NO. 45791-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHERI ROLLINS, an individual,

Appellant,

v.

BOMBARDIER RECREATIONAL PRODUCTS, INC.,
a foreign corporation,

Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

1. Did the trial court properly dismiss Appellant's WPLA claim against BRP on federal preemption grounds?

2. Can the trial court be affirmed on the alternative ground that Appellant's claim was an impermissible claim for the indemnification of a tortfeasor?

3. Can the trial court be affirmed on the alternative ground that Appellant was not the real party in interest when her claims were dismissed?

II. STATEMENT OF THE CASE

A. Facts Pertaining to Appellant's Claims in the Trial Court.

On August 18, 2011, Plaintiff/Appellant Cheri Rollins ("Appellant") filed suit solely against former defendants Dennis and Lynette Long ("the Longs"), her parents, claiming the Longs' negligence in failing to properly maintain their 1999 Sea-Doo XP LTD personal watercraft ("PWC") manufactured by Respondent Bombardier Recreational Products Inc. ("BRP") was the sole cause of the explosion that injured Appellant. CP 2571-72.[1] On April 5, 2012, the Longs moved to amend their Answer to implead BRP. CP 2575-79. The trial court

[1] The Longs failed to have the Sea-Doo undergo seasonal and annual safety inspections as recommended, encouraged, and directed by BRP. CP 2278-2281. From approximately 2005 onward, instead of taking the Sea-Doo to a maintenance facility, the Longs attempted their own "maintenance" on the PWC. *Id.* The Longs, however, did not conduct (nor had the expertise or tools to conduct) many of the manufacturer directives, such as fuel system pressurization checks or inspection of the starter connections, which Appellant's own experts found were in utter disrepair and caused the explosion. *Id*; CP 2140-2152.

granted the motion, and the Longs subsequently filed their Third Party Complaint ("TPC") against BRP on April 19, 2012. CP 44-49.

In the TPC, the Longs asserted third-party claims against BRP for alleged violations of Washington's Product Liability Act ("WPLA"), Washington's Consumer Protection Act ("CPA"), and for contribution. *See id.* Appellant then amended her complaint to assert the same WPLA design-defect claim directly against BRP. *See* CP 54-57. In response to BRP's Interrogatory No. 13, which asked Appellant to describe how the subject Sea-Doo was defectively designed, Appellant stated the only reason she asserted a WPLA claim against BRP was to eliminate the "empty chair" created by the Longs' impleading BRP. CP 2588-90.[2]

The parties appear to agree that the defect allegation underlying Appellant's design defect claim under WPLA, RCW 7.72 *et seq.* is that BRP (like every other PWC manufacturer) did not include a powered "blower" device on the subject PWC to vent any accumulated fuel vapors before starting the engine.

Appellant's Opening Brief ("AOB"), however, presents a one-sided version of the facts, largely devoid of any citation to the record, in contravention of RAP 10.3(a)(5);[3] the record belies her factual recitation.

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[2] Appellant also asserted a CPA claim against BRP but stipulated to dismissing that claim with prejudice on April 3, 2013. CP 91-93. Accordingly, Appellant's only remaining claim when the Court granted the summary judgment from which she appeals was her design defect claim brought under the WPLA.

[3] Appellant's brief should contain "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." RAP 10.3(a)(5) (emphasis added); *see also Hirata v. Evergreen State Limited Partnership No. 5*, 124 Wn. App. 631, 637 n.4 (2004) (court

For purposes of this appeal, the salient points are as follows: (1) federal law preempts powered ventilation on PWC; and (2) the trial court determined alternative grounds exist for dismissing Appellant's case against BRP. BRP's statement of the case will speak to those matters.

B. Facts Pertaining to the Summary Judgment from which Appellant Appeals.

From 1988 to the present, the U.S. Coast Guard has repeatedly granted BRP and all other PWC manufacturers an official Exemption from, among other things, the provisions of Section 183.610 of Subpart K of Part 183 of Title 33, Code of Federal Regulations ("CFR"), relating to powered ventilation systems for conventional boats. CP 229-232. The Coast Guard first exempted BRP from these requirements on January 22, 1988. CP 670-71; CP 677-680. The 1988 Grant of Exemption, entitled "CGB 88-001," provides: "[a]ll information presented in the [BRP

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struck portion of respondent's statement of the case not supported by references to the record). Pages 6 through 8 of Appellant's brief are particularly egregious, most notably her third, fifth, and sixth footnotes. For example, equating lack of powered ventilation--intended for conventional boats, not PWCs-- to car seat belts, smoking on airplanes, asbestos and high beam walking is beyond hyperbole. More importantly, these so-called "facts" are not a part of the record before this Court. To the extent Appellant presents the testimony of her paid expert regarding the installation of an alleged $5 dollar blower as "factual," see AOB at 7, this information is as specious as it is irrelevant. The shortcomings of Appellant's paid expert's work, however, are likewise not part of the record and not relevant to this appeal. Simply stated, there was nothing before the trial court establishing a blower would make the Sea-Doo more safe, especially given the neglect and lack of maintenance performed on the PWC. Had this case proceeded to trial, BRP would have established that placing a blower on this and all PWCs presents myriad problems and safety issues as has been recognized by relevant federal agencies. CP 1747 (outlining some problems presented by powered ventilation under "Ventilation" heading). The reasons for the Coast Guard's standard of no powered ventilation for PWCs are many, but they are irrelevant and not part of the record on appeal. For Appellant to acknowledge the irrelevancy of the liability issues, yet still argumentatively refer to them, is improper.

exemption] petition has been carefully considered by the Coast Guard." CP 678 (emphasis added). As to Section 183.610, the Grant of Exemption provides:

> The present ventilation regulations in Subpart K of Part 183 were intended to apply to conventional types of boats powered by inboard or sterndrive engines or equipped with generators. These engines may emit gasoline fuel vapors. The ventilation regulations are intended to remove such vapors; however, the fuel system on the "Sea-Doo" boat is not designed in the same way as a fuel system on a conventional inboard or sterndrive. The fuel system is sealed to prevent leakage when the boat is oriented in any position. As a result, compliance with the requirements of Section 183.610 is unnecessary to achieve an acceptable level of safety.

CP 679 (emphasis added). The Coast Guard concluded:

> In consideration of the foregoing, I find that to grant this exemption would not adversely affect boating safety. Therefore, pursuant to the authority contained in 46 U.S.C. 4305 and 49 C.F.R. 1.46(n)(1), which authority has been delegated to me by the Commandant, an exemption from the requirements of...Section 183.610 of Subpart K of Part 183 of Title 33, Code of Federal Regulations is hereby granted to the Bombardier..."

Id. (emphasis added). Subsequent amendments to the 1988 Grant of Exemption continued the Exemption, including Amendment CGG 88-001-9 relating to the subject 1999 Sea-Doo, issued on December 1, 1998. CP 670, CP 673-675.

By virtue of the Coast Guard's Grant of Exemption (CGB 88-001) and Amendment (CGG 88-001-9), the subject Sea-Doo was statutorily exempt from the requirements relating to powered ventilations systems set forth in Section 183.610. CP 232. This Exemption has remained in force for all personal watercraft manufactured by any manufacturer for sale in

the United States, including BRP personal watercraft, since 1988 and has never been revoked by Coast Guard. *Id.*

C. Facts Pertaining to Affirming Trial Court on Alternative Grounds.

1. The Mary Carter-like Settlement Agreement Before the Trial Court.

In September 2013, Appellant and the Longs entered into a Settlement Agreement entitled "Settlement, Release, and Assignment" ("SRA"). The SRA provides in pertinent part:

- The Longs' insurer, State Farm, paid $1.2 million – the insurance policy limits (plus $100,000) – for Appellant's claim against BRP, CP 2594;
- As "consideration" for the $1.2 million, Appellant assigned her personal injury claim against BRP to the Longs and State Farm, who then would prosecute Appellant's action against BRP, *id*;
- Appellant agreed to "cooperate fully with the Longs in their prosecution of those claims," CP 2595-96; *see also* CP 2597 (¶a);
- Appellant "ceded full and complete litigation control of those claims to the Longs," CP 2596;
- Appellant and the Longs would "share equally" the "net" proceeds of "any recovery against Bombardier," CP 2596 (¶e); and
- "To the extent a conflict may exist in favor of the Longs, by their attorneys prosecuting the claims of [Appellant], they waive any such conflict, whether actual or in appearance only, as the claims prosecuted against BRP going forward are not made against them (The Longs)." CP 2597 (¶ a) (emphasis added).

In explaining the settlement amount, Appellant stated:

> The Agreement involves payment of $1,200,000 in exchange for Cheri and Blake non-suiting, with prejudice, their claims against the Longs. In addition, Cheri agrees to assign proceeds of her claim against Bombardier as well as all litigation control of the claim. The additional $100,000

> above the insurance policy limits is presumably consideration for Cheri's assignment.

CP 2609.[4]

After executing the SRA, Appellant non-suited her claims against the Longs. On October 15, 2013, Appellant's now-counsel of record transmitted a letter to BRP clarifying State Farm's interest in, and control over, Plaintiff/Appellant's lawsuit pursuant to the SRA:

> Instead, [Ms. Rollins] assigned the proceeds of those claims to State Farm and, after payment of certain litigation expenses, those proceeds will be paid to Ms. Rollins.
> ...
> Given the settlement agreement, there is no incentive for either Ms. Rollins or State Farm to walk away for a small amount. Ms. Rollins simply has nothing to lose because State Farm on behalf of the Longs is advancing all costs without recourse. State Farm has nothing to lose because by the settlement it has protected its first party insured.

See CP 2601-2605.

Following the SRA, Appellant attempted to bury and prevent BRP from deposing her experts, who provided causation testimony that was adverse and unfavorable to the Longs. *See* CP 2140-2152. On November 6, 2013, Appellant provided to BRP "Plaintiff's Discovery Supplements

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[4] Additionally, in asking the trial court to approve the settlement agreement, the Guardian ad Litem stated:

> "We [Appellant and the Guardian ad litem, Mr. Dan E. Lazares] discussed the proposed settlement and [Appellant] was satisfied with the same. [Appellant] is adamant that she would not pursue claims against her parents beyond the available [$ 1.1 million] insurance limits."

CP 2621 (emphasis added). Notably, Mr. Lazares recommended approval of the settlement amount of $1.2 million "in light of the fact that ... the primarily injured Plaintiff [, Appellant,] would not allow her attorneys to pursue the personal assets of" the Longs. CP 2622.

and Witness Updates" wherein she (1) adopted all of the Longs' discovery responses in an apparent attempt to cure deficiencies in her own response created by the fact that she had no interest in pursuing BRP until State Farm purchased her claim; and (2) stated she would be proceeding to trial with the Longs' testifying experts. *See* CP 2692–2700.

2. BRP Sought Dismissal of Appellant's Action Based on the SRA's Provisions.

On November 21, 2013, based on the SRA's provisions, BRP moved to dismiss Plaintiff's case or, in the alternative, to void the SRA and disqualify the Longs' State Farm Appointed Counsel from representing Appellant. CP 2548-2566. BRP pointed to the SRA and myriad other materials to demonstrate Appellant's action against BRP was, in actuality, one for indemnification brought by State Farm in contravention of RCW 4.22.040(3). CP 2553-2555. BRP further argued that Appellant's case against BRP should be dismissed because the SRA effected an impermissible personal injury claim assignment rendering Appellant no longer the real party in interest. CP 2556-2563. Additionally, BRP highlighted that the SRA was an affront to Washington law and its judicial process, as well as contrary to public policy.[5] CP 2563-2566.

Appellant filed her response on December 9, 2013, contending she was merely re-paying the Longs for moneys they advanced to her. *See,*

[5] BRP also argued that the Longs' State Farm-appointed counsel should be prohibited from representing Appellant because the scheme set up by the SRA created a conflict of interest in representing both Appellant and the Longs. CP 2565-2566; CP 2675-2680.

e.g, CP 2641. In so doing, Appellant ignored that insurance giant State Farm financed the Longs' defense and the $1.2 million settlement; following the settlement, State Farm was bankrolling the litigation in Appellant's name. *See* CP 2688-2691; *see also* CP 2601-2605.[6]

On December 20, 2013, the Honorable Garold E. Johnson found: (1) citing *Toste v. Durham & Bates Agencies*, 116 Wn. App. 516, 67 P.3d 506 (2003), Plaintiff's claim against BRP was one for indemnification of a tortfeasor in contravention of Washington law, [7] RP (12-20-13) at 20, CP 2791; and (2) Appellant was no longer the real party in interest. RP (12-20-13) at 22; CP 2791.[8] The Court articulated its view that these rulings provided alternative grounds for dismissing Appellant's claims against BRP and, indeed, made its rulings with the intent that this Court address these issues on appeal. RP (12-20-13) at 28–30, 32–33; RP (1-10-14) at 8-9. Appellant's counsel responded that he believed these determinations to be "error," RP (1-10-14) at 4; yet, despite filing a fifty-page opening brief, Appellant has not challenged them on appeal. *See generally* AOB.

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[6] On December 16, 2013, BRP filed its Reply to Appellant's opposition brief. *See* CP 2665-67; CP 2667-70; 2670-73.

[7] The court was further concerned the settlement agreement not only provided for indemnification of a tortfeasor in contravention of Washington law, but actually created a potential for the tortfeasors to profit from their tortious conduct. RP (12-20-13) at 20-21.

[8] The trial court further determined the SRA between Appellant and former defendants the Longs was collusive in effect, that there was evidence of collusion between them during the litigation, and that grounds existed to invalidate the SRA. CP 2971; RP (12-20-13) at 21.

The court also concluded Appellant's current counsel had a conflict of interest in representing Appellant. *See* RP (12-20-13) at 22-23; CP 2791.[9]

Because Appellant's counsel was unwilling to sign an order embracing all of the trial court's determinations on December 20, 2013, *see* RP (12-20-13) at 33–34, the trial court entered another order on January 10, 2014, after another contentious hearing, *see* RP (1-10-14), that reflected its December 20, 2013 rulings and dismissed Appellant's case against BRP with prejudice. *See* CP 2791.

III. ARGUMENT

A. Summary Judgment Should be Affirmed Because Appellant's Design Defect Claim is Both Expressly and Impliedly Preempted by the Federal Boat Safety Act.

1. The Doctrine of Federal Preemption.

The doctrine of preemption arises out of the Supremacy Clause, contained in Article VI, clause 2 of the United States Constitution, which provides: "This Constitution and the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Federal preemption of state law occurs in three ways relevant to this appeal. First, Congress may explicitly define the extent to which it intends to preempt state law, known as express preemption. *See Cipollone v. Liggett Group, Inc.*, 505 U.S.

[9] The court expressly stated it was not deciding whether the found conflict was a disqualifying one, leaving that determination for the reviewing court. RP (12-20-13) at 31.

504, 517 (1992). Where statutory language expressly provides for preemption of state law, state law must yield to Congressional command. *Id.* (emphasis added).

Second, state law is preempted when (1) Congress indicates an intent to occupy a field of regulation or (2) state law actually conflicts with federal law; this is known as implied preemption. Even "[i]n the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law." *Cippollone*, *supra*, 505 U.S. at 517; *Inlandboatmen's Union of the Pacific, et al. v. Dep't of Transp.*, 119 Wn.2d 697, 701-02 (1992).

Significantly, regulatory action by federal agencies acting within the scope of Congressionally delegated authority is afforded the same preemptive power over conflicting state laws or regulations. *See City of New York v. F.C.C.*, 486 U.S. 57, 63-64 (1988) (internal citation omitted). The U.S. Supreme Court recognizes the Coast Guard as such a federal agency with preemptive power, holding "Coast Guard regulations are to be given pre-emptive effect over conflicting state laws." *U.S. v. Locke*, 529 U.S. 89, 109-110 (2000). Washington courts have reiterated this holding. *See Inlandboatmen's Union*, 119 Wn.2d at 706-07.

2. Appellant's Design Defect Claim is Expressly Preempted by the Federal Boat Safety Act.

The Federal Boat Safety Act (46 U.S.C. § 4301 *et seq.*), established by Congress in 1971, "was enacted 'to improve boating safety,' to authorize 'the establishment of national construction and

performance standards for boats and associated equipment,' and to encourage greater 'uniformity of boating laws and regulations as among the several States and the Federal Government.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 57 (2002) (citing Pub.L. 92-75, § 2, 85 Stat. 213-214) (emphasis added). The FBSA applies to "recreational vessels," defined in Section 2101 as those which are "being manufactured or operated primarily for pleasure" or those which are "leased, rented, or chartered to another for the latter's pleasure." The subject 1999 Sea-Doo XP LTD PWC constitutes a "recreational vessel" subject to the regulations of the FBSA. *See* CP 1313-1314.

Section 4302(a)(2) of the FBSA authorizes the Secretary of Transportation to prescribe regulations "requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems...)...." Significantly, Section 4305 further authorizes the Secretary of Transportation to exempt a recreational vessel from a regulation (or even the entire Chapter 43) if the Secretary believes the recreational vessel's safety will not be adversely affected. With these two sections, Congress created an explicit statutory scheme, which authorizes the Coast Guard to issue both regulations and exemptions therefrom pertaining to PWCs. The Secretary of Transportation has delegated all authority concerning these regulations and exemptions to the Coast Guard. *Sprietsma*, 537 U.S. at 57 (citing 49 C.F.R. § 1.46(n)(1) (1997)).

FBSA Section 4306 addresses federal preemption. That Section forbids a State from establishing or enforcing a standard or requirement or

imposing a requirement for a recreational vessel "that is not identical" to the Federal standard. *See* 46 U.S.C. § 4306 and Official Notes.

a. Coast Guard Regulations Pertaining to Watercraft Ventilation Systems.

Pursuant to its authority granted by Congress, the Coast Guard has heavily regulated the area of powered ventilation systems for both boats and PWCs. The Coast Guard has promulgated regulations for such systems, which are codified in Section 183.610 of Subpart K of Part 183 of Title 33, CFR. That section requires that boats with inboard engines (*i.e.*, not open to the atmosphere) have a powered ventilation system:

> (a) Each compartment in a boat that has a permanently installed gasoline engine with a cranking motor must:
>
> (1): Be open to the atmosphere, or
> (2): Be ventilated by an exhaust blower system.

33 CFR § 183.610 then sets forth certain specifications pertaining to exhaust blower systems. For over 40 years, through the FBSA, the Coast Guard has actively and extensively regulated the area of powered ventilation systems for both boats and PWCs. *See Becker v. U.S. Marine Co.*, 88 Wn. App.103, 106-107 n.9 (1997) (recognizing Coast Guard's promulgation of regulations in 10 specific areas relative to boats and PWCs, specifically identifying ventilation systems).

b. The Coast Guard's Exemption of BRP (And All Other Manufacturers) PWCs from Its Powered Ventilation Requirements.

For purposes of brevity, see Statement of Case, *supra*, at 3-5.

c. The Coast Guard's Preemptive Power is not Limited to Statutorily Enacted Laws, but Flows to Non-Statutory Standards Pursuant to "Flexible Regulatory Authority."

Appellant's primary argument on appeal is that the Coast Guard's Grant of Exemption is just a letter that has no preemptive power because the Exemption is not a "law" or "regulation" that is contained in the Code of Federal Regulations. *See* AOB at 8, 14-15. Appellant erroneously maintains that preemption can only result from statutorily enacted laws. Such an argument, however, is directly refuted by Congress' intent as manifested through the plain language of the FBSA.

i. Section 4302 of the Federal Boat Safety Act

Section 4302, entitled "Regulations," provides in relevant part:

> (a) The Secretary may prescribe regulations -
>
> * * *
>
> (2) requiring the installation, carrying, or use of associated equipment (including...ventilation systems...) on recreational vessels and classes of recreational vessels subject to this chapter, and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section; and
>
> (3) requiring or permitting the display of seals, labels, plates, insignia, or other devices for certifying or evidencing compliance with safety regulations and standards of the United States Government for recreational vessels and associated equipment. (Emphasis added.)

The official Notes to Section 4302 provide:

> Section 4302 authorizes the Secretary to prescribe regulations to carry out the provisions of this chapter [Chapter 43 of the FBSA]. In lieu of establishing specific statutory safety requirements, subsection (a) provides flexible regulatory authority to establish uniform standards for the design, construction, materials, and performance of the boats themselves and all associated equipment. It also provides for the display of seals and other devices for

> certifying or evidencing compliance with applicable safety regulations or standards.

46 U.S.C. § 4302, Historical and Revision Notes (emphasis added).

From this language, the Coast Guard's regulatory authority to administer the provisions of the FBSA consists not only of "specific statutory safety requirements," but also "flexible regulatory authority" to establish non-statutory uniform safety standards for the design of watercraft and associated equipment. Such Congressional intent refutes Appellant's contention that Coast Guard "regulation" consists only of a statutorily enacted law.

ii. Section 4305 of the Federal Boat Safety Act

Section 4305 of the FBSA, entitled "Exemption," provides:

> If the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter.

46 U.S.C. § 4305 (emphasis added). The Notes to Section 4305 provide:

> Section 4305 permits the Secretary to grant appropriate exemptions from the requirements of this chapter when recreational vessel safety will not be adversely affected.

46 U.S.C. § 4305, Historical and Revision Notes (emphasis added).

Through Section 4305, Congress vested the Coast Guard with authority to issue exemptions not only from statutorily enacted regulations prescribed under Chapter 43 (46 U.S.C. §§ 4301-4311) of the FBSA, but also from the entirety of Chapter 43 itself. This encompasses other non-statutory regulatory action mandated pursuant to the Coast Guard's "flexible statutory authority" vested by Congress in Section 4302.

The Coast Guard's power to grant Exemptions from Chapter 43 requirements flows from and is codified in the FBSA itself (at Section 4305). Thus, the Coast Guard's power to enact the powered ventilation regulations derives from the same power giving the Coast Guard the authority to grant exemptions from those very requirements. In other words, the Coast Guard's power to issue regulations (whether statutorily or through non-statutory agency determinations) and power to exempt is on equal footing and flows from the same Congressional Act—the FBSA.[10]

Through the Exemption, granted pursuant to the Coast Guard's "flexible regulatory authority," the Coast Guard has mandated the uniform federal standard for powered ventilation and PWC design—PWCs cannot be designed with them. At the 61st Meeting of the National Boating Safety Advisory Council (NBSAC),[11] on April 27-28, 1998, the Chief of the

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[10] Throughout her Opening Brief, Appellant states that the FBSA requires powered ventilation. AOB at 19, 26, 37. Yet, at the same time, Appellant correctly acknowledges that the FBSA itself does not contain any recreational vessel performance or equipment regulations, but vests the Coast Guard with authority to issue such regulations. Thus, the powered ventilation requirements are one-step removed from the FBSA, issued pursuant to Section 4302. The same holds true with the Exemption—Congress, through the FBSA, vests the Coast Guard with equal authority to issue Exemptions. Thus, for Appellant to state that the FBSA, through the Coast Guard regulation, requires powered ventilation, it must also be stated that the FBSA, through the Exemption, does not require powered ventilation for PWCs. Thus, the FBSA itself requires that PWCs be designed without powered ventilation.

[11] The NBSAC is a federally-mandated council created by the FBSA of 1971 made up of 21 members of seven representatives from the manufacturers of recreational vessels and associated equipment, seven representatives from State Boating Law Enforcement agencies, and seven representatives from boating safety organizations. *See* 46 U.S.C. § 13110; CP1753-1754; *see also Sprietsma*, 537 U.S. at 57-58. Through a formal process, the NBSAC advises the Coast Guard on boating safety issues. *See* 46 U.S.C.

Coast Guard's Office of Boating Safety acknowledged: "...Coast Guard lawyers had advised [me] that granting the same exemption to personal watercraft for ten years is in effect a standard." CP1765-1766. Moreover, on October 19, 1999, the Coast Guard and Department of Transportation published in the Federal Register a Notice of Petition and Request for Comments entitled, "[*Personal Watercraft*] *Manufacturer Exemptions From Recreational Boat Standards*" relating to 33 CFR 181 (certification regulations) and 183 (manufacturing regulations – including powered ventilation). CP 1742. There, the Coast Guard stated:

> If the manufacturer changes the design or construction of a boat subject to the provisions of an exemption,...the manufacturer must petition the Coast Guard for an amendment to the provisions of the grant of exemption.

CP 1748. As this last sentence demonstrates, PWCs designed without a powered ventilation is the only allowable Coast Guard design standard. If PWC manufacturers unilaterally attempted to include a powered ventilation into the design of PWCs, they would be in violation of the Exemption and thus the federal standard. To include powered ventilation, a manufacturer would first have to go through the Exemption process and petition the Coast Guard for an amendment to the provisions of the Exemption, and satisfy the Coast Guard "that boating safety would not be adversely affected." *See* 46 U.S.C. § 4305. CP 673-675; CP 677-680. This plainly belies Appellant's repeated assertion that BRP had the choice

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§ 4302(c); CP1754. The NBSAC typically holds two meetings a year to analyze and address boating safety issues. CP 1754.

to use powered ventilation at its discretion and that it was not prohibited from using it. AOB at 8, 19, 35.

iii. Section 4306 of the Federal Boat Safety Act

In her Opening Brief, Appellant claims repeatedly that FBSA Section 4306 (relating to federal preemption) applies only to statutorily enacted "laws" and, because the Exemption is not a statutorily-enacted law, there can be no federal preemption under section 4306. AOB at 19, 21, 22. Appellant myopically limits her argument to the single word "regulation" in Section 4306 in an attempt to ignore and/or limit the Coast Guard's preemptive power only to official laws. Such an argument ignores Section 4306's language, the official Notes thereto, and Chapter 43 of the FBSA's entire statutory scheme.

Section 4306, entitled "Federal Preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.[12]

46 U.S.C. § 4306 (emphasis added). The official Notes clarify:

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[12] This express preemption clause constitutes an explicit, "unambiguous congressional mandate" of Congress' intent to preempt state regulation. *Inlandboatmen's Union of the Pacific, et al. v. Dep't of Transportation*, 119 Wn.2d at 702.

> Section 4306 establishes the Federal preemption of recreational boating standards and requirements. A State or a political subdivision may not establish, continue, or enforce a law or regulation establishing a performance or other safety standard that is not identical to a Federal standard...This is to provide uniform standards without the imposition of excessive special requirements by individual states.

46 U.S.C. § 4306, Historical and Revision Notes (emphasis added).

Through Section 4306, Congress sets forth its purpose of providing uniform standards without the burden of special requirements by individual States. 46 U.S.C. § 4306, Historical and Revision Notes. Washington courts, too, have recognized this important policy. *See, e.g.*, *Becker v. U.S. Marine Co.*, 88 Wn. App. at 108 (noting the FBSA's preemption clause was "founded on the need for uniformity applicable to vessels moving in interstate commerce").

d. The Coast Guard's Congressionally Authorized Exemption Carries Express Preemptive Weight.

It is the "purpose of Congress" that is "the ultimate touchstone of pre-emption analysis." *Cipollone*, 505 U.S. at 517 (citations and quotations omitted). Per the FBSA's statutory scheme, through Sections 4302, 4305 and 4306 (and their official Notes), Congress intended "regulation" as used in Chapter 43 to refer to any authorized Coast Guard regulatory act, whether manifested through a statute or non-statutory regulation, standard, requirement or exemption pursuant to the "flexible regulatory authority" granted by Congress. Here, the over 25-year Exemption constitutes an official regulatory act to establish the uniform standard for PWC ventilation. Under Section 4306, neither Appellants nor

the State of Washington, either legislatively or judicially, may establish or enforce any law, regulation, standard or requirement for PWC ventilation that is not identical to the standard established by the Exemption.[13]

In *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997), relied upon by Appellant, the Seventh Circuit addressed express preemption of common law claims, where the National Highway Transportation Safety Administration ("NHTSA") had established windshield retention requirements, and exemptions therefrom, for certain vehicles upon delegation pursuant to the National Traffic and Motor Vehicle Safety Act ("Safety Act"). *Id.* at 297. The *Gracia* court found NHTSA's decision to issue an exemption to its windshield requirements constituted "an authoritative federal determination" with "as much [express] pre-emptive force as a decision to regulate." *Id.* at 296-97. The court referred to this as an "affirmative decision by agency officials." *Id.* at 297.

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[13] To hold that the Exemption does not carry legal power would render BRP (and all other PWC manufacturers), and even Appellants in violation of both federal and state law. In such case, manufacturing PWCs for over 25 years without powered ventilation would constitute a "Prohibited Act." 46 U.S.C. § 4307. And to even operate, or permit someone else to operate, a PWC without powered ventilation would likewise violate Section 4307 (as well as WAC 352-60-50(1)). This, in turn would subject BRP and Appellant (as well as her parent owners of the PWC) to criminal, civil and regulatory liability under both Federal law—FBSA § 4311—and Washington state law. In response, Appellant states it is "plainly hyperbole" and "false on its face." AOB at 47. Appellant, however, is ignoring the clear language of these FBSA provisions. *See also Sprietsma v. Mercury Marine*, 537 U.S. at 64 ("The FBSA itself imposes civil money penalties payable to the United States, as well as imprisonment for willful violations, 46 U.S.C. § 4311[.]")

Appellant makes much of the fact that the *Gracia* exemption was contained in a positive regulation, and argues that fact forecloses preemption in this case where the Exemption was not so contained. *See, e.g.*, AOB at 31 ("*Gracia* provides BRP no authority."). Appellant, however, ignores several important facts. First, while the Safety Act in *Gracia* (49 U.S.C. § 30101, *et seq.*) contained an express preemption clause and a provision allowing for NHTSA to issue motor vehicle safety standards (just like the FBSA), it did not contain an independent Exemption provision like FBSA Section 4305. Thus, NHTSA had to create a positive regulation in order to exempt the vehicles for which it determined it "was both technically impracticable to design windshields which could comply with the standards and impracticable to apply the standard's barrier crash tests to these vehicles." *Id.* at 297. Here, the Coast Guard premised its Section 4305 Exemption on similar facts, finding the powered ventilation requirements in 33 CFR § 183.610 were intended to apply to conventional boats, not PWCs, and that PWCs, without powered ventilation met the intent and level of safety contemplated by the ventilation requirements. CP 673-675; CP 677-680; *see also* CP 1747.

Second, Appellant ignores the language of FBSA Section 4302 and its Notes, which defines "regulations" to include not only statutory requirements, but also non-statutory standards and requirements—which the Exemption constitutes. Dispositive in *Gracia* was that a federal standard for windshield retention existed. *Id.* at 296. The same holds true

here: the federal powered ventilation standard for PWCs, unlike conventional boats, is that PWCs currently cannot be designed with powered ventilation. The design standards in the Exemption control.

Moreover, the *Gracia* opinion refutes Appellant's contention that a positive law is always required for preemption. Citing the U.S. Supreme Court in *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 384 (1983), the *Gracia* court highlighted: "A federal determination to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." *Id.*[14] Thus, preemption turns on an "authoritative federal determination," not on whether a "law" is passed.

In her discussion of *Gracia*, Appellant also makes the curious argument that the Safety Act in *Gracia* "was intended to establish the safety standards for motor vehicles," whereas the FBSA was "only intended to establish 'minimum' safety standards." AOB at 31. This, Appellant claims, distinguishes *Gracia* and negates preemption. But *Gracia* again squarely refutes that argument. Citing the text of the Safety Act, the *Gracia* court repeated that a "motor vehicle safety standard" as

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[14] BRP is mindful of the Third Circuit's opinion in *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 246 (3d Cir. 2008), where it noted the Supreme Court's caution that this statement was not meant in an unqualified sense. That said, *Arkansas Elec.* is still good law and recognizes circumstances where a federal determination not to issue positive regulations can have preemptive effect. Here, of course, the Coast Guard has not foregone regulation of ventilation systems for boats and PWCs, but has actively and extensively regulated this area for over 25 years.

used in the Safety Act was "broadly defined as 'a minimum standard for motor vehicle or motor vehicle equipment performance." *Gracia,* at 296 (citing 49 U.S.C. § 30102(a)). Yet, the court still found preemption.

The *Gracia* opinion also dispels Appellant's saving clause argument. Specifically, Appellant asserts Congress intended no immunity by manufacturer compliance with the FBSA. AOB at 18. The plaintiffs in *Gracia* made the same argument, contending that reading the preemption and savings clause (which are almost identical to the FBSA's preemption and saving clauses) in conjunction indicated Congress did not intend for common law claims to ever be preempted. *Gracia*, at 297. Rejecting this argument, the *Gracia* court noted that the Safety Act had the objective of, among other things, establishing uniform safety standards. *Id.* at 298. The same holds true for the FBSA, which was enacted to authorize "the establishment of national construction and performance standards for boats and associated equipment." *Spreitsma*, 537 U.S. at 57 (citing Pub.L. 92-75, Section 2, 85 Stat. 213-214). The *Gracia* court acknowledged that when a state requirement is not identical to the federal standard, it would impede the objective of uniform national standards. *Gracia*, 112 F.3d at 298.

Moreover, the *Gracia* court held that if plaintiff's common law claims were not preempted, manufacturers would be subject to varying standards from state to state, which could not all be complied with simultaneously. *Id.* The same scenario is present here—if Appellant's state or common law claims are not preempted, and BRP is required to

equip its PWCs with powered ventilation (intended for conventional boats) it would subject BRP and all PWC manufacturers to varying standards across the fifty states. But Washington courts have reiterated the policy against such a result:

> The Senate report [for the FBSA] notes the preemption section conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce.[15] In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.

Becker, 88 Wn. App. at 108 (citing S. Rep. 92-248(1971) and S.Rep. 92-248 Section 10 (1971)). For a Washington court to impose a powered ventilation requirement on PWCs would create an unidentical, unworkable standard prohibited by FBSA Section 4306, and would create a special requirement under Washington state law, in direct violation of Congress' policy goal of "provid[ing] uniform standards without the imposition of excessive special requirements by individual States." 46 U.S.C. § 4306.

Finally, the *Gracia* court noted it was not Congress' intent to "save" common law claims when they conflict with a federal standard, but rather to prevent a manufacturer from having a complete defense to a common law action not addressed by the federal standard by merely stating that it was in full compliance with all federal safety standards. *Gracia*, at 298. In making this determination, the court highlighted U.S.

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[15] Maritime safety and vessel movement in interstate commerce are matters traditionally within the exclusive jurisdiction of the federal government. *See, e.g., U.S. v. Locke*, 529 U.S. at 103.

Supreme Court holdings that similar savings clauses do not preserve conflicting or non-identical state common law actions from preemption. *Id.* (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987).

In this case, the official Coast Guard Exemption constitutes a 25-year "authoritative federal determination" (as used in *Gracia*) and the federal standard for PWCs and powered ventilation with express preemptive effect through FBSA Sections 4305 and 4306. As such, the FBSA expressly preempts Appellant's design defect claim.

Moreover, by exempting all PWC manufacturers from the powered ventilation requirements in 33 CFR § 183.610, the Coast Guard has determined that PWCs designed without powered ventilation met the intent of the regulations and are in legal compliance with them. This is the federal standard for PWCs.

i. The Coast Guard's 1999 Federal Register Notice of Petition and Request for Comments Regarding the PWC Exemption Process.

As briefly discussed above, on October 19, 1999, the Coast Guard and Department of Transportation published in the Federal Register a Notice of Petition and Request for Comments entitled, *"[Personal Watercraft] Manufacturer Exemptions From Recreational Boat Standards"* relating to, among other things, 33 CFR Part 183 (manufacturing regulations – including powered ventilation). CP 1742-1748. The Coast Guard sought public comment to respond to a petition

for rulemaking submitted by the Personal Watercraft Industry Association (PWIA) relating to the Exemption process. CP 1742.

Importantly, through the Federal Register Notice, the Coast Guard confirmed the Exemption process as the only method by which PWC manufacturers can comply with the Federal recreational boating safety laws as they relate to PWCs [i.e., ventilation requirements]: "[c]urrently, PWC manufacturers must petition for an exemption from manufacturing regulations." CP 1742; CP 1756-57. This was the very purpose of the PWIA petition: to potentially authorize a new/alternate method of compliance with Federal recreational boating safety laws for PWC manufacturers other than the exemption process.[16] CP 1742-1748. Additionally, at the end of the Notice, under "Questions," the Coast Guard posited a number of inquiries confirming the legal and regulatory effect of the Exemption Process:

* * *

> 2. Should the Coast Guard continue to require PWC manufacturers to petition the Coast Guard for exemptions to the manufacturing regulations for recreational boats?
> 3. Should the Coast Guard develop a method other than the exemption process to require PWC manufacturers comply with Federal recreational boating safety laws?

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[16] In her Opening Brief, Appellant describes the 1999 Federal Register Notice as evidence that the Coast Guard sought to change the law as it relates to ventilation and PWC design. AOB at 28. This is inaccurate. The Notice was not seeking to change the law, but sought to consider "alternate" methods to the Exemption process for PWC manufacturers to be deemed in compliance with the powered ventilation requirements. The Exemption would be on the same level and have the same legal authority and effect of any alternative method of compliance adopted. Of course, to date, no such alternate method has been adopted. The Exemption is the only method of legal compliance that has ever existed.

> If yes, what alternate method should the Coast Guard develop?
>
> Examples of alternate regulatory methods to the exemption process include (1) requiring the PWC manufacturers meet prescribed industry design standards such as ISO 13590 standards, SAE standards, or some other industry standard or (2) developing manufacturing regulations that address accidents associated with the specific design of PWC.

CP 1748 (emphasis added).

In the 1999 Federal Register Notice, the Coast Guard discussed the FBSA's background, described the applicable manufacturing regulations for recreational boats (to which the Exemption applied), and discussed the Exemption process. In the "Background" section, the Coast Guard recognized that its regulations appearing in 33 CFR Part 183 were intended for conventional boats that contain a typical hull, transom, and passenger load carrying area. CP 1743. After citing its authority under the FBSA to issue Exemptions from the regulations, the Notice states that, since 1972, the Coast Guard has granted Exemptions with respect to certain non-conventional boats, including PWCs, airboats, hovercraft, submarines, drift boats, race boats, and mini-bass boats. *See id.*

With respect to the ventilation regulations in Part 183, the Coast Guard acknowledged that, when promulgated, they did not consider vessels such as PWCs that had a tendency to capsize and would ingest water into blower intakes.[17] CP 1747. Nor did the regulations specify

[17] Due to their unique characteristics, small size and maneuverability, PWCs—unlike boats—are expected to turn over in the water, which is accounted for in the sealed design and sealed electrical components and a label on the watercraft instructing operators how to correctly turn a capsized watercraft upright to avoid water getting in the engine.

blower capacities appropriate for the minimal net compartment volumes of most PWC. *See id.* Thus, "the Coast Guard has granted exemptions from the powered ventilation regulations to manufacturers of inboard PWC." *Id.* BRP's Exemptions have never been revoked by the Coast Guard.

ii. The Coast Guard's Exemption Process Relating to PWCs

In the 1999 Federal Register Notice, the Coast Guard also provided important details regarding the Exemption process itself:

> **The Exemption Process**
>
> A boat manufacturer petitions for an exemption from regulations by sending the Coast Guard's Recreational Boating Product Assurance Division a letter describing the boat for which the exemption is sought, the reasons why the application of a regulation is impractical or unreasonable, and providing data or arguments that demonstrate why boating safety will not be adversely affected. Each petition for an exemption is considered on its own merits. To obtain an exemption, the manufacturer must show that the boat for which the exemption is sought achieves an acceptable level of safety in keeping with the intent of Federal boating safety laws.
>
> The grant of exemption contains language that requires the manufacturer to display a label different than the typical certification label to alert the owner or operator that the boat does not comply with the Coast Guard standards published in the Code of Federal Regulations. An exemption lasts for a period of three years after which the manufacturer must petition the Coast Guard for an extension. If the manufacturer changes the design or construction of a boat subject to the provisions of an exemption, or if the manufacturer begins producing additional model boats, the manufacturer must petition the Coast Guard for an amendment to the provisions of the grant of exemption.

CP 1748.[18] The Exemption process was also confirmed in much greater detail in the trial court by a retired Coast Guard Captain and former Chief of the Office of Boating Safety, Scott H. Evans.[19]

iii. On Its Face, the Coast Guard's Exemption Constitutes Law.

The legal power of the Coast Guard Exemption is further evident from a review of the Grant of Exemption and Amendment themselves. A plain reading of these documents demonstrates the Exemption is a statutorily-authorized federal determination with the force of law—not "mere letters." AOB at 1. These documents constitute official Coast Guard regulatory action done under color of authority of the United States government pursuant to Congressional authority from the FBSA.

On their face, the 1988 Grant of Exemption and Amendment are formatted in the style of an official Order ("In the Matter of the Petition of...). CP 677. The Exemption contains the official "US Department of

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[18] As noted above, PWCs not having powered ventilation is the only allowable Coast Guard design standard. Manufacturers cannot unilaterally change this design standard without first petitioning the Coast Guard for an amendment to the Exemption, and satisfy the Coast Guard that boating safety would not be adversely affected by doing so.

[19] While not detailing the contents of Captain Evans' Declaration here, it is important, however, to highlight two points from Evans' Declaration. First, to obtain an Exemption, the Coast Guard had to determine that the boat or vessel for which the Exemption was sought achieved an acceptable level of safety in keeping with the intent of federal boating safety laws and standards. CP 1756. As part of this determination, the Coast Guard worked closely with the manufacturers to ensure that the designs met and/or exceeded the federal standards and requirements. *Ibid.* An Exemption would not be granted unless and until this threshold was met. *Ibid.*

Second, Captain Evans confirmed that since 1988, the National Boating Safety Advisory Council (NBSAC) (created by Congress through the FBSA) and its Personal Watercraft Subcommittee has advised and consulted the Coast Guard on a wide range of safety issues relative to PWCs, including the Exemptions and Exemption process. CP 1754.

Transportation, United States Coast Guard" heading, and is afforded an official number: CGB 88-001. *See id.*

The Exemption also sets forth detailed regulatory oversight of BRP Sea-Doo watercraft in five (5) areas relating to boating safety, of which powered ventilation is only one part.[20] In addressing these areas, the Coast Guard engaged in detailed analysis of the intent and purpose underlying each regulation and carefully examined the Sea-Doo watercraft in relation to those regulations. CP 674-75 ("In view of the somewhat unique configurations of the 'Sea-Doo' boat, the Coast Guard considers..." "After careful examination of the 'Sea-Doo' design, the Coast Guard considers...").

Ultimately, on January 22, 1988, the Coast Guard granted BRP an Exemption from Subparts B, C, F, J and Section 183.610 Title 33, CFR. In so doing, the Coast Guard cited its authority under FBSA Section 4305 and its statutory threshold that granting the Exemption "would not adversely affect boating safety." CP 679.

The Coast Guard also referenced four provisions making up the single Exemption. CP 679-80. And importantly, the Exemption was not solely a negative authorization that BRP was not required to comply with the relevant Standards. Rather, provisions two and three of the Exemption

[20] These five areas include: (1) Display of Capacity Information requirements under Subpart B of Part 183 of the *Code of Federal Regulations*; (2) Safe Loading Standard in Subpart C of Part 183; (3) Flotation Standard in Subpart F of Part 183; (4) Fuel System requirements under Subpart J of Part 183; and (5) Powered Ventilation requirements in Section 183.610 of Subpart K of Part 183.

legally required BRP to affix labels to its Sea-Doos that met the requirements of Section 181.17 and 181.19 of Title 33, CFR. *See Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 245-46 (3rd Cir. 2008) (implicitly recognizing that agency actions that impose new obligations on a party can create federal law capable of preemption).

In short, the Exemption has multiple provisions, requires affirmative action by BRP, references Coast Guard "Authorization," and uses the terms "superseded," "rescinded" and "terminated" in connection with the Exemption (provision four), which are legal terms afforded legal effect. To suggest that the Exemption is simply an insignificant "letter" ignores the Exemption's plain language, ignores the statutory scheme embodied in the Exemption, and ignores the Coast Guard's Congressionally endowed power to issue the Exemption. By virtue of the Exemption, BRP is in legal compliance with the powered ventilation requirement in 33 CFR § 183.610.

3. Appellant's Design Defect Claim Is Also Impliedly Preempted by the FBSA's Statutory Scheme.

Implied preemption provides a second, independent basis by which to affirm summary judgment. As noted, implied preemption may arise it two ways: "conflict" preemption and "field" preemption. Both exist here.

A. Conflict Preemption.

Conflict preemption is applicable where "state law is nullified to the extent that it actually conflicts with federal law[.]" *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713

(1985). Additionally, where it is "impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," conflict preemption occurs. *Sprietsma,* 537 U.S. at 64-65 (2002) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

In her Opening Brief, Appellant attacks conflict preemption on the same erroneous basis she asserts throughout the rest of her brief: that there must be a state law that conflicts with a federal statutory "law." AOB at 23, 24. Appellant maintains the Exemption is a mere "letter" and erroneously asserts that because it was not subject to notice and public comment, and was not published in the CFRs as required by the Administrative Procedure Act, the Exemption does not constitute law or regulation. *See* AOB at 8. Appellant states this is "perhaps the only material fact on appeal"—that nothing short of a statutory law can have preemptive effect. *Id.* at 8, 11. Her myopic focus on a statutory law, however, is misplaced and dispelled by the FBSA itself and by the very law upon which she relies.

First, with respect to the FBSA, as already discussed, the Exemption derives from and thus is part and parcel of the FBSA. 46 U.S.C. § 4305. As such, the FBSA itself directly exempts PWCs and sets the federal standard for PWC ventilation: that powered ventilation is not allowed. Appellant's claim that the subject PWC is defective without powered ventilation conflicts with the FBSA.

Second, per the FBSA's statutory scheme, through Sections 4302, 4305 and 4306 (and their official Notes), Congress intended "regulation" (as used in Chapter 43) to refer to any authorized Coast Guard regulatory act, whether manifested through a statute or non-statutory regulation, standard, requirement or exemption pursuant to the "flexible regulatory authority" granted by Congress. Here, the over 25-year Exemption is the Coast Guard's federal regulation, standard and requirement for PWCs. Appellant's claim under the WPLA cannot succeed without creating conflict with this federal regulatory authority.

Moreover, Appellant's "statutory law" argument, *see* AOB at 24, is undermined by the very case law upon which she relies. For instance, in *Fellner v. Tri-Union Seafoods, LLC*, the Third Circuit, in discussing what constituted federal law that could preempt contrary state law, specifically noted:

> Although there is some authority for the proposition that the only regulatory process which can produce 'federal law' for purposes of the Supremacy Clause is formal, notice and comment rulemaking, [citation omitted],...in appropriate circumstances, federal agency action taken pursuant to statutorily granted authority short of formal, notice and comment rulemaking may also have preemptive effect over state law."

539 F.3d at 244 (emphasis added) (citing *Colacicco v. Apotex, Inc., et al.* 521 F.3d 253, 264 (3d Cir. 2008) ("Although preemption is commonly thought of in terms of statutes and regulations, a federal agency's action taken pursuant to statutorily granted authority may also have preemptive effect over state law"); *see also Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 327 (1981) ("These findings by the

[Interstate Commerce] Commission, made pursuant to the authority delegated by Congress, simply leave no room for further litigation over the matters respondent seeks to raise in state court."); *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1497-99 (5th Cir. 1990) (finding that Federal Deposit Insurance Corporation's action taken pursuant to statutory authority preempted state law).

While *Fellner* did not find a federal statutory scheme with preemptive effect, that finding was based on the "scheme" at issue consisting only of a "one-time" consumer advisory letter, a "backgrounder" information sheet for the advisory and an FDA Compliance Policy Guide. *Id.* at 241-42. Contrary to Appellants' position, the letter in *Fellner* is utterly dissimilar to the Coast Guard's Section 4305 Exemption. The *Fellner* letter was from the FDA Commissioner to the California Attorney General and merely expressed the Commissioner's "opinion"n that prior regulatory action by the FDA preempted the State's lawsuit. *Id.* at 241. The court found that this letter did not have preemptive effect because it "was not the product of some form of agency proceeding and did not purport to impose new legal obligations on anyone...." *Id.* at 245.[21]

Further, the *Fellner* court highlighted that "regularity of procedure" has preemptive effect, unlike "less formal measures" such as

[21] As noted, the Exemption did put affirmative legal requirements on BRP in the form of affixing labels to Sea-Doos that meet the statutory requirements of 33 CFR §§ 181.17 & 181.19.

the FDA Commissioner's one-time letter. *Id.* at 245. Appellant's claim that *Fellner* controls here—where the Coast Guard has, for over 25 years, regularly issued Congressionally empowered exemptions to all PWC manufacturers—simply fails.

Further in *Chicago & North Western Transp. Co.*, *supra*, the U.S Supreme Court found conflict (and field) preemption where state law conflicted with a "finding" by the Interstate Commerce Commission (ICC) made pursuant to the authority delegated by Congress under the Interstate Commerce Act. 450 U.S. 311 (1981). Notably, the ICC's "finding" was not codified as a regulation and was not published in the Federal Register as Appellant claims must occur for preemption to lie. Yet, the U.S. Supreme Court still found preemption where the "finding" flowed from the authority granted by the Interstate Commerce Act such that the Court held the state law at issue conflicted with the Act itself and the purposes of the Act. *Id.* at 326. Here, the Exemption—even more so than the "finding" in *Chicago*—flows directly from the FBSA such that Appellant's design defect claim conflicts with the FBSA itself and its purposes.[22]

Additionally, preemptive effect exists "where a comprehensive federal regulatory scheme authorized a process for the agency to apply a

[22] Appellant's "pot shot" at BRP for citation to *Chicago & N.W. Transp. Co.* is baffling. Appellant chastises BRP, claiming BRP falsely "assert[ed] preemption was found in the absence of any statutory language." AOB at 45. Appellant's attack is misplaced. As cited above, *Fellner, Colacicco* and *Chicago* plainly recognized this proposition. Thus, to the extent Appellant takes umbrage, she should do so with the U.S. Supreme Court and the Third Circuit Court of Appeals, not BRP.

federal standard...." *Fellner*, 539 F.3d at 244. The FBSA is such a comprehensive federal regulatory scheme, whereby Congress vested authority in the Coast Guard to preside over issues of boating design. The Coast Guard's 25-year history of granting exemptions to PWC manufacturers from the powered ventilation requirements constitutes "established policy." *See id.* at 245. Here, because the Coast Guard has acted pursuant to its congressionally delegated authority, neither Appellant nor Washington can impose liability for lack of powered ventilation without creating conflict between state and federal law.

Appellant's reliance on *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445 (7th Cir. 1990), is similarly misplaced. The agency action in *Wabash* did not concern Congressionally-authorized Exemptions, but another one-time letter from the Rural Electrification Administration (REA) regarding jurisdiction over electricity rates. *Id.* at 450. Further, the *Wabash* court was concerned whether the REA's letter was even valid under the operative Act—the Rural Electrification Act. *Id.* at 453. In addressing that question, the court noted that neither REA's letter nor its appellate brief cited to any provision of the Act allowing it to undertake the action is sought. *Id.*

> Unless the REA has this authority, it is hard to see how it can preempt state law[.] REA needs a source of authority to set up a system making demands inconsistent with those of state law, so that under the Supremacy Clause the federal obligation would prevail.

Id. Here, of course, unlike *Wabash*, there is no question whether the Coast Guard has the authority to issue Exemptions—the FBSA specifically

authorizes it. 46 U.S.C. § 4305. Thus, through the authorized Exemption system, the federal PWC ventilation standard prevails over Appellant's inconsistent state demand. *Id.*

Appellant also relies heavily on *Sprietsma v. Mercury Marine*, 537 U.S. 51, which addressed implied preemption under the FBSA. Appellant, however, misconstrues *Sprietsma*. In *Sprietsma*, an individual died after being struck by a boat propeller. *Id.* at 54. The decedent's husband filed suit on state law theories, alleging that the motor should have been protected by a propeller guard. *Id.* at 55. Notably, the Coast Guard had previously decided, after testing and consultation, not to take any regulatory action whatsoever concerning the use of propeller guards. *Id.* at 61.[23] The Court noted this decision "[did] not convey an 'authoritative' message of a federal policy...." *Id.* at 67.

While the Court held that the Coast Guard's decision to forego regulation of propeller guards on boats did not impliedly preempt common law claims, its decision was based on the Coast Guard's calculated decision not to regulate at all. *Id.* at 65; *See also Becker*, 88 Wn. App. at 112 (finding no preemption where Coast Guard had not regulated or even considered regulating bow seating design for boats). Dispositive to the court was that petitioner's state common-law claims related "to an area not

[23] The Court framed the issue as follows: "The question presented is whether a state common-law tort action seeking damages from the manufacturer of an outboard motor is pre-empted either by the enactment of the [FBSA], or by the decision of the Coast Guard in 1990 not to promulgate a regulation requiring propeller guards on motorboats. *Id.* at 54 (emphasis added).

yet subject to federal regulation;" thus, there was no conflict. *Spreitsma*, 537 U.S. at 65-66. Here, unlike *Spreitsma*, however, the Coast Guard has extensively regulated the area of ventilation for boats and PWCs, establishing—through the Exemption—that PWCs must be designed without a powered system. This fact alone distinguishes *Spreitsma*.

The *Spreitsma* court advocated finding preemption where—as here—"a tort suit [] would stan[d] as an obstacle to the accomplishment and execution" of Congress' objectives. *Id.* at 68 (citations omitted). And, similar to *Gracia*, the Court recognized the compelling policy of fostering uniformity in manufacturing regulations. *Id.* at 70; *see also Becker*, 88 Wn. App. at 108 (discussing one of the FBSA's purposes is to provide uniformity in boating safety).[24]

Moreover, Appellant's argument under *Spreitsma* that all personal injury state and common law claims survive preemption by virtue of the FBSA's savings clause likewise fails. AOB at 17-18, 21-22. Indeed, *Spreitsma* specifically acknowledged that, notwithstanding the FBSA's savings clause, state common law claims may be implicitly preempted by

[24] Appellant maintains that *Spreitsma* rejects the argument that a PWC powered ventilation requirement conflicts with Congress' interest to establish uniform national standards. AOB at 37. Appellant's quoting of *Spreitsma* at 537 U.S. at 57, however, conspicuously omits the first part of the quote: "Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies..." (emphasis added.) Through the Coast Guard's extensive regulation of ventilation systems for boats and PWCs (through the Exemption), unlike with propeller guards that had never been regulated, the Coast Guard has issued a contrary decision such that the concern for uniformity for watercraft ventilation displaces conflicting state common-law remedies.

the entirety of the FBSA. *Id.* at 64; *see also Geier v. Am Honda Motor Co.*, 529 U.S. 861,868, 881 (2000). Specifically, the *Spreitsma* court held:

> Of course, if a state common-law claim directly conflicted with a federal regulation promulgated under the Act, or if it were impossible to comply with any such regulation without incurring liability under state common law, pre-emption would occur.

Id. (emphasis added). *See also Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323, 131 S.Ct. 1131, 1136 (2011) (statute's express preemption clause cannot foreclose or limit the operation of ordinary conflict preemption principles to save common-law tort action). Appellant's argument to the contrary fails. [25]

Appellant's reliance on *Williamson* is similarly misplaced. AOB at 33-36. *Williamson* dealt with a standard issued by the Department of Transportation pursuant to the National Traffic and Motor Vehicle Safety Act which allowed manufacturers a choice as to what type of seat belt (lap belts or lap-and-shoulder belts) to install on rear inner seats. 131 S.Ct. 1131, 1134 (2011). In refusing to find preemption, the court noted that a standard giving manufacturers "multiple options for the design of" a device would not preempt a suit claiming a manufacturer should have chosen one particular option. *Id.* at 1139. The court held that even though the state tort suit may restrict the manufacturer's choice, it does not "stan[d] as an obstacle to the accomplishment ... of the full purposes and objectives" of the federal law. *Id.* (citation omitted).

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[25] See footnote 27, *infra*.

Williamson is inapposite. First, the Act at issue there did not have an independent Exemption provision (like the FBSA). Second, contrary to Appellant's assertion, the Exemption and statutory scheme of the FBSA did not provide BRP a "choice" as to the utilization of powered ventilation in its PWCs. As previously discussed, PWCs not having powered ventilation is the only allowable Coast Guard design standard. There is no choice in the matter. And finally, unlike *Williamson*, Appellant's state tort suit absolutely would stand as an obstacle to the FBSA's federal objective of uniform, national legal standards for PWC design by imposing a different legal requirement at odds with the federal standard thus rendering compliance with both standards a legal impossibility. *See Freightliner*, 514 U.S. at 287. Appellant's claim therefore does not survive conflict preemption.

B. Field Preemption.

Appellant's design defect claim is also precluded by implied "field" preemption. Field preemption exists when "Congress' intent to pre-empt all state law in a particular area may be inferred [because] the scheme of federal regulation is sufficiently comprehensive" or "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County,* 471 U.S. at 713 (emphasis added). Express and implied preemption (both field and conflict) are not "rigidly distinct"; for example, "field pre-emption may be understood as a species of conflict preemption: a state law that falls within a pre-empted field conflicts with Congress' intent (either

expressly or plainly implied) to execute state regulation." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79-80, n. 5 (1990)).

In this case, the Coast Guard's active regulation of ventilation systems for boats and PWCs preempts the field in this particular design area, and all other areas it has chosen to regulate. While *Spreitsma* did hold that the FBSA does not occupy the entire field of safety regulation for recreational boats, it still recognized the FBSA "as expressly occupying the field with respect to state positive laws and regulations[.]" *Id.* at 68. The court held state common law claims relating to an area never subject to federal regulation are not impliedly preempted. *Id.* at 65-66. In *Spreitsma*, propeller guards had never been subject to federal regulation by the Coast Guard; thus, states were free to regulate this area. *See also Becker*, 88 Wn. App. at112 (finding no preemption where Coast Guard had never regulated or even considered regulating boat bow seat design.) That is the central holding of *Spreitsma* and *Becker*. Conversely here, because the Coast Guard has actively regulated ventilation for boats and PWCs for over 25 years, states cannot regulate differently in this area.

The FBSA's comprehensive scheme manifests Congress' and the Coast Guard's intent to preempt all state and common law in all areas of boating design for which it has undertaken regulation and oversight, which includes recreational vessel ventilation systems. Pursuant to the Coast Guard's "flexible regulatory authority to establish uniform standards for the design, construction, materials, and performance of the boasts themselves and all associated equipment," 46 U.S.C. § 4302 and official

Notes, Congress has vested total power in the Coast Guard to establish and regulate boat and PWC ventilation standards, which it has done through the Exemption. This Coast Guard ventilation standard preempts the field.[26]

B. SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE THE SUBJECT SEA-DOO'S DESIGN COMPLIES WITH BOTH THE FEDERAL COAST GUARD STANDARD AND IDENTICAL WASHINGTON STATE LAW

Through the FBSA's statutory scheme, the subject PWC without powered ventilation is in legal compliance with the Coast Guard ventilation requirements. In recognition of the FBSA's preemptive charge to "establish uniform national boating standards" and "uniformity of boating laws and regulations as among the several States and the Federal

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[26] In her Opening Brief, Appellant makes two more mystifying arguments regarding the Exemption. First, Appellant contends it is merely an "Administrative hall-pass" whereby the Coast Guard "essentially told BRP it would not pursue Administrative action for the lack of a powered ventilation[.]" AOB at 47-48. Second, Appellant maintains that for the Coast Guard to give legal power to its Exemption, which, as detailed above, it has done, makes the Coast Guard's action "illegal." AOB at 48. These arguments are both absurd and unfounded. Appellant has not provided a scintilla of legal authority to support her argument that the Coast Guard has been engaged in an over 25-year history of selective non-enforcement of federal boating laws pertaining to powered ventilation. Moreover, both the 1999 Federal Register Notice and the Declaration of former Coast Guard Captain and Head of Office of Boating Safety, Scott Evans, make clear that the powered ventilation regulations in CFR Part 183 were intended for conventional boats—not PWCs—and that the Exemption's standard deems all PWC manufacturers in compliance with federal law. Otherwise, PWC manufactures would be subject to criminal and civil punishment under the FBSA.

With respect to Appellant's Coast Guard's "illegality" argument, she is attempting to overturn an over-25 year history of the Exemption's standard, the power of which directly emanates from: (1) Congress, through 46 U.S.C. § 4305 and the broad authority granted the Coast Guard through 46 U.S.C. § 4302; (2) consultation between the Coast Guard and the NBSAC, as created and mandated by Congress, *see* CP 1754; and (3) the 1999 Federal Register Notice's recognition of such power.

Government," *see Sprietsma*, 537 U.S. at 57, and in deference to the Coast Guard's regulatory scheme administered under the FBSA, Washington has promulgated identical boating regulations and standards to those of the Coast Guard, including those pertaining to powered ventilation.

1. Washington's Ventilation Regulations Are Identical to Federal Coast Guard Ventilation Regulations As Required By The FBSA and its Preemption Provision.

Washington expressly recognizes and defers to the preemptive authority of Coast Guard regulations, actions and exemptions. Washington Administrative Code (WAC) 352-60-050, entitled "Ventilation," is identical to the federal regulations contained in 33 CFR 183.610, from which the Coast Guard has exempted Respondent (and all other PWC manufacturers). WAC 352-60-050 references the FBSA and defers to the ventilation systems required by the FBSA, mandates approval by the Coast Guard, and contains a "catch all" that a vessel may have any type of ventilating system allowable by the Coast Guard:

* * *

> (2) Compartments with gasoline engines. Each compartment in a vessel that has a permanently installed gasoline engine with a cranking motor must be open to the atmosphere, or be ventilated by a natural ventilation system and a mechanical exhaust blower system as required by the Federal Boat Safety Act of 1971, as amended, and applicable federal regulations.
> (3_ [A] natural ventilation system must be approved for use by the United States Coast Guard[.]
> (4) Exhaust blowers. Each vessel that is required to have an exhaust blower must have a label that is located as close as practicable to each ignition switch, is in plain view of the operator, and has at least the following information: "WARNING—GASOLINE VAPORS CAN EXPLODE. BEFORE STARTING ENGINE OPERATE BLOWER

> FOR FOUR (4) MINUTES AND CHECK ENGINE COMPARTMENT BILGE FOR GASOLINE VAPORS."
> (5) In lieu of the ventilation and warning label required in this section, a vessel may be provided with any type of ventilating system as required by the Federal Boat Safety Act of 1971, as amended, and applicable federal regulations [33 CFR § 183.610].

Appellant's design defect claim is subject to WAC 352-60-050, as that Section sets the standards for any such violation under the WPLA.

2. Washington's Statutory Scheme for Recreational Vessels Defers to the Coast Guard's Federal Scheme.

WAC Chapter 352-60 is entitled "Recreational Vessel Equipment and Operation." WAC 352-60-010 provides this chapter was "promulgated in order to establish standards for boating safety equipment and related activities in recreational boating in accordance with RCW 43.51.400 [re-codified at RCW 79A.05.310]." RCW 79A.05.310 further emphasizes Washington's deference to the Coast Guard and its regulatory scheme governing recreational vessels and associated equipment:

> The state parks and recreation commission shall: [...]
>
> (2) Adopt rules...consistent with United States coast guard regulations, standards, and precedents...; [27]
>
> (5) Adopt and enforce recreational boating safety rules, including but not necessarily limited to equipment and navigating requirements, consistent with the United States coast guard regulations;

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[27] Coast Guard Exemptions constitute both "standards" and "precedents." CP 1765-1766 (reciting then-Chief of Coast Guard's Office of Boating Safety, Captain J.A. Stimatz: "...Coast Guard lawyers had advised [me] that granting the same exemption to personal watercraft for ten years is in effect a standard.") (Emphasis added.)

> (7) Take additional actions necessary to gain acceptance of a program of boating safety for this state under the federal boat safety act of 1971.

(Emphasis added). Further, RCW 79A.60.100 provides that it is to supplement federal laws and regulations and to the extent Washington law is inconsistent, the federal laws and regulations shall control. RCW 79A.60.100(2) (emphasis added). In light of these provisions, Appellant's design defect claim relating to powered ventilation is subject to the Coast Guard's regulatory scheme under the FBSA.

Conjunctively, WAC 352-60-010 and RCW 79A.05.310 create a statutory scheme that requires absolute deference and strict consistency between state boating safety requirements and Coast Guard regulations, standards and precedents enacted pursuant to the FBSA. WAC 352-60-010; RCW 79A.05.310. In her Opening Brief, Appellant largely ignores these provisions, simply concluding they require powered ventilation in PWCs. AOB at 44. Appellant fails to recognize RCW 79A.05.310's mandate deferring to Coast Guard "standards" and "precedents."

Here, the Coast Guard Exemption—at the very least—constitutes such a "standard" and/or "precedent," that nullifies Appellant's design defect claim as a matter of law. What Appellant seeks to do is create an entirely new legal requirement for ventilation for recreational vessels in Washington that is at odds with the precluded by both the FBSA and Washington law. Washington's own statutory scheme prohibits this.

Through the Exemption and Washington's submission to the Coast Guard's regulatory scheme, BRP is in legal compliance with

Washington's powered ventilation requirements in WAC 352-60-050. To conclude otherwise would violate not only the FBSA and federal preemption, but also Washington state law. 46 U.S.C. § 4306 and Historical and Revision Notes; WAC 352-60-050(1). Through the RCW and WAC, however, Washington has made clear that no such result was intended or may occur. Appellant's WPLA design defect claim fails as a matter of law.[28]

C. ALTERNATIVE GROUNDS EXIST FOR AFFIRMING THE TRIAL COURT'S DISMISSAL OF APPELLANT'S ACTION

An appellate court may affirm a decision of the trial court on any basis presented in the pleadings and record. *LK Operating, LLC v. Collection Grp.*, LLC, 181 Wn.2d 48, 73 (2014); *see also* Tegland, 2A Wash Prac., Rules Practice RAP 2.5, at 254 (8th ed. 2014) ("A trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof."). Here, the trial court determined: (1) Appellant's action against BRP was, in actuality, one for

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[28] "A statute precludes a common law tort claim if the legislature intended the statute to be exclusive." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 90 (2008) (internal citation omitted). With regard to watercraft ventilation, Washington has a clear, unambiguous regulatory regime deferring to Coast Guard authority and determinations. *See In re Estate of Kerr*, 134 Wn.2d 328, 343 (1998).

Moreover, the WPLA precludes any attempt by Appellant to assert a product liability common law claim. *See* RCW 7.72.010. State and federal courts in Washington have consistently agreed that the WPLA's "[c]lear statutory language and corroborative legislative history leave no doubt" that the statute was intended to preempt common law remedies. *See, e.g., Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853 (1989) (en banc); *see also Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 409 (2012) (en banc); *Laisure-Radke v. Par Pharm., Inc.*, 426 F.Supp.2d 1163, 1168-69 (W.D. Wash. 2006).

indemnification of a tortfeasor in contravention of Washington law; and (2) Appellant was not the real party in interest. The trial court's dismissal of Appellant's action against BRP may be affirmed on either basis.

1. Appellant may not challenge the trial court's indemnification and real party in interest determinations at this juncture.

As an initial matter, because Appellant failed to address the trial court's findings and conclusions supporting dismissal of her claims against BRP, she has waived her ability to argue the incorrectness of those determinations in her reply brief. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992) (appellate court will not consider argument raised and argued for first time in reply brief).[29]

Further, it is well-settled that findings of fact entered by a trial court to which no error is assigned are verities before a reviewing court. *See, e.g., Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 692 (2002). Despite the fact that the trial court's indemnification and real party in interest findings provide additional bases for dismissal, and despite the trial court's intention that these determinations be considered by this Court, Appellant has not challenged them on appeal. As shown directly below, Appellant's failure to challenge these determinations –

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[29] *See also Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC, LLC*, 146 Wn. App. 546, 556 (2008), *rev'd on other grounds by* 169 Wn.2d 265 (2010), ("[T]o the extent the tenants do not make arguments related to the assignments of error to the court's findings and conclusions, those arguments are also waived."); *Kershaw Sunnyside v. Yakima Inter.*, 121 Wn. App. 714, 732 (2004) ("Because Kershaw has not assigned error to this conclusion, it is not properly before us on appeal."); *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4 (2003).

now verities before this Court – warrants affirming the trial court. *See Preview Props., Inc. v. Landis*, 161 Wn.2d 383, 387-89 (2007) (holding it is error to reverse court's entire judgment when an appellant fails to challenge findings and conclusions supporting judgment).[30]

2. Summary Judgment May Be Affirmed Because Appellant's Claim Against BRP was an Impermissible Claim for Indemnification of a Tortfeasor.

The trial court properly determined that Appellant's action against BRP was, in actuality, one for the indemnification of State Farm/the Longs. In 1982, our legislature enacted RCW 4.22.040(3), which provides: "[t]he common law right of indemnity between active and passive tort feasors is abolished." Washington courts have addressed attempts at end-runs around this provision and held that such claims cannot be maintained. In *Toste v. Durham & Bates Agencies, Inc.*, 116 Wn. App. at 518, the Tostes insured their fishing vessel through agent Durham & Bates, which in turn procured insurance through Marine Insurance Managers, Inc. (MIMI). MIMI secured coverage with an offshore underwriter, Liberty Insurance Company. *Id.* The Tostes' boat burned and sank but Liberty did not pay the claim. When Durham & Bates also refused to pay the Tostes' claim, the Tostes sued Durham & Bates, which in turn impleaded MIMI as a third-party defendant. *Id.* The

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[30] To the extent Appellant argues the trial court did not make an appealable determination, or that she was only required to address the trial court's preemption determination, she is incorrect. "Where an issue of law is raised, briefed, and argued by the parties but not decided by the trial court, an appellate court may resolve the issue on review[.]" *LK Operating, LLC v. Collection Grp.*, LLC, 181 Wn.2d at 70-71.

complaint against MIMI included, *inter alia*, claims for violation of Washington's Consumer Protection Act (CPA). *Id.* Subsequently, both Durham & Bates and MIMI settled with the Tostes. Durham & Bates then moved for partial summary judgment on the CPA claim, which the trial court granted and awarded Durham & Bates the $100,000 it paid to the Tostes as settlement, $10,000 in treble damages, and attorney fees and costs Durham & Bates incurred to prosecute its CPA claim. *Id.* at 518-19.

Reversing, the Court of Appeals, Division Two, stated:

> Here, Durham & Bates's claim, to the extent that it seeks reimbursement for the $100,000 it paid the Tostes as settlement, is actually an indemnity claim in disguise. As in *Fisons*, this CPA action is simply an indirect attempt to obtain contribution from the [settling defendant].

Id. at 520 (emphasis added) (internal citations and quotations omitted).

This Court held that, because the CPA claim was an indemnity claim in disguise and an indirect attempt to obtain contribution, the claim was extinguished by the settlement. *See id.* at 521, 525. *See also Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 324 (1993) (extinguishing an insurance company's CPA claim, reasoning that "[t]o allow the insurance company to bring a consumer protection action against [a drug company] for what is in reality contribution or indemnity would be to allow an 'end-run' around the tort reform act (RCW 4.22)").

Given the trial court's unchallenged determination that Appellant's action against BRP was one for indemnification of a tortfeasor, *Toste* and *Fisons* govern. As in *Toste* and *Fisons*, Appellant's claim against BRP

has been extinguished – indeed, the claim is barred by RCW 4.22.040(3) – and the trial court's dismissal of that claim is properly affirmed.

3. Summary Judgment May be Affirmed Because Appellant was not the Real Party in Interest.

BRP successfully argued to the trial court that Appellant was not the real party in interest; rather, by way of the SRA and its claim assignment, State Farm/the Longs had become the real parties in interest. CR 17(a) provides, "[e]very action shall be prosecuted in the name of the real party in interest." Washington courts have affirmed dismissals where – as here – an action is brought by one other than the real party in interest. *See Bench v. State Auto. & Cas. Underwriters, Inc.*, 67 Wn.2d 999 (1965) (upholding dismissal on the basis that named plaintiff, by assigning her claim to a third-party, was not the real party in interest); *Triplett v. Dairyland Ins. Co.*, 12 Wn. App. 912, 915 (1975) (affirming dismissal because real party in interest—Allstate Ins. Co.—had paid judgment and was seeking to recoup it from defendants); *see also Dennis v. Heggen*, 35 Wn. App. 432, 434 (1983).

Below, the trial court correctly determined Appellant was not the real party in interest. As in *Bench* and *Triplett* where the trial court's dismissal of claims was affirmed based on essentially the same facts as here, this Court should affirm the trial court's dismissal of Appellant's claims against BRP.

IV. CONCLUSION

The trial court should be affirmed. Costs on appeal should be awarded to BRP.

DATED this 2nd day of February, 2015.

MERRICK, HOFSTEDT & LINDSEY, P.S.

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DECLARATION OF SERVICE

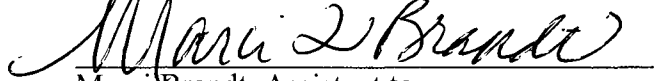
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now, and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date below stated I caused to be served in the manner indicated a copy of the Motion for Extension for Opening Brief to the parties identified below:

Attorneys for Plaintiffs Dan'L Bridges McGaughey Bridges & Dunlap 3131 Western Avenue, Suite 410 Seattle, WA 98121 dan@mcbdlaw.com	☑ ☑	E-Mail U.S. Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 2nd day of February, 2015, at Seattle, Washington.



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