FILED
SUPREME COURT
STATE OF WASHINGTON
7/31/2019 9:19 AM
BY SUSAN L. CARLSON
CLERK

No. 97272-9

SUPREME COURT
OF THE STATE OF WASHINGTON

STACIE CAVNER and PRESTON CAVNER, husband and wife, and parents of HUDSON CAVNER and MYLES CAVNER, minors; RACHEL ZIENTEK, a single woman; TAMMY ZIENTEK and MICHAEL ZIENTEK, husband and wife, and parents of Rachel Zientek; THE ESTATE OF MYLES CAVNER, by its personal representative CAROLANN O'BRIEN STORLI; CAROLANN O'BRIEN STORLI, as litigation guardian ad litem for HUDSON CAVNER, a minor,

Plaintiffs/Appellants/Cross-Respondents

v.

CONTINENTAL MOTORS, INC.,

Defendants/Respondent/Cross-Respondent.

ANSWER TO CONTINENTAL MOTORS, INC.'S PETITION FOR REVIEW

Kenneth W. Masters, WSBA No. 22278
Shelby R. Lemmel, WSBA No. 33099
MASTERS LAW GROUP, PLLC
241 Madison Avenue N.
Bainbridge Island, Washington 98110
Telephone: (206) 780-5033
Attorneys for Appellants/Cross-Respondents Stacie Cavner; Rachel Zientek; Tammy Zientek; Michael Zientek; the Estate of Myles Cavner, by and through its personal representative, Carolann O'Brien Storli; and Hudson Cavner, by and through his litigation guardian ad litem, Carolann O'Brien Storli

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Attorneys for Appellant/Cross-Respondent Preston Cavner

TABLE OF CONTENTS

Page

Table of Authorities ii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT WHY REVIEW SHOULD BE DENIED 3

A. Whether the Court of Appeals in this case correctly interpreted the jury's verdict when it rejected a proposed alternative ground for affirmance is not an issue of substantial public interest and, in any event, the Court of Appeals correctly interpreted the jury's verdict. 3

B. Nothing in the Tort Reform Act requires fault-free claimants to meet special evidentiary requirements to receive the benefit of joint and several liability under RCW 4.22.070(1)(b), and whether to impose such requirements based on policy considerations is a question for the Legislature, not this Court. 8

C. The trial court never reached the issue of conflict preemption, and CMI waived the issue on appeal by failing to raise it until a motion for reconsideration. Regardless, CMI's conflict-preemption argument is meritless. 10

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Ayers By & Through Ayers v. Johnson & Johnson Baby Prods. Co.,
117 Wn.2d 747, 818 P.2d 1337 (1991) 5

Bernal v. Am. Honda Motor Co.,
87 Wn.2d 406, 553 P.2d 107 (1976) 12

Brown v. Brown,
100 Wn.2d 729, 675 P.2d 1207 (1984) 8

Cano-Garcia v. King County,
168 Wn. App. 223, 277 P.3d 34 (2012) 8

Estate of Becker v. Avco Corp.,
187 Wn.2d 615, 387 P.3d 1066 (2017) 3, 11, 12, 15

Estate of Becker v. Avco Corp.,
192 Wn. App. 65, 365 P.3d 1273 (2015), *rev'd*, 187 Wn.2d 615, 387 P.3d 1066 (2017) 3

Freehe v. Freehe,
81 Wn.2d 183, 500 P.2d 771 (1972) 8

Goucher v. J.R. Simplot Co.,
104 Wn.2d 662, 709 P.2d 774 (1985) 7

Kottler v. State,
136 Wn.2d 437, 963 P.2d 834 (1998) 9

McDaniel v. City of Seattle,
65 Wn. App. 360, 828 P.2d 81 (1992) 4, 7

Merrick v. Sutterlin,
93 Wn.2d 411, 610 P.2d 891 (1980) 8

Provins v. Bevis,
70 Wn.2d 131, 422 P.2d 505 (1967) 8

Page(s)

West v. Gregoire,
184 Wn. App. 164, 336 P.3d 110 (2014).. 8

Whitchurch v. McBride,
63 Wn. App. 272, 818 P.2d 633 (1991) 8

Federal Cases

Avco Corporation v. Sikkelee
(U.S. Supreme Court no. 18-1140) 2, 11

Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 486-87, 133 S.
Ct. 2466, 186 L. Ed. 2d 607 (2013) 14

Sikkelee v. Precision Airmotive Corp., 822 F.3d 680 (3d
Cir.), *cert. denied*, _ U.S. _, 137 S. Ct. 495, 196 L.
Ed. 2d 433 (2016).. 11

Sikkelee v. Precision Airmotive Corp.,
907 F.3d 701 (3d Cir. 2018) 12, 14, 15

Wyeth v. Levine,
555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51
(2009) 12, 13, 14, 15

Constitutional Provisions, Statutes and Court Rules

14 C.F.R. § 1.1 13

14 C.F.R. § 21.93(a)... 13

14 C.F.R. § 21.95 .... 13, 15

14 C.F.R. § 21.99(b) 15

49 U.S.C. § 44704(a) 15

49 U.S.C. § 44704(a)(1) 12

Laws of 1986, ch. 305, § 401 8

RAP 13.4(b)(4) 1, 3, 16

Page(s)

RAP 4.2(a) 11

RCW 4.22.070 8

RCW 4.22.070(1)(b) 1, 8, 9, 10

RCW 7.72.030(1)(a) 4

RCW 7.72.030(1)(c) 5

Other Authorities

6 WASH. PRAC, WASH. PATTERN JURY INSTR. CIV. 4, 8

I. INTRODUCTION

Continental Motors, Inc. ("CMI") purports to raise three issues of "substantial public interest" for determination by this Court under RAP 13.4(b)(4). None of these issues warrants review by this Court.

First, the Court of Appeals reversed the dismissal of Plaintiffs'[1] design-defect claim against CMI on implied field-preemption grounds based on a straightforward application of this Court's decision in *Estate of Becker v. Avco Corp.*, 187 Wn.2d 615, 387 P.3d 1066 (2017). The Court of Appeals rejected, as an alternative ground to affirm the dismissal, the notion that the jury implicitly rejected the existence of a design defect. Because it affects only the parties in this case, whether the Court of Appeals correctly interpreted the jury's verdict is not an issue of substantial public interest. But even if it were, review is unwarranted because the Court of Appeals' decision is manifestly correct: nothing about the jury's verdict negates the existence of a design defect.

Second, to provide full compensation for persons injured by no fault of their own, the Legislature has preserved a modified form of joint and several liability in cases where the trier of fact determines that the claimant was free of fault: the defendants against whom judgment is entered are jointly and severally liable for the sum of their proportionate shares of fault. RCW 4.22.070(1)(b). The Court of Appeals rejected CMI's argument that a claimant who is forced to sue a family member to ensure full

[1] Plaintiffs, who were appellants and cross-respondents in this appeal, are Preston, Stacie, and Hudson Cavner; the Estate of Myles Cavner, by and through its personal representative Carolann O'Brien Storli; and Rachel, Tammy, and Michael Zientek.

compensation under that exception may not rely on the normal rule giving parties the benefit of all favorable evidence regardless of which party presented it, but must instead present independent evidence to prove each element of the claim against the family member. Review is unwarranted because the Tort Reform Act does not include such an unusual and onerous requirement, and whether to adopt such a requirement for public policy reasons is properly a question for the Legislature, not this Court.

Third, the trial court never reached implied conflict preemption as a ground to dismiss Plaintiffs' design-defect claim. CMI first raised the issue on appeal as an alternative ground to affirm in an unsuccessful motion for reconsideration. CMI nevertheless conditionally asks this Court to accept review and decide in the first instance whether implied conflict preemption applies, in the event that the U.S. Supreme Court grants certiorari in *Avco Corporation v. Sikkelee* (U.S. Supreme Court no. 18-1140). This Court does not decide issues in the first instance. In addition, review is unwarranted because CMI's implied-conflict-preemption argument is meritless under established U.S. Supreme Court precedent.

This Court should deny CMI's petition for review.

II. STATEMENT OF THE CASE

Plaintiffs rely on the fact summaries in the Court of Appeals' decision and in their Petition for Review, filed May 30, 2019.

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Whether the Court of Appeals in this case correctly interpreted the jury's verdict when it rejected a proposed alternative ground for affirmance is not an issue of substantial public interest and, in any event, the Court of Appeals correctly interpreted the jury's verdict.

Whether the jury implicitly rejected the existence of any design defect is not an issue of substantial public interest that this Court should decide. Rather, it is an issue that affects only the parties in this case. Review is thus not warranted under RAP 13.4(b)(4). In any event, the Court of Appeals properly rejected CMI's proffered alternative ground for affirmance.[2]

The trial court dismissed Plaintiffs' design-defect claim based on *Estate of Becker v. Avco Corp.*, 192 Wn. App. 65, 365 P.3d 1273 (2015), in which the Court of Appeals held that federal regulation of aircraft fuel systems is so pervasive that all related product-liability claims are preempted under the doctrine of implied field preemption. After the verdict in this case, this Court reversed the Court of Appeals in *Estate of Becker* in a unanimous decision. 187 Wn.2d 615. The Court of Appeals then reversed the dismissal of Plaintiffs' design-defect claim, accordingly.

Contrary to CMI's argument, none of the jury findings "conclusively negate[s]" the existence of a design defect, and thus none

---

[2] CMI did not fully raise this alternate ground for affirmance until oral argument. In its brief of respondent, CMI argued only that the jury's finding that Preston Cavner's negligence was a proximate cause of the crash rendered the trial court's erroneous dismissal of the design-defect claim harmless. *Br. of Respondent* at 23-24. CMI argued for the first time at oral argument that by rejecting Plaintiffs' manufacturing-defect claim, the jury inherently rejected the design-defect claim. The Court of Appeals rejected both arguments.

provides an alternative ground to affirm the dismissal of the design-defect claim. *Petition* at 9. This case is distinguishable from *McDaniel v. City of Seattle*, 65 Wn. App. 360, 828 P.2d 81 (1992), where the erroneous dismissal of a malicious-prosecution claim was harmless in view of the jury's finding that the policy had probable cause to arrest the plaintiff. *Id.* at 369.

First, the jury did not implicitly reject the existence of a design defect by rejecting Plaintiffs' manufacturing-defect claim. As the Court of Appeals pointed out, the legal tests and pattern instructions for manufacturing-defect claims and design-defect claims differ materially. *Slip Op.* at 9; *compare* RCW 7.72.030(1)(a) *with* RCW 7.72.030(1)(a); *compare* 6 WASH. PRAC, WASH. PATTERN JURY INSTR. CIV., WPI 110.02 *with id.*, WPI 110.01. The verdict form asked the jury whether CMI supplied a product that was "not reasonably safe in construction"; it did not ask whether the product was "not reasonably safe as designed." CP 12049, 12079.

In addition, the jury's verdict factually did not rule out a design defect. The manufacturing-defect claim was based on the presence of unremoved metal burrs in 11 out of 12 valve lifters, contrary to an instruction in the design drawing that required CMI to "remove all burrs." *See* RP 1427-36, 1798-99, 6810-24, 6834-39; Ex. 1321 (at 6-19). Contrary to CMI's assertion, the jury did not implicitly find that "there were no burrs." *Petition* at 9. The jury could have accepted Plaintiffs' evidence that unremoved burrs were present, but also accepted the testimony of CMI's

experts that the instruction in the design drawing did not require CMI to remove the specific burrs at issue. *See* RP 4414-16, 4700-01, 4742-43, 5234-44. But for the erroneous dismissal of Plaintiffs' design-defect claim, the jury could have found that the absence of an instruction in the design drawings to remove the burrs at issue was a design defect.

Further, Plaintiffs' design-defect claim went beyond the presence of burrs in the valve lifters, encompassing defects in the cylinders that caused low compression. Plaintiffs' expert Donald Sommer testified that the engine failed because of an overly rich fuel mixture caused by two problems in combination: (1) valve lifters that malfunctioned because of unremoved burrs and (2) low compression. RP 1580-82, 1791, 1804-07, 1845-46. In fact, that combination is what caused the engine to fail repeatedly in post-crash tests.[3] RP 962, 1065, 1574-75.

Second, the jury did not implicitly reject the existence of a design defect by rejecting Plaintiffs' failure-to-warn claim. Failure to warn is a negligence-based theory, meaning that the plaintiff must establish that the manufacturer was on notice of a problem sufficient to trigger a duty to warn. *See* RCW 7.72.030(1)(c); *Ayers By & Through Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 765, 818 P.2d 1337 (1991). The jury

[3] When a lifter malfunctions, the valve is unable to push all the way open, resulting in an overly "rich" fuel and air mixture, intermittent engine operation, and consequent loss of power. RP 1128-29, 1581, 1759-60, 1770-71, 1774-75. When examined after the crash, nearly all the valve lifters in Cavner's aircraft showed evidence of malfunction. RP 1125, 1439, 1449-55, 1752, 1776-81, 1788-91; *see* Exs. 448, 1321 (at 32-37), 1331, 1332. A "rich" fuel mixture means there is excess fuel in the fuel-air mixture in the combustion chamber. RP 1574-75, 1579. This causes spark plugs to misfire, resulting in a loss of power. RP 1579-80.

could have concluded that Plaintiffs failed to establish that CMI had sufficient notice of a problem with low compression to give rise to a duty to issue a warning, without rejecting the notion that low compression was a problem with CMI engines. In addition, as already discussed, low compression was not the only basis for Plaintiffs' design-defect claim. Because of the erroneous dismissal of Plaintiffs' design-defect claim, the jury never heard Plaintiffs' theory that the valve lifters malfunctioned because of a design defect.

Third, the jury did not implicitly reject the existence of a design defect by finding that negligent compression testing by Ace Aviation and Northwest Seaplanes was not a proximate cause of the crash. CMI maintained that Ace Aviation and Northwest Seaplanes were negligent in that they failed to perform a borescope inspection of the cylinders when they inspected the engine before the crash. RP 7202-06. But CMI's corporate representative and expert witness, Terry Horton, admitted on cross-examination that a borescope inspection would not have made a difference and the aircraft would have been cleared to fly. RP 5899-5900. Supporting that conclusion was evidence that when Ace Aviation and Northwest Seaplanes tested compression, they relied on a CMI service bulletin that allowed compression levels far below industry standard. RP 1013-18, 1031-35, 1039-44, 1089-92, 1642-47, 1653, 1672-73, 1702-05; Ex. 79, 1039 (at PC 100013). Thus, the jury could find that the negligence of Ace Aviation and Northwest Seaplanes was not a proximate cause of the crash, without ruling out a compression problem. And again, low

compression was not the only possible design defect. A borescope inspection would not have disclosed the defective condition of the valve lifters. RP 1102-04.

Finally, the jury did not implicitly reject the existence of a design defect by finding no other proximate cause of the crash than pilot Preston Cavner's negligence. The Court of Appeals correctly observed that the jury's causation finding "would preclude remand only if we could conclude the jury's finding would have been the same had the design defect claim been presented to it." *Slip Op.* at 8 (citing *McDaniel*, 65 Wn. App. at 369). The Court of Appeals correctly determined that it could not reach such a conclusion here. An occurrence may have more than one proximate cause, *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 767-77, 709 P.2d 774 (1985), and the jury's verdict does not disclose whether the jury would have concluded that Preston's negligence alone caused the accident had it been allowed to consider whether a design defect was a concurrent cause.

In sum, the possible existence of an alternative ground to affirm in this case is not an issue of substantial public interest, but even if it were, the Court of Appeals properly rejected the notion that the jury's verdict rendered harmless the erroneous dismissal of Plaintiffs' design-defect claim.

B. Nothing in the Tort Reform Act requires fault-free claimants to meet special evidentiary requirements to receive the benefit of joint and several liability under RCW 4.22.070(1)(b), and whether to impose such requirements based on policy considerations is a question for the Legislature, not this Court.

A party is entitled to the benefit of all evidence supporting a claim or defense, regardless of which party introduced it. *Provins v. Bevis*, 70 Wn.2d 131, 136-37, 422 P.2d 505 (1967); *see also* 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV., WPI 1.02 (7th ed.). Thus, as the Court of Appeals recognized, when evaluating whether a claimant has met its burden of production on a CR 50 motion, the court considers all the evidence supporting the party's allegation, regardless of which party introduced the evidence. *Slip Op.* at 43 (citing *Whitchurch v. McBride*, 63 Wn. App. 272, 275, 818 P.2d 633 (1991)).[4] CMI's suggestion that this established rule should not apply where a claimant is forced to sue a family member to secure the benefits of joint and several liability afforded by RCW 4.22.070(1)(b) finds no support in the Tort Reform Act.[5]

The Legislature enacted RCW 4.22.070 as part of the Tort Reform Act of 1986. Laws of 1986, ch. 305, § 401. Under that statute, liability for

---

[4] Without acknowledging this general rule, CMI relies on cases that did not involve a cross-claim or similar circumstance where a party might rely on evidence presented by other parties to sustain a claim. *Petition* at 13 (citing *West v. Gregoire*, 184 Wn. App. 164, 336 P.3d 110 (2014); *Cano-Garcia v. King County*, 168 Wn. App. 223, 277 P.3d 34 (2012)). Those cases do not address the situation presented here.

[5] The common law plainly allows intra-family claims of the type asserted here. Washington long ago abolished restrictions on claims against family members for injuries caused by negligent operation of a vehicle. Washington abolished intraspousal tort immunity in 1972. *Freehe v. Freehe*, 81 Wn.2d 183, 192, 500 P.2d 771 (1972), *overruled on other grounds by Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984). And while parental immunity still exists in certain circumstances, it does not shield a parent from liability to a child for injuries resulting from negligent operation of a vehicle. *Merrick v. Sutterlin*, 93 Wn.2d 411, 416, 610 P.2d 891 (1980).

tort damages generally is several and not joint, meaning that each defendant is responsible for damages only in proportion to its percentage of fault as determined by the trier of fact. RCW 4.22.070(1). But an exception applies where the claimant is found to have been free of fault. In that circumstance, the defendants against whom judgment is entered are jointly and severally liable for the sum of their proportionate shares of the claimant's total damages. RCW 4.22.070(1)(b).

In a case where the party who bears a substantial percentage of fault has insufficient assets or insurance to satisfy a judgment, joint and several liability can mean the difference between full recovery and negligible recovery. Our Legislature has made a policy choice to preserve a modified form of joint and several liability to ensure "full compensation" for claimants injured by no fault of their own. *Kottler v. State*, 136 Wn.2d 437, 442-46, 963 P.2d 834 (1998). In this context, suing a family member is not "gam[ing] the system." *Petition* at 14. Because only the defendants against whom judgment is entered are jointly and severally liable under RCW 4.22.070(1)(b), a claimant must sue and obtain judgment against each potentially responsible party, including family members, to take full advantage of the exception.[6]

At base, CMI's complaint is with the Legislature's policy choice to preserve a modified form of joint and several liability for fault-free claimants. The "[p]olicy considerations" CMI cites in support of its

---

[6] Plaintiffs' cross-claims expressly sought relief only to the extent Preston Cavner was found liable as a result of CMI's affirmative defense that he was at fault. CP 308.

argument should be directed to the Legislature, not this Court. *Petition* at 14. But regardless, there is nothing improper or "contrived" about "intra-family" cross-claims asserted to preserve the possibility of joint and several liability under RCW 4.22.070(1)(b), *Petition* at 14, and there is no reason to consider a special rule that would preclude a claimant alleging that a family member was partially at fault for his injuries from relying on the evidence presented against that defendant by other parties, as allowed under established law, and instead require the claimant to present his own independent evidence to satisfy each element of a negligence claim.

C. The trial court never reached the issue of conflict preemption, and CMI waived the issue on appeal by failing to raise it until a motion for reconsideration. Regardless, CMI's conflict-preemption argument is meritless.

When it dismissed Plaintiffs' design-defect claim as precluded by implied *field* preemption, the trial court expressly did not reach CMI's alternative argument based on implied *conflict* preemption. CP 6748-49. And when Plaintiffs appealed the dismissal of their design-defect claim, CMI did not raise implied conflict preemption as an alternative ground for affirmance. *See Br. of Respondent* at 23-24.[7] CMI first raised implied conflict preemption on appeal in a motion for reconsideration, which the Court of Appeals denied. The Court of Appeals also denied CMI's simultaneously filed motion to supplement the clerk's papers; as a result,

---

[7] CMI argued only that the jury's finding that Preston Cavner's negligence was a proximate cause of the crash rendered the trial court's erroneous dismissal of the design-defect claim harmless. *Br. of Respondent* at 23-24.

many of the pertinent superior-court filings are not part of the record on review.

Nevertheless, CMI conditionally asks this Court to decide in the first instance whether Plaintiffs' design-defect claim is conflict preempted. CMI acknowledges that this Court's deciding that issue at this stage would be inappropriate "[u]nder ordinary circumstances," but urges this Court to accept review and stay this case if the U.S. Supreme Court grants certiorari in *Avco Corporation v. Sikkelee* (U.S. Supreme Court no. 18-1140). *Petition* at 15-16. Avco Corporation, the defendant aircraft-engine manufacturer and petitioner in *Sikkelee*, has asked the U.S. Supreme Court to review the decision by the United States Court of Appeals for the Third Circuit reversing a federal district court's decision that the plaintiff's claim in that case was impliedly conflict preempted. *Petition for a Writ of Certiorari*, *Avco Corp. v. Sikkelee*, no. 18-1140, at 17-23 (March 1, 2019); *see Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3d Cir. 2018).[8]

Regardless of whether the U.S. Supreme Court grants certiorari in *Sikkelee*, review by this Court is not warranted. This Court does not decide issues in the first instance; even when it accepts direct review, this Court reviews a superior-court decision. *See* RAP 4.2(a). And this Court should

---

[8] Avco also renewed its request that the Court review the Third Circuit's earlier decision that implied field preemption did not apply (relied on by this Court in *Estate of Becker*), even though the Court previously denied review of that decision. *Petition for a Writ of Certiorari*, *Avco Corp. v. Sikkelee*, no. 18-1140, at 23-31 (March 1, 2019); *see Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir.), *cert. denied*, _ U.S. _, 137 S. Ct. 495, 196 L. Ed. 2d 433 (2016). Although CMI anticipated that the U.S. Supreme Court would dispose of Avco's petition by mid-July 2019, *see Petition* at 16, it is presently unknown when the Court will consider the petition; in late June, the Court delayed consideration by inviting the Solicitor General to file a brief expressing the federal government's views.

deem waived an alternative ground for affirmance that was not raised in the Court of Appeals. *See Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976). CMI's plea for this Court to provide "definitive guidance" to Washington courts immediately in the wake of a decision from the U.S. Supreme Court in *Sikkelee* falls flat; the U.S. Supreme Court's decision would provide any needed guidance on the general principles at issue.

In any event, under established U.S. Supreme Court precedent, conflict preemption does not apply in this case. As this Court recognized in *Estate of Becker*, "there is a strong general presumption against finding that federal law has preempted state law." 187 Wn.2d at 622. And CMI's conflict-preemption argument specifically lacks merit. Like the plaintiff in *Sikkelee*, CMI invokes an aspect of implied conflict preemption, called "impossibility preemption," that arises where compliance with both federal and state duties is "impossible." *Sikkelee*, 907 F.3d at 709. CMI asserts that it is impossible for it to implement any safer alternative design that Plaintiffs may propose as a basis for design-defect liability under state tort law because design changes are subject to approval by the Federal Aviation Administration. But CMI cannot meet the heavy burden of establishing that the "demanding" defense of impossibility preemption applies here. *Wyeth v. Levine*, 555 U.S. 555, 573, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009).

It is true that design changes are subject to FAA approval. Under federal law, a manufacturer must obtain a "type certificate" from the FAA before manufacturing an aviation product for sale. 49 U.S.C. § 44704(a)(1).

A type certificate certifies that a new design for an aircraft or aircraft part "is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed" by the FAA. *Id.* "Major" changes to an aircraft's design require advance FAA approval.[9] *See* 14 C.F.R. § 21.93(a); 14 C.F.R. § 21.95.

Nevertheless, for at least three reasons, CMI is wrong that FAA's issuance of a type certificate is a complete defense to product-liability claims.

First, state product-liability law exists to compensate injured persons, not to regulate. Neither a plaintiff's presentation of evidence of a feasible alternative design in a products-liability action nor a jury's verdict that a product is not reasonably safe as designed mandates that a manufacturer circumvent the FAA and adopt a particular design modification. Such a verdict establishes merely that the existing design is not reasonably safe under the applicable state tort-law standard of care. *See Wyeth*, 555 U.S. at 565 (concluding that a jury's verdict that a warning label was insufficient was not tantamount to "mandating a particular replacement warning" but rather "established only that the manufacturer's warning was insufficient"). The question for preemption purposes is thus not whether a state court may prescribe a specific design change, but whether federal law

[9] A "minor" change is "one that has no appreciable effect on the weight, balance, structural strength, reliability, operational characteristics, or other characteristics affecting the airworthiness of the product." 14 C.F.R. § 21.93(a). Other changes are deemed "major" and require advance approval. *Id.*; *see also* 14 C.F.R. § 1.1 (defining "major alteration").

preempts a jury's determination that an existing design was not reasonably safe. *See id.*

Second, the fact that modifications are subject to a federal agency's approval does not necessarily render compliance with federal and state standards "impossible." U.S. Supreme Court precedent in the context of prescription-drug warning labels controls on this issue. *See Sikkelee*, 907 F.3d at 712-14 (discussing *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 131 S. Ct. 2567, 180 L. Ed. 2d 580 (2011), and *Wyeth*, 555 U.S. 555). The Supreme Court held in *PLIVA* that impossibility preemption applied where federal regulations prevented a generic prescription-drug manufacturer from applying to change its product warnings unless the brand-name manufacturer first obtained FDA approval to change its warnings. 564 U.S. at 619; *see also Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 486-87, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013). But the Court reached the opposite result in *Wyeth*, a similar case involving a brand-name prescription-drug manufacturer.

The Court held in *Wyeth* that even though a brand-name manufacturer must obtain FDA approval to change its warnings, impossibility preemption would not apply absent "clear evidence" that the FDA would deny such approval. 555 U.S. at 571. The Court held that such evidence did not exist where the manufacturer had not shown that it "attempted to give the kind of warning required by the [state-court] jury but was prohibited from doing so by the FDA." *Id.* at 572.

CMI is in a similar position as the manufacturer in *Wyeth*: CMI has never presented any evidence, let alone "clear" evidence, either that it may not seek FAA approval for a design change that would improve the safety of its engine components or that the FAA would disapprove such a change. *See Sikkelee*, 907 F.3d at 713-14. In fact, FAA regulations encourage type-certificate holders to make changes that "will contribute to the safety of the product and to "submit [such] design changes for approval." 14 C.F.R. § 21.99(b). CMI employees can even approve design changes under FAA-delegated authority. *See* 14 C.F.R. § 21.95; CP 9548-56.

Third, there is no indication that Congress intended to preempt aviation product-liability claims by requiring the FAA to issue type certificates. By statute, FAA safety regulations establish only "minimum standards," 49 U.S.C. § 44704(a), meaning that imposition of liability for product defects under state law may "supplement the federal scheme and further its central purpose: safe aircrafts." *Sikkelee*, 907 F.3d at 714-15. Meanwhile, allowing manufacturers to rely on type certificates to avoid liability would undermine that purpose. *See id.* at 715. As this Court observed in *Estate of Becker*, "the history of the Federal Aviation Act strongly supports the conclusion that Congress did not intend the act to preempt state product liability law." 187 Wn.2d at 625-26.

CMI's conditional request for review of the implied-conflict-preemption issue is both untimely and meritless. This Court should deny review.

IV. CONCLUSION

CMI raises no issues that come within RAP 13.4(b)(4) or otherwise merit review. This Court should deny CMI's petition for review.

Respectfully submitted this 31st day of July, 2019.

MASTERS LAW GROUP, PLLC

#14405

By: MB King for

Kenneth W. Masters, WSBA No. 22278
Shelby R. Lemmel, WSBA No. 33099
Attorneys for Appellants/Cross-Respondents Stacie Cavner; Rachel Zientek; Tammy Zientek; Michael Zientek; the Estate of Myles Cavner, by and through its personal representative, Carolann O'Brien Storli; and Hudson Cavner, by and through his litigation guardian ad litem, Carolann O'Brien Storli

CARNEY BADLEY SPELLMAN, P.S.

By Michael B King

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Attorneys for Appellant/Cross-Respondent Preston Cavner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via Appellate Portal to the following:

Timothy M. McCloskey Carrigan McCloskey & Roberson, LLP 945 Heights Blvd Houston TX 77008-6911 tmccloskey@cmrllp.com brizzo@cmrllp.com	Mark Northcraft Northcraft Bigby & Biggs 819 Virginia St Ste C2 Seattle WA 98101-4433 Mark.northcraft@northcraft.com biggs@northcraft.com Lilly_Tang@northcraft.com
Douglas A. Hofmann Marshall L. Ferguson Williams Kastner 601 Union St Ste 4100 Seattle WA 98101-2380 dhofmann@williamskastner.com mferguson@williamskastner.com mbarger@williamskastner.com llisty@williamskastner.com jkrowell@williamskastner.com	Alisa Brodkowitz Friedman & Rubin 81 Vine St Ste 202 Seattle WA 98121-1377 Alisa@friedmanrubin.com jvick@friedmanrubin.com
William Skinner Skinner Law Group 21600 Oxnard St Ste 1760 Woodland Hills CA 91367-7846 Woodruff@skinnerlawgroup.com lim@skinnerlawgroup.com skinner@skinnerlawgroup.com weiherer@skinnerlawgroup.com	Charles Jordan Michelle Buhler Calfo Harrigan Leyh & Eakes, LLP 999 3rd Ave Ste 440 Seattle WA 98104-4019 chipj@calfoharrigan.com michelleb@calfoharrigan.com yvettec@calfoharrigan.com kelliem@calfoharrigan.com

Thomas W. Bingham Jeffrey Jones Krutch Lindell Bingham Jones, PS 600 University St Ste 1701 Seattle WA 98101-3303 twb@krutchlindell.com jcj@krutchlindell.com jcj@nwlink.com legalassistant@krutchlindell.com	Matthew Clarke Robert B. Hopkins Jennifer L. Gates Richard S, Yugler Landye Bennett Blumstein LLP 1300 SW Fifth Avenue, Suite 3500 Portland, OR 97201 ryugler@lbblawyers.com jgates@lbblawyers.com rhopkins@lbblawyers.com mclarke@lbblawyers.com; jfisher@lbblawyers.com scristo@lbblawyers.com; kbaker@lbblawyers.com jlarson@lbblawyers.com

DATED this 31st of July, 2019.

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

July 31, 2019 - 9:19 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97272-9
Appellate Court Case Title:	Stacie Cavner, et ux., et al. v. Continental Motors Inc.

The following documents have been uploaded:

- 972729_Answer_Reply_20190731091823SC569886_7868.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to CMIs Petition for Review.PDF

A copy of the uploaded files will be sent to:

- anderson@carneylaw.com
- dbulis@williamskastner.com
- dewinter@bryancave.com
- dhofmann@williamskastner.com
- dshaw@williamskastner.com
- ken@appeal-law.com
- mark_northcraft@northcraft.com
- marks_northcraft@northcraft.com
- paralegal@appeal-law.com
- salita@skinnerlawgroup.com
- shelby@appeal-law.com
- skinner@skinnerlawgroup.com
- slechta@skinnerlawgroup.com

Comments:

Sender Name: Patti Saiden - Email: saiden@carneylaw.com
Filing on Behalf of: Michael Barr King - Email: king@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20190731091823SC569886