend was untimely.[50] The litigation had been pending for nearly two years before the trial court dismissed FTI, and FTI had served discovery on Becker asking Becker to identify specific regulations that FTI violated. Under these circumstances, Becker's

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[46] Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

[47] Id.

[48] Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154 (1997); Karlberg v. Otten, 167 Wn. App. 522, 529, 280 P.3d 1123 (2012).

[49] Doyle v. Planned Parenthood of Seattle-King County, Inc., 31 Wn. App. 126, 130-31, 639 P.2d 240 (1982).

[50] See Haselwood v. Bremerton Ice Arena, 137 Wn. App. 872, 890, 155 P.3d 952 (2007).

delay in alleging specific violations of federal regulations was a reasonable basis to deny Becker's motion.[51]

The trial court also denied Becker's motion to amend its second amended complaint to add a punitive damages claim against FTI. Because implied field preemption applies, we need not reach Becker's argument that the trial court should have allowed Becker to allege punitive damages in an amended complaint. We also decline to reach FTI's alternative arguments that it is not a product seller or manufacturer under Washington's Product Liability Act. And we decline to reach FTI's argument that this appeal is untimely.

Lastly, for the first time in its reply brief, Becker contends FTI lacks standing to assert the preemption defense because FTI claims it is not subject to federal regulations. The cases relied upon by Becker, Miller v. Rite Aid Corp.[52] and W.G. Clark Construction Co. v. Pacific Northwest Regional Council of Carpenters,[53] relate to an express preemption clause contained in the Employee Retirement Income Security Act of 1974 (ERISA),[54] an entirely different setting than implied field preemption under the FAA and regulations adopted by the Federal Aviation Administration. Those opinions do not stand for the proposition that a noncertificated contractor under the FAA may not

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[51] See id. (trial court did not abuse its discretion in denying defendant leave to amend its pleadings after summary judgment was granted).

[52] 504 F.3d 1102, 1105 (9th Cir. 2007) ("ERISA does not preempt the claims of parties who do not have the right to sue under ERISA because they are neither participants in nor beneficiaries of an ERISA plan.").

[53] 180 Wn.2d 54, 65, 322 P.3d 1207 (2014) ("[S]tate lien claims that apply to third parties are outside the scope of ERISA and thus not preempted.").

[54] 29 U.S.C. §§ 1001-1461.

assert a preemption defense to state law manufacturing defect claims. Therefore, we reject Becker's contention that FTI lacks standing to assert a preemption defense.

CONCLUSION

We conclude the FAA and related regulations preempt the standard of care for Becker's state law manufacturing defect claims against FTI. Because Becker cites no authority that an applicable parallel federal standard of care applies to those state law claims, nothing remains for the trial court to decide.

We affirm the dismissal of Becker's claims against FTI.

WE CONCUR:

Appendix B: Order denying Motion for Reconsideration, February 18, 2016.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ESTATE OF VIRGIL VICTOR BECKER, JR., by its Personal Representative, Jennifer L. White, Appellant, v. FORWARD TECHNOLOGY INDUSTRIES, INC., Respondent.	)	No. 72416-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's opinion filed December 28, 2015. After consideration of the motion and answer filed by respondent, the panel has determined that the motion should be denied.

Now therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

Done this 18th day of February, 2016.

FOR THE PANEL:

Verellen, ACJ