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No. 92972-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiff/Petitioner,

vs.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Defendant/Respondent.

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WASHINGTON STATE
SUPREME COURT
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper interpretation and application of the Washington Product Liability Act, Ch. 7.72 RCW (WPLA), and the circumstances under which this act is preempted by federal law.

II. INTRODUCTION AND STATEMENT OF THE CASE

In this appeal, the Court is asked to decide whether the WPLA applies in these circumstances and, if so, whether it is subject to field preemption under the Federal Aviation Act, 49 U.S.C. §§ 44701-735.

This litigation arises out of a fatal plane crash that occurred in Washington in July, 2008. The Estate of Virgil Victor Becker, Jr., by Personal Representative Jennifer L. White (Becker), initiated this tort action against Forward Technology Industries, Inc. (FTI), and other defendants for the wrongful death of Virgil Becker, Jr. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Estate of Becker v. Forward Tech. Indus., Inc., 192 Wn. App. 65, 365 P.3d 1273 (2015), *review granted*, 185 Wn.2d 1040 (2016); Becker Br. at 4-18; FTI Amended Br. at 2-16; Becker Reply Br. at 1-3;

Becker Pet. for Rev. at 4-8; FTI Ans. to Pet. for Rev. at 4; Becker Supp. Br. at 4-7; FTI Supp. Br. at 1-3.

For purposes of this brief, the following facts are relevant: Becker brought this product liability action against FTI under state law, alleging strict liability, negligence and breach of warranty, contending that the plane crash resulted from a defective carburetor float. See Becker, 192 Wn. App. at 69, 72 & n.9. The carburetor was manufactured by Precision Airmotive Corporation (Precision). Precision contracted with FTI to assemble and weld the float's parts together. While Precision was subject to FAA regulations setting certification requirements for manufacturers of airplane engines and their components, FTI was not subject to these regulations.

FTI moved for summary judgment of dismissal of Becker's claims, contending that it is not subject to the WPLA because it is neither a "product seller" nor a "manufacturer" under the act. FTI further contended that any state product liability standard of care was preempted because the FAA administrative regulations occupied the field of aviation safety. The superior court concluded that the FAA and its regulations preempted any state law standard of care. It also denied Becker's motion for leave to amend the pleadings to assert violation of a federal standard of care. The court did not reach the question of whether the WPLA applied under the circumstances.

Becker appealed, and the Court of Appeals affirmed. The court concluded that "the specific area at issue here is the engine's fuel system, which includes the carburetor and its component parts." Becker, 192 Wn. App. at 76. The court found that "there are many federal regulations focused upon performance and safety standards for engine fuel systems, including the carburetor and its component parts," id., and then surveyed a number of regulations supporting its pervasiveness determination, see id. at 76-79. It also noted that "[t]he lack of a specific regulation expressly directed to carburetor floats is of no consequence because the specific area at issue for purposes of implied field preemption is the engine's fuel system." Id. at 79 (footnote omitted).

Under the above analysis, the Court of Appeals held that "[b]ecause federal regulations pervasively regulate an airplane engine's fuel system, including its carburetor and component parts, implied field preemption precludes applying a state law standard of care to Becker's claims." Id. In reaching this result, the court relied upon a series of Ninth Circuit Court of Appeals opinions addressing field preemption claims under the FAA and its regulations. See id. at 74-81. These Ninth Circuit cases are Montalvo v. Spirit Airlines, 508 F.3d 464 (9th Cir. 2007); Martin ex rel. Heckman v. Midwest Express Holdings, Inc., 555 F.3d 806 (9th Cir. 2009); and Gilstrap v. United Air Lines, Inc., 709 F.3d 995 (9th Cir. 2013). The Ninth Circuit analysis in these cases is, in turn, influenced by the Third Circuit's opinion regarding FAA field preemption in Abdullah v.

American Airlines, Inc., 181 F.3d 363 (3rd Cir. 1999). See Montalvo, 508 F.3d at 468, 473-74.

In light of its field preemption determination, the Court of Appeals did not reach the question of whether the WPLA applied under the circumstances. See 192 Wn. App. at 83-84.

This Court granted Becker's petition for review challenging the Court of Appeals determination of field preemption based upon the pervasiveness of FAA regulations regarding engine fuel systems. See Becker Pet. for Rev. at 4 (issue 1), 8-17. FTI urges the Court of Appeals correctly found field preemption, and further argues that the summary judgment of dismissal may be affirmed on the alternate ground that Becker's claims are not cognizable under the WPLA. See FTI Supp. Br. at 3-4 (issue 1); 14-20.

Subsequent to the petition for review in this case, the Third Circuit Court of Appeals issued its opinion in Sikkelee v. Precision Airmotive Corp., 822 F.3d 680 (3rd Cir. 2016), *pet. for cert. filed*, 85 U.S.L.W. 3098 (U.S. Sept. 6, 2016) (No. 16-323). This opinion retreated from that Circuit's earlier position regarding the scope of FAA field preemption set forth in Abdullah, *supra*, the case that influenced the Ninth Circuit opinions relied upon by the Court of Appeals below.

III. ISSUES PRESENTED

1. Is FTI a "manufacturer," as defined in RCW 7.72.010(2), and subject to liability under the WPLA because it assembled and welded together parts of the defective carburetor float causing the fatal plane crash in question?

2. If the answer to issue #1 is "yes," are Becker's WPLA product liability claims impliedly preempted because the Federal Aviation Act and its regulations occupy the field of aviation product safety?

IV. SUMMARY OF ARGUMENT

Re: WPLA Applicability

FTI is a "manufacturer" under RCW 7.72.010(2). The definition of "manufacturer" specifically includes a person who "fabricates" the product or component part. Under the plain and ordinary meaning of the undefined term "fabricate," by assembling and welding parts of the carburetor float together, FTI fabricated this component part.

Re: Field Preemption of the FAA

Becker's WPLA products liability claims should not be subject to implied field preemption under the Federal Aviation Act. This result follows in light of the strong presumption against federal preemption of state law, the absence of express preemption, the presence of a savings clause, Congress' limited delegation of authority to the FAA Administrator to establish "minimum standards" for aviation safety, along with several other indicia that confirm the state products liability standards of care are not intended to be superseded by this act, in whole or in part.

Federal Circuit Court cases, including certain Ninth Circuit opinions (Montalvo, Martin, and Gilstrap, *supra*), that allow field preemption to rise or fall based upon the "pervasiveness" of FAA regulatory standards bearing on aviation safety are unpersuasive. There is

insufficient evidence in the act itself of a clear congressional intent to supersede state product liability law on this basis. Neither the relevant state product liability standards of care nor any other element of state product liability claims should be subject to field preemption.

V. ARGUMENT

A. FTI Is A "Manufacturer" Under The WPLA Because, Under RCW 7.72.010(2), By Assembling And Welding Parts Of A Carburetor Float Together It "Fabricates" This Component Part.

Washington product liability law is governed by the WPLA, which imposes liability for products that are not reasonably safe due to construction, design, failure to adequately warn regarding usage, or when the product does not conform to an express warranty or implied warranties under Title 62A RCW. See RCW 7.72.030; Macias v. Saberhagen Holdings, Inc., 175 Wn.2d 402, 409-10, 282 P.3d 1069 (2012).

FTI asserts that it is not a "manufacturer" under the WPLA, and therefore it is not subject to liability under the act. See FTI Supp. Br. at 4, 15-16, 20. More particularly, FTI argues that under RCW 7.72.010(2) it is not a manufacturer because it is neither a "product seller" who performs a manufacturing-type function nor a "product seller or entity that holds itself out as a manufacturer." See FTI Supp. Br. at 20. This argument overlooks the fact that under RCW 7.72.010(2) a manufacturer also includes those who actually *engage* in manufacturing.¹

¹ FTI challenges Becker's assertion that FTI is also subject to the WPLA because it is a "product seller" under the act. See FTI Supp. Br. at 4, 16-19; FTI Amended Br. at 3-4; Becker Reply Br. at 13-15. This brief does not address this question. The Court does not

RCW 7.72.010 sets forth definitions for key terms used in the WPLA. This statute provides in relevant part:

For the purposes of this chapter, unless the context clearly indicates to the contrary:

(...)

(2) **Manufacturer.** "Manufacturer" includes a product seller who *designs, produces, makes, fabricates, constructs, or remanufactures* the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of RCW 7.72.030(1)(a).

(Emphasis added.)

Although the language in subsection (2) is worded awkwardly, what is clear is that *any* entity that "designs, produces, makes, fabricates, constructs, or remanufactures" a component part of a product is indeed a manufacturer, regardless of whether it is a "product seller" under the act. This core definition is surrounded by language providing that, in addition, certain product sellers or others may also qualify as a "manufacturer," depending upon their particular conduct. FTI does not address this fundamental basis for qualifying as a manufacturer under the act. See FTI

need to reach this question if it determines FTI is a "manufacturer" under the act.

Supp. Br. at 20. The Court of Appeals opinion suggests it is undisputed that FTI "assembled and welded" parts of the carburetor floats. Becker, 192 Wn. App. at 71; see also Becker Supp. Br. at 4-5; FTI Br. at 3-4.

The relevant plain and ordinary meaning of the word "fabricate," undefined in subsection (2), means "to construct from diverse and usually standardized parts." Merriam-Webster Online Dictionary "fabricate" (viewed Sept. 22, 2016; available at www.merriam-webster.com); see also Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 259, 261, 840 P.2d 860 (1992) (citing with approval a similar dictionary definition of "fabricate," in the course of upholding a jury instruction defining "manufacturer" based upon RCW 7.72.010(2) as the law of the case).² The act of assembling and welding together the parts of the carburetor floats meets the definition of "fabricate," qualifying FTI as a "manufacturer" under the WPLA. This conclusion is wholly consistent with the "plain meaning rule" of statutory construction, which requires evaluating the meaning of a particular term or phrase in light of the entire statute and related statutes. See Dep't of Ecology v. Campbell & Gwynn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002). The use of the term "manufacturer" in RCW 7.72.030, addressing the liability of manufacturers, focuses on the *acts* of persons or entities in designing, constructing or warning about the product or component part in question. This statute does not support FTI's argument that the definition of

² In Washburn, the Court recognized that whether a defendant qualified as a "manufacturer" for purposes of RCW 4.16.300 could be a question of fact. See 120 Wn.2d at 254-57.

"manufacturer" in RCW 7.72.010(2) is confined to product sellers performing a manufacturing function or persons or entities who hold themselves out as manufacturers.

Under the foregoing analysis, the Court should find that FTI is a "manufacturer" under the WPLA, and turn to the question of whether the WPLA is preempted under a field preemption analysis.³

B. The Issue Of FAA Field Preemption Of WPLA Product Liability Claims Should Not Turn On The "Pervasiveness" Of Agency Regulations Setting "Minimum Standards" For Aviation Safety, And Ninth Circuit Cases Supporting This View Are Unpersuasive; Proof Of Clear And Manifest Congressional Intent Supporting Field Preemption Of State Product Liability Claims Is Lacking.

FTI asserts that Becker's state product liability claims are preempted by the FAA and agency regulations regarding certification requirements for airplane engine fuel systems. See FTI Supp. Br. at 3-4. FTI only asserts implied field preemption applies, and has not raised either express preemption or implied conflict preemption. See id. at 5-6.⁴ The Court of Appeals opinion confirms that only implied field preemption is at issue in this case, and it does not appear that either express preemption or

³ FTI's briefing seems to suggest that if the WPLA does not apply, then there is no basis for imposing tort liability under state law. See FTI Supp. Br. at 15-20; FTI Amended Br. at 36-42. Becker urges that if the WPLA does not apply there would be residual common law liability. See Becker Reply Br. at 15. While the WPLA is preemptive of the common law of product liability, see Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 853-56, 774 P.2d 1199 (1989), this should not mean that a person suffering a harm as a result of tortious conduct that falls outside of the WPLA should be remediless. See RCW 7.72.020(1) (providing "[t]he previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter").

⁴ Becker argues that FTI should not be able to invoke field preemption because it is not subject to the FAA regulations setting forth specifications for airplane engine fuel systems. See Becker Pet. for Rev. at 4. This question is not addressed in this brief, and it is assumed for purposes of argument that FTI may invoke the defense of implied field preemption.

implied conflict preemption were briefed by the parties. See Becker, 192 Wn. App. at 74.

As explained in §A., supra, FTI is a "manufacturer" under the WPLA, and Becker has a valid claim against it for fabricating a component part that is not reasonably safe. See RCW 7.72.030(1)-(3). Under the constitutional principle of dual sovereignty, Becker is entitled to pursue this state remedy unless Congress has expressed a *clear and manifest* intent to preempt state law. See Wyeth v. Levine, 555 U.S. 555, 565 (2009). There is a strong presumption against preemption. "Preemption is the exception, not the rule in Washington...." Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 864, 93 P.3d 108 (2004). The presumption against preemption is even stronger when the state regulation involves matters of health and safety. See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 327, 858 P.2d 1054 (1993); Inlandboatmen's Union of the Pac. v. Dep't of Transp., 119 Wn.2d 697, 705, 836 P.2d 823 (1992). Courts have been very reticent to imply federal preemption based on only a comprehensive federal regulatory scheme, which may reflect the complexity of the subject rather than any intent to preempt state law. See Inlandboatmen's Union, 119 Wn.2d at 705.

The FAA has no express preemption provision. See Sikkelee, 822 F.3d at 692. With respect to implied field preemption, the inquiry is focused on whether "federal law so thoroughly occupies a legislative field

'as to make reasonable the inference that Congress left no room for the States to supplement it.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)). This occurs when a court finds "federal law leaves no room for state regulation and that Congress had a clear and manifest intent to supersede state law...." Sikkelee at 688. If there are two equally plausible readings of statutory text the court has a duty to accept the reading that disfavors preemption. See id. at 687. Necessarily, the question of field preemption involves close examination of the law in question, here the FAA. See City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 638 (1973).

While the Court of Appeals below acknowledged these general principles, it does not appear to have examined the various aspects of the FAA bearing on whether Congress actually exhibited a clear and manifest intent to preempt state product liability law. Instead, it turned to an examination of the FAA agency regulations and whether the relevant regulations were so pervasive in nature as to establish a congressional intent to occupy the area of aviation safety. See Becker at 75. In doing so, it essentially adopted the approach developed by the Ninth Circuit Court of Appeals in Montalvo, Martin, and Gilstrap, supra. See Becker at 75-81.⁵

⁵ As indicated supra at 3-4, these Ninth Circuit cases drew on the Third Circuit's FAA field preemption analysis in Abdullah, supra. While this Court may find Ninth Circuit views of federal law persuasive, it is not bound to do so. See State v. Barefield, 110 Wn.2d 728, 732 n.2, 756 P.2d 731 (1988).

This approach to the field preemption question presented here is misguided. Before agency regulations may be deemed relevant in preemption analysis, there should be a threshold determination that Congress intended the regulations to have preemptive effect. Here, many factors militate against finding a clear and manifest intent by Congress to occupy the field of aviation safety, including state product liability claims.

The factors reflecting a lack of congressional intent to occupy the field are the following:

- **The absence of a general express preemption provision:** There is no general express preemption provision in the FAA that encompasses product liability claims. See Sikkelee at 692. One amendment to the FAA imposes a statute of repose on personal injury claims, suggesting that they are otherwise viable under state law. See General Aviation Revitalization Act of 1994 (providing an eighteen year statute of repose for product liability claims involving certain aircraft).⁶
- **FAA savings clause preserves state remedy:** The FAA has a savings clause that provides “[a] remedy under this part is *in addition* to any other remedies provided by law.” 49 U.S.C. §40120(c) (emphasis added). See Medtronic, Inc. v. Lohr, 518 U.S. 470, 486-89 (1996) (recognizing concept of “remedy” includes common law actions and the

⁶ Pub. L. No. 103-298, 108 Stat. 1552 (1994), as amended by Pub. L. No. 105-102, § 3(e), 111 Stat. 2204, 2215-16 (1997) (codified at 49 U.S.C. § 40101 note); see Burton v. Twin Commander Aircraft, LLC, 171 Wn.2d 204, 208 & n.1, 214-15, 254 P.3d 778 (2011).

general duties enforced by these actions; lead op. by Stevens, J.; Breyer, J. concurring in part at 504-08).

- **Congressional requirement for aviation insurance coverage:**

Congress amended the FAA to require that certain air carriers maintain liability insurance against potential claims for personal injury and wrongful death. See 49 U.S.C. §41112(a) (requiring insurance "... for bodily injury to, or death of, an individual or for loss of, or damages to, property of others, resulting from the operation or maintenance of the aircraft...").

- **Limited delegation of regulatory authority:** The congressional delegation of enforcement authority to the FAA Administrator is *not* categorical, and does not give the agency plenary power to undertake a regulatory system that would occupy the field. See, e.g., Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-02, 310 & n.13 (1988) (providing the Natural Gas Act administrative agency *exclusive* jurisdiction over enforcement of act); City of Burbank, 411 U.S. at 626-28, 633 (holding amendment of FAA by Noise Control Act of 1972 provides FAA Administrator broad and exclusive authority to regulate use of national airspace, including aircraft noise control). Here, in the FAA Congress authorized the agency to set "minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft." 49 U.S.C. § 44701(a)(1). This statutory provision should be deemed insufficient to establish a clear

congressional intent to preempt. See Sikkelee at 692. The language hardly suggests a clear and manifest intent by Congress to occupy the field of product liability claims.⁷ As noted in Sikkelee, *supra*, in retreating from the Third Circuit's broad field preemption analysis in Abdullah:

[T]hese regulations do not purport to govern the manufacture and design of aircraft per se or to establish a general standard of care but rather establish procedures for manufacturers to obtain certain approvals and certificates from the FAA,... and in the context of those procedures to "prescribe airworthiness standards for the issue of type certificates,".... Of course, the issuance of a type certificate is a threshold requirement for the lawful manufacture and production of component parts and, at least to that extent, arguably reflects nationwide standards for the manufacture and design of such parts. But the fact that the regulations are framed in terms of standards to acquire FAA approvals and certificates – and not as standards governing manufacture generally – supports the notions that the acquisition of a type certificate is merely a baseline requirement and that, in the manufacturing context, the statutory language indicating that these are "minimum standards," 49 U.S.C. §44701, means what it says.

Sikkelee, 822 F.3d at 694 (internal citations omitted).⁸

Under the foregoing analysis, the Court should conclude that FTI has failed to overcome the strong presumption against preemption. The

⁷ The FAA regulations are consistent with the limited nature of the congressional mandate for "minimum standards." The introduction for the various subsections governing specifications for aircraft reference the fact that the regulations only bear upon meeting certification requirements. See e.g. 14 C.F.R. § 23.1 (providing "[t]his part prescribes airworthiness standards for the issue of type certificates, and changes to those certificates..."); 14 C.F.R. §§ 25.1, 33.1 (using similar introductory language).

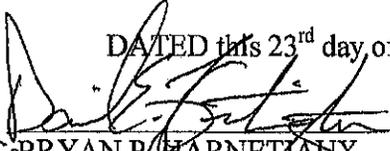
⁸ For various reasons, a number of federal appellate courts support the view that aviation product liability claims are not field preempted. See Sikkelee, 822 F.3d at 706-07 (collecting cases); see also John D. McClune, There Is No Complete, Implied, Or Field Federal Preemption Of State Law Personal Injury/Wrongful Death Negligence Or Product Liability Claims In General Aviation Cases, 71 J. Air L. & Com. 717 (2006).

FAA itself does not establish a clear and manifest intent to occupy the field of state product liability law.⁹

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving the issues on review.

DATED this 23rd day of September, 2016.

for 
BRYAN P. HARNETAUX
for 
VALERIE D. MCOMIE


DANIEL E. HUNTINGTON

On behalf of WSAJ Foundation

⁹ In the course of its reexamination of its field preemption analysis in Abdullah, the Third Circuit in Sikkelee suggests that an issue remains regarding whether implied *conflict* preemption may prevent a state from imposing its own standards of care regarding product liability claims. See Sikkelee, 822 F.3d at 683, 701-04, 709. In Sikkelee the Third Circuit requested the FAA itself address the court on the scope of field preemption under the act and agency regulations. The FAA filed a "letter brief" as amicus curiae in the case, addressing interpretation of the act and the applicability of both field and conflict preemption. See 822 F.3d at 693 & n.9, 699, 703. The Sikkelee opinion found this brief persuasive regarding its conflict preemption analysis. See 822 F.3d at 693-94, 699, 702-03. (This letter brief is available on the Third Circuit Court of Appeals website, Sikkelee v. Precision Airmotive Corp., Docket No. 14-4193, Document: 003112080847, Date Filed: 09/21/2015.)

No conflict preemption issue is raised by FTI or briefed by the parties. This inquiry can be complicated. See e.g. Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000) (involving interpretation of express preemption provision and savings clause resulting in conflict preemption analysis). If the Court is inclined to address conflict preemption, then it should consider requesting supplemental briefing, see RAP 12.1(b), and provide the parties (and amici curiae) the opportunity to address whether under these circumstances a conflict preemption analysis would reach a different result.

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From: danhuntington@richter-wimberley.com [mailto:danhuntington@richter-wimberley.com]
Sent: Friday, September 23, 2016 4:33 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: hedrick@aviationlawgroup.com; anderson@aviationlawgroup.com; ffloyd@floyd-ringer.com; apearce@floyd-ringer.com; jsafarli@floyd-ringer.com; jjimenez@floyd-ringer.com; Stewart A. Estes (sestes@kbmlawyers.com) <sestes@kbmlawyers.com>; Jeffrey.White@justice.org; Bryan Harnetiaux (bryanpharnetiauxwsba@gmail.com) <bryanpharnetiauxwsba@gmail.com>; Bryan P. Harnetiaux (amicuswsajf@wsajf.org) <amicuswsajf@wsajf.org>; Valerie McOmie <valeriemcomie@gmail.com>
Subject: Subject: Estate of Becker v. Forward Technology Industries, Inc. (S.C. #92972-6)

Dear Ms. Carlson:

Re: Estate of Becker v. Forward Technology Industries, Inc.
Supreme Court Case No. 92972-6

On behalf of WSAJ Foundation, attached please find a letter request to file an Amicus Curiae Brief and the accompanying Amicus Curiae Brief. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

Daniel E. Huntington
WSBA #8277

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