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Supreme Court No. 92972-6
Court of Appeals No. 72416-9-I

IN THE SUPREME COURT OF
WASHINGTON

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

Petitioner,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondents.

PETITIONER'S ANSWER TO AMICUS CURIAE BRIEFS

Robert F. Hedrick, WSBA No. 26931
James T. Anderson, WSBA No. 40494
AVIATION LAW GROUP, P.S.
1420 5th Avenue, Suite 3000
Seattle, WA 98101
Telephone: (206) 464-1166

*Attorneys for Plaintiff/Petitioner
Estate of Virgil V. Becker, Jr.*

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A. Petitioner Becker's Answer To The Boeing Company's Amicus Curiae Brief.

Introduction

Boeing's amicus brief repeatedly relies on two U.S. Supreme Court cases involving oil tankers and the Ports and Waterways Safety Act. The only similarity between this case and Boeing's parade of maritime cases are that they are like two ships passing in the night.

Even then, Boeing fails to mention the U.S. Supreme Court's more recent refusal to apply preemption in maritime product liability cases. Boeing's proper focus should have been on the relevant Federal Aviation Act, its legislative history, amendments, and regulations.

Furthermore, this appeal involves FTI, a noncertificated components parts manufacturer, which, unlike Boeing, is outside the FAA regulatory scheme. Indeed, FTI contends that it is not subject to federal regulation at all; presumably leaving it free to produce and supply carburetor floats that are out of dimension, leak, and fail, without fear of civil liability to aviation accident victims.

Boeing overlooks this critical difference.

Boeing suggests that implied field preemption won't immunize FAA certificate holders from liability for manufacturing defects and argues that the regulations should set the standard of care. But that is a

nonsequitur when applied to FTI, which has obtained the benefits of federal preemption without being subject to the burdens of federal regulation.

The bulk of Boeing's amicus brief is devoted to an attack on the reasoning, analysis, and holding of *Sikkelee v. Precision Airmotive Corp.*, 822 F. 3d 680, 707 (3rd Cir. 2016). Yet these are identical arguments that Boeing raised in its amicus curiae briefing in *Sikkelee*, and which were rejected by the Third Circuit.¹ This is why "no federal appellate court has held an aviation products liability claim to be subject to a federal standard of care or otherwise field preempted." *Sikkelee*, 822 F. 3d at 707. Boeing's rehash of the same arguments in this case is similarly unpersuasive.

1. Boeing Fails to Recognize That Applying Implied Field Preemption to Unregulated Component Part Manufacturers Like FTI "Immunizes" Them From Liability for Manufacturing Defects.

Boeing flatly states, "[t]here is no 'immunity' for defects in manufacturing." Boeing Amicus Br. at 3. According to Boeing, manufacturers still may be liable if a component part "[is] not manufactured correctly vis-à-vis federal regulations or the type design, or even [where] there [is] simply an error in manufacturing." *Id.* at 13.

¹ Brief of Amicus Curiae The Boeing Company Supporting Re-Hearing En Banc, 2016 WL 3035383 (C.A.3), U.S. Ct. App., Third Circuit.

FTI's summary judgment shows otherwise. Despite the strong evidence of FTI's knowing manufacture of leaking carburetor floats for use on aircraft, FTI has escaped any liability because the entire field has been found to be impliedly preempted by nonexistent federal regulations regarding carburetor float design or manufacture.

How did this immunity come about? That is because, as *Sikkelee* observed, "neither the Federal Aviation Act nor the associated FAA regulations "were [ever] intended to create federal standards of care" for manufacturing and design defect claims." *Sikkelee*, 822 F.3d at 695. In Division One's words, "it is elusive to determine whether there is an applicable parallel federal standard of care, especially as to a noncertificated contractor who assembles and welds parts." *Estate of Becker v. Forward Tech. Indus., Inc.*, 192 Wn. App. 65, 80, 365 P.3d 1273 (Wn. App. 2015).

According to Division One, the absence of any specific applicable standards set forth in federal regulations regarding defective carburetor floats proves fatal. Since the federal standards at best are "elusive," any civil remedy is elusive as well. *Estate of Becker*, 192 Wn. App. at 69.

Sikkelee reached the opposite conclusion. According to *Sikkelee*, this is precisely where state common law steps in to fill the gap. Any contrary position "would therefore have the perverse effect of granting

complete immunity . . . to an entire industry that, in the judgment of Congress, needed more stringent regulation . . .” *Sikkelee*, 822 F.3d at 695-696, citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). “Like the Supreme Court in *Medtronic*, however, we find it ‘to say the least, ‘difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.’” *Sikkelee*, 822 F.3d at 696.

Congress clearly did not intend to bar all product liability claims to which the FAA had failed to enact specific regulations, and certainly did not designate the FAA as the sole arbiter to either set product liability standards or allow immunity if they did not set specific standards, regardless of whether the manufacturer is regulated.

In such contexts, states are free to exercise their traditional powers to improve product safety and compensate injured victims through tort claims against manufacturers of defective products, without impeding federal regulatory goals.

2. As *Sikkelee* Holds, Aircraft Are Not Like Oil Tankers and the Federal Aviation Act and Its Implementing Regulations Dramatically Differs From the Ports And Waterways Safety Act.

Boeing claims that the “settled test” for implied field preemption is found in the 1978 federal maritime case of *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978). Boeing Amicus Br. at 2. Boeing calls *Ray* “[t]he most applicable U.S. Supreme Court preemption decision for design regulation of aircraft...” Boeing Amicus Br. at 4.

What Boeing fails to mention is that *Sikkelee* extensively discussed and distinguished *Ray* and a related case, *United States v. Locke*, 529 U.S. 89, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000), based upon the applicable Federal Aviation Act, its legislative history, amendments, and enacted regulations. As *Sikkelee* pointed out (and as Boeing conveniently omits) a subsequent U.S. Supreme Court opinion, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002), limited *Ray* and *Locke* to their unique procedural context: state laws that mandated specific design requirements in order for tanker ships to travel in state navigable waters; design requirements that were well beyond those contained under federal maritime law.

Here's how *Sikkelee* put it: "As to tankers, the Supreme Court [in *Sprietsma*] subsequently distinguished *Ray* and *Locke* on the grounds that both cases invalidated state regulations that created positive obligations, and neither of those cases 'purported to pre-empt possible common law claims,' [citation] such as the aviation tort claims at issue here." *Sikkelee*, 822 F.3d at 700.

As *Sikkelee* stressed, Congressional intent is the "touchstone" of any preemption analysis, as manifested in an expression of a "clear and manifest intent" to preempt state law. *Sikkelee*, 822 F.3d at 687-688.

Sikkelee contrasted the Congressional intent in the Ports and Waterways Safety Act, 33 U.S.C. § 1221 *et seq.*, (at issue in *Ray* and *Locke*), with the Federal Boat Safety Act, 46 U.S.C. § 4301 *et seq.* (at issue in *Sprietsma*), and the Federal Aviation Act, at issue here. The case at bar, like *Sprietsma* and unlike *Ray* and *Locke*, involves federal *minimum* design standards and a savings clause, which saves state tort common law in product liability actions, an area traditionally regulated by states as recognized in *Sprietsma*.²

In *Sprietsma*, a unanimous Supreme Court found that litigation of state common law claims would not interfere with any federal policy

² The savings clause in *Locke* had little value because it did not apply to preserving the issue at hand, state regulation of oil tanker design. *Locke*, 529 U.S. at 105-06.

judgments or regulation involving maritime products liability. *Sprietsma*, 537 U.S. at 66-67.

Far from being an outlier, as Boeing suggests, *Sikkelee* does nothing more than preserve the status quo.³ Aviation torts have consistently been governed by state law since the first reported judicial decision, which coincidentally arose in Washington State. See discussion in *Sikkelee*, 822 F.3d at 690. The Federal Aviation Act contained no express preemption provision and empowered the FAA to adopt *minimum* standards for aviation safety. 49 U.S.C. § 44701. It further contained a savings clause which provided that its remedies were “in addition” to those provided by law. 49 U.S.C. § 41020(c).

The General Aviation Revitalization Act of 1994 (“GARA”), 49 U.S.C. § 40101 note⁴, creating an eighteen-year statute of repose for general aviation product liability lawsuits, buttresses the view against a sweeping implied field preemption in this area. “Congress left state law remedies in place when it enacted GARA in 1994, just as it did when it enacted the Civil Aeronautics Act in 1938 and the Federal Aviation Act in 1958.” *Sikkelee*, 822 F.3d at 696-697.

³ “Since the inception of the aviation industry” state and federal courts have consistently applied “state tort remedies for people injured or killed in plane crashes caused by manufacturing and design defects. . .” *Sikkelee* at 22. To reject preemption for product liability claims “simply maintains the status quo”. *Id.*

⁴ Pub. L. No. 103-298, 108 Stat. 1552 (1994), amended by Act of Pub. L. No. 105-102, § 3(e), 111 Stat. 2204, 2216 (1997).

These provisions belie the argument that Congress demonstrated a clear and manifest intent to preempt traditional state products liability claims. *Sikkelee*, 822 F.3d at 692-693. And *Sikkelee* specifically noted that the FAA regulations were framed in terms of minimum standards to require FAA approvals and certificates, “and not as standards governing manufacture generally” *Id.* at 694.

Permitting manufacturing defect claims to proceed under state tort law,

does not effect a sea change. . . . That status quo leaves intact the traditional deterrence mechanism of a state standard of care, with attendant remedies for its breach. Thus, while perhaps contrary to certain policies identified by Appellees and their amici, our holding furthers an overriding public policy and one we conclude is consistent with the Federal Aviation Act, FAA regulations, GARA, and decisions of the Supreme Court and our sister Circuits: promoting aviation safety.

Sikkelee, 822 F.3d at 707-708.

Most recently, *Davidson v. Fairchild*, 2016 WL 5539982 (S.D.Tex. 9/29/16) rejected implied field preemption for aircraft product liability claims:

The court finds the rationale of the well-considered opinions in *Sikkelee* [*Sikkelee v. Precision Airmotive Corp.*, 822 F. 3d 680 (3rd Cir. 2016)] and *Morris* [*Morris v. Cessna Aircraft Co.*, 833 F. Supp. 2d 622(N.D. Tex. 2011)] to be convincing. The court concurs that the federal statutory and regulatory scheme on aviation does not preempt the field of products liability. Those opinions also

acknowledge, in the discussions of field preemption, that the certification system effectuates “baseline requirement[s]” that “speak to a floor of regulatory compliance.” . . . This court finds that products liability law is not preempted as a field. This court also concludes that the minimum standards of the federal aviation regulations do not prohibit the design and manufacture of safer aircraft and component parts.

Davidson v. Fairchild, 2016 WL 5539982 at p.8.

As recognized in *Sikkelee* and *Davidson*, preserving state tort law only enhances the stated congressional goal of aviation safety, and does not detract from it. On the contrary, applying preemption in this case would have the perverse effect of granting immunity to aviation component manufacturers, who manufacture defective aircraft parts, based on a federal act designed to ensure greater aviation safety. This inconsistency hardly reflects a clear and manifest Congressional intent to preempt, let alone removing the built in safety enhancement of co-existing state tort law.

B. Petitioner Becker’s Answer To The Washington State Association Of Justice’s Amicus Curiae Brief.

Amicus WSAJ has responded to FTI’s argument that FTI is not a manufacturer under the WPLA. WSAJ Amicus Br. at 6-9. While Becker agrees with WSAJ, Becker does not agree that the issue is properly before this Court.

RAP 13.4(d) provides “If the [answering] party wants to seek

review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer.” Here, the Court of Appeals did not decide FTI’s WPLA argument, and it was not formally raised as an issue before this Court by FTI. See Respondent’s Answer To Petition For Discretionary Review.⁵ As a result, Appellant Becker has not briefed this issue before this Court.

Furthermore, since there is no decision by either the trial court or Division One on the WPLA issue, it is inappropriate to initially review the issue before this Court, on this record, at this time. Should this Court reverse the Court of Appeals on its preemption ruling, the WPLA issue can return to the trial court for consideration.

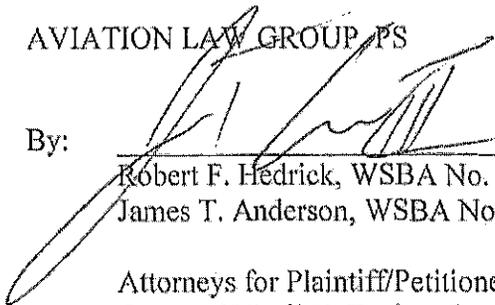
Should the Court decide otherwise and consider the WPLA issue, Becker incorporates by reference its earlier briefing before the trial court, (CP 269-278), and Court of Appeals. (Appellant’s Reply Br. at 11-15).

⁵ In FTI’s Answer to Becker’s Petition for Review, FTI called Becker’s reference to FTI as a manufacturer “disingenuous” in a footnote. FTI Answer at p. 8, FN 2. FTI then simply stated that it disputed that it was a manufacturer in its appellate briefing, and that the Court of Appeals expressly declined to reach FTI’s argument that it was not a product seller under the WPLA. *Id.*

Respectfully submitted this 25th day of October, 2016.

AVIATION LAW GROUP PS

By:



Robert F. Hedrick, WSBA No. 26931

James T. Anderson, WSBA No. 40494

Attorneys for Plaintiff/Petitioner
Estate of Virgil V. Becker, Jr.

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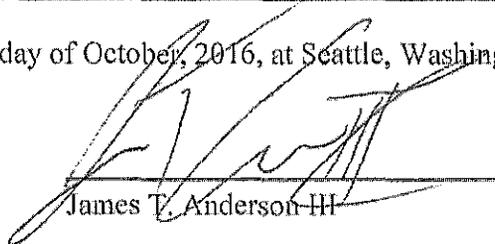
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<p>Francis S. Floyd ffloyd@floyd-ringer.com John Safarli jsafarli@floyd-ringer.com Amber L. Pierce apearce@floyd-ringer.com Floyd, Pflueger & Ringer, P.S. 200 West Thomas Street, Suite 500 Seattle, Washington 98119</p> <p><i>Attorneys for Defendant Forward Technologies Industries, Inc.</i></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via E-Service</p>
<p>Eric B. Wolff EWolff@perkinscoie.com Jeffery S. Clackey JClackey@perkinscoie.com Perkins Coie, LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101</p> <p><i>Attorneys for Amicus The Boeing Company</i></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via E-Service</p>

<p>Brian F. Ladenburg brian@bergmanlegal.com Bergman Draper Ladenberg 821 2nd Avenue, Suite 2100 Seattle, WA 98104</p> <p>Jeffrey R. White jeffrey.white@justice.org American Association for Justice 777 6th Street, N.W., Suite 200 Washington, DC 20001</p> <p><i>Attorneys for Amicus American Association for Justice</i></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via E-Service</p>
<p>Brian P. Harnetiaux bryanpharnetiauxwsba@gmail.com 517 E. 17th Ave Spokane, WA 99203</p> <p>Valerie D. McOmie valeriemcomie@gmail.com 4549 NW Aspen St. Camas, WA 98607</p> <p>Daniel E. Huntington danhuntington@richter- wimberly.com 422 W. Riverside, Ste. 1300 Spokane, WA 99201</p> <p><i>Attorneys for Washington State Association for Justice Foundation</i></p>	<p><input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via E-Service</p>

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Case Name: ESTATE OF VIRGIL V. BECKER JR., by its Personal Representative Nancy A. Becker, Petitioner, v. FORWARD TECHNOLOGY INDUSTRIES, INC., Respondent.

Case Number: Supreme Court No. 92972-6, Court of Appeals No. 72416-9-I

Person Filing Document: James T. Anderson, (206) 464-1411, WSBA No. 40494, anderson@aviationlawgroup.com

Respectfully,

James T. Anderson

AVIATION LAW GROUP, PS

1420 Fifth Avenue, 30th Floor
Seattle, Washington 98101
Phone: (206) 464-1166 | Direct: (206) 464-1411

www.aviationlawgroup.com

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