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

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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ESTATE OF VIRGIL VICTOR BECKER, JR., by its Personal  
Representative, Jennifer L. White,

Petitioner,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondent.

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**FORWARD TECHNOLOGY INDUSTRIES, INC.'S  
ANSWER TO AAJ AMICUS CURIAE BRIEF**

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## I. INTRODUCTION

Amicus American Association for Justice (AAJ) argues: (1) that federal preemption is inappropriate where it “deprives” injured people of their state law claims; (2) that FAA regulation is insufficient to establish implied preemption; and (3) federal preemption should not be applicable to manufacturing defect claims. Amicus is mistaken. This case has never involved federal preemption of state law *claims*; the significant record of Congressional intent, which includes a pervasive regulatory regime, is sufficient to find intent to preempt standards of care; and state manufacturing defect claims statutorily require a “defective” standard, which is clearly preempted by federal standards of care.

This action arises out of a fatal airplane crash. Jennifer White, the personal representative of the Estate of Virgil Victor Becker, Jr. (Becker) brought wrongful death and product liability actions against twelve parties, including: (1) AVCO Corporation, who built and is a type certificate holder for the subject Lycoming aircraft engine and carburetor; (2) Precision Airmotive LLC (Precision), who designed and built carburetors for use on Lycoming type certified engines and also held a Parts Manufacturer Approval (PMA) authorization from the Federal Aviation Administration (FAA) to build the carburetor and its component parts, including the

carburetor floats at issue in this case for use on Lycoming engines; and (3) Forward Technology Industries (FTI), the respondent.

This appeal solely concerns Becker's claims against FTI, who welded together components of the float that Precision supplied. FTI then returned the welded floats to Precision. The FAA and related regulations do not require FTI to hold a certificate or permit for this work. FTI did not sell or distribute the component parts or the actual floats.

Becker sued FTI for state law strict liability, negligent design and manufacture, and breach of warranty. Becker's complaint alleged that the design and construction of the carburetor float "was not in compliance with specific mandatory government specifications relating to safe design and construction, including the Federal Aviation Regulations (14 CFR *et seq.*)." When FTI asked Becker during discovery to identify specific federal regulations (either within or outside Title 14 of the Code of Federal Regulations) that FTI purportedly violated, Becker answered "none," but vaguely asserted that "[t]he engine, its carburetor component, including its Delrin float, did not meet federal minimum standards." During discovery and at the summary judgment proceedings, Becker never identified those standards.

The trial court granted summary judgment in favor of FTI on the ground that implied field preemption of state tort standards of care applied.<sup>1</sup> Becker moved for reconsideration, arguing for the first time that FTI waived federal preemption by not raising it as an affirmative defense in its answer. The trial court denied the reconsideration motion because, among other things, FTI raised federal preemption as an affirmative defense and there was no surprise or prejudice to Becker.

Finally, Becker moved for leave to amend her complaint to allege that the defendants violated federal standards of care. This motion, which was made *after* FTI was dismissed, was denied as to FTI but granted as to the remaining defendants.

In a unanimous opinion by then-Acting Chief Judge Verellen, the Court of Appeals affirmed, holding that “the FAA and related regulations pervasively regulate the ‘area’ of an airplane engine’s fuel system, including carburetors and their component parts. Therefore, implied field preemption bars the state tort standards of care alleged against FTI.” *Estate of Becker v. Forward Tech. Industr., Inc.*, 192 Wn. App. 65, 69, 365 P.3d 1273 (2015). The Court of Appeals also affirmed the trial court’s denial of

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<sup>1</sup> FTI argued, alternatively, for summary judgment dismissal on the basis that all of Becker’s claims are based on the Washington Product Liability Act, to which FTI is not subject because FTI is neither a product seller nor a manufacturer. The trial court did not reach this issue. The Court of Appeals also did not reach this issue.

Becker's reconsideration motion and its denial of Becker's request for leave to amend the complaint against FTI.<sup>2</sup> FTI respectfully submits the Supreme Court should affirm the trial court on all grounds.

## II. SUPPLEMENTAL RESTATEMENT OF THE CASE

FTI rests on the counter-statement of facts presented in its Court of Appeals' Response Brief at 2-16.

## III. COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether federal law preempts state law *claims* or state law *standards of care*?
2. Whether the trial court correctly granted FTI summary judgment dismissal because regulations adopted by the FAA pervasively regulate the area of an aircraft engine's fuel system, thereby preempting any state standard of care for alleged defects arising from the professional welding services of a noncertified contractor (FTI) for Precision, who has Parts Manufacturer Approval (PMA) authorization from the FAA?
3. Whether the state law standard of care inherent in manufacturing defect claims brought under the WPLA are preempted by federal law?

## IV. ARGUMENT

**A. FTI WAS CORRECTLY DISMISSED ON PREEMPTION GROUNDS. FTI HAS NEVER ARGUED THAT FEDERAL LAW PREEMPTS STATE LAW CLAIMS. AAJ'S ARGUMENT IS IRRELEVANT TO THE CASE BEFORE THE COURT.**

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<sup>2</sup> Before FTI moved for summary judgment dismissal, Becker sought leave to amend its complaint to assert punitive damages against FTI. The trial court denied leave. Becker appealed this denial, but the Court of Appeals did not reach the issue because Becker's claims were preempted. Becker did not identify the punitive damages issue in its Petition for Review.

AAJ argues that “the presumption of preemption is even stronger . . . with the result of depriving wrongfully injured people of their state law causes of action.” Br. Amicus Curiae AAJ at 3. But AAJ is off base and its argument is irrelevant to any issue before this Court. FTI has never asserted that federal law preempts state law causes of action, only that it preempts state law standards of care.

The Court of Appeals granted summary judgment finding that “the FAA and related regulations pervasively regulate the ‘area’ of an airplane engine’s fuel system, including carburetors and their component parts. Therefore, implied field preemption bars the state tort *standards of care* alleged against FTI.” *Estate of Becker v. Forward Tech. Industr., Inc.*, 192 Wn. App. 65, 69, 365 P.3d 1273 (2015) (emphasis added). AAJ irrelevantly argues that evidence of preemption is insufficient to find intent to preempt state law *claims*. Claim preemption has never been raised in this case and is not at issue in this appeal. The Court should disregard AAJ’s briefing as wholly irrelevant.

This Court reviews summary judgment dismissals de novo. *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008). Summary judgment is appropriate where there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter

of law. CR 56(c). The evidence and inferences from the evidence are construed in favor of the nonmoving party, here Becker. *Id.* at 383.

Under the Supremacy Clause of the United States Constitution, Congress has the authority to preempt state law. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007).<sup>3</sup> Congressional intent is the touchstone of preemption. *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009). This case concerns implied field preemption, which occurs when “federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it.” *Montalvo*, 508 F.3d at 470 (internal quotation omitted). “Preemptive intent is more readily inferred” in the field of aviation safety, because it is “an area of the law where the federal interest is dominant.” *Id.* at 471.

Another indication of preemption is “pervasiveness of the regulations enacted pursuant to the relevant statute to find preemptive intent.” *Id.* Federal regulations demonstrate implied field preemption because where “Congress has entrusted an agency,” such as the FAA, “with the task of promulgating regulations to carry out the purposes of a statute,

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<sup>3</sup> Ninth Circuit precedent is entitled to “substantial deference.” *Lundborg v. Keystone Shopping Co.*, 138 Wn.2d 658, 677, 981 P.2d 854 (1999). Here, the trial court relied on *Montalvo* in granting FTI summary judgment dismissal. See CP at 666. Remarkably, Becker never discussed *Montalvo* in the opening brief or petition for review.

as part of the preemption analysis [courts] must consider whether the regulations evidence a desire to occupy a field completely.” *Id.* at 470-71.

Importantly, there are two forms of implied field preemption: (1) claim preemption and (2) standards of care preemption. *See Montalvo*, 508 F.3d at 468. Ever since its Motion for Summary Judgment, FTI has argued that preemption requires that federal *standards of care* apply to appellants’ claims. It has never argued that appellants’ *claims* are preempted. The Court of Appeals correctly noted an absence of “any question regarding the viability of manufacturing defect claims brought against a certificate or PMA holder.” *Estate of Becker v. Forward Technology Industries, Inc.*, 192 Wm. App. 65, 70 n.2, 365 P.3d 1273 (2015).

AAJ argues that the Court should find that no preemption exists because it would deprive individuals of their causes of action. Such an assertion is based on a confused understanding of federal preemption law. Federal law can preempt standards of care while leaving state law claims completely intact—as is the case here. If this Court were to find that federal law preempts state law standards of care, state law claims, including the WPLA, would remain fully intact and actionable. It is clear that AAJ’s brief does not relate to the issues before the Court. It should be disregarded as irrelevant to this case.

**B. THE SUBSTANTIAL EVIDENCE OF CONGRESSIONAL INTENT, WHICH INCLUDES A PERVASIVE REGULATORY REGIME, CLEARLY SUPPORTS A FINDING THAT FEDERAL LAW PREEMPTS STATE LAW STANDARDS OF CARE**

AAJ argues that the FAA's regulatory regime does not establish congressional intent to preempt state standards of care. AAJ is mistaken. The entire record, which includes the FAA's regulatory regime, legislative history, and judicial precedent from across the country, clearly indicates that Congress intended to preempt state law standards of care.

Congress adopted the FAA to create a "uniform and exclusive system of federal regulation" in the area of aviation safety and commerce.<sup>4</sup> *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1993); *see also Ventress v. Japan Airlines*, 747 F.3d 716, 721 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 164 (2014).<sup>5</sup> In 1994, the House Judiciary Committee "noted that general aviation is unique because it is exclusively, and thoroughly, regulated by the federal government."<sup>6</sup> This Court has similarly acknowledged the pervasiveness of

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<sup>4</sup> The federal government regulates aviation through three principal statutes: the Federal Aviation Act, the Airline Deregulation Act, and the General Aviation Revitalization Act. The Aviation Act, passed by Congress in 1958, created the Federal Aviation Administration.

<sup>5</sup> *See* Henry H. Perritt, Jr. & Albert J. Plawinski, *One Centimeter Over My Back Yard: Where Does Federal Preemption of State Drone Regulation Start?* 17 N.C. J.L. & TECH. 307, 324-41 (2015) (discussing the Ninth Circuit's constitutional framework and implied field preemption).

<sup>6</sup> Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money is Gone, That is Permanent, Irreparable Damage to You,"* 42 STETSON L. REV. 457, 465 (2013) (citing H.R. Rpt. 103-525 (II) at 5).

federal regulation in aviation safety. *See Crosby v. Cox Aircraft*, 109 Wn.2d 581, 590, 746 P.2d 1198 (1987) (“In light of the extensive government regulation regarding the design, development, and testing of new and modified aircraft, *see generally* 14 C.F.R. ch. 1, subchapter C (1978) (Federal Aviation Administration certification procedures and airworthiness standards), we conclude that test flights are not abnormally dangerous.”)

The question of whether federal law preempts state law for aviation safety was answered in the affirmative in *Montalvo*, 508 F.3d at 470-74. In *Montalvo*, an appeal involving 14 consolidated cases, plaintiffs brought a state law failure-to-warn claim against several commercial airline companies. Plaintiffs alleged that the airlines failed to warn about the risk of developing deep vein thrombosis during prolonged flights. The district court held that plaintiffs’ failure-to-warn claim was meritless because there was no federal requirement that airlines warn passengers about the risk of developing the condition.

The Ninth Circuit affirmed, holding that “the regulations enacted by the [FAA], read in conjunction with [the Federal Aviation Act of 1958, 49 U.S.C. § 40103 *et seq.*], sufficiently demonstrate an intent to occupy exclusively the entire field of aviation safety and carry out Congress’s intent to preempt all state law in this field.” *See Montalvo*, 508 F.3d at 471. The

Ninth Circuit noted that aviation safety is “not subject to supplementation by, or variation among, states” because the field has “long been dominated by federal interests” and “federal air safety regulations[] establish complete and thorough safety standards” for aviation. *Id.* at 471, 474. As noted by the late Supreme Court Justice Jackson, “[f]ederal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.” *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1944) (Jackson, J., concurring). Holding to the contrary would allow each state to enact different standards and potentially expose the airlines to fifty different standards of care. *Id.* at 473.

The *Montalvo* Court concluded that “it is clear that Congress intended to invest the Administrator of the FAA with the authority to enact exclusive air safety standards,” including regulations that cover “airworthiness standards.” *Montalvo*, 508 F.3d at 472 (emphasis added). The First, Fifth, Sixth, and Tenth Circuits reached the same conclusion. *French v. Pan Am Express, Inc.*, 869 F.2d 1, 5 (1st Cir. 1989); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 386 (5th Cir. 2004); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 495 (6th Cir. 2005); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010); *but see Sikkelee v.*

*Precision Airmotive*, 822 F.3d 680 (3rd Cir. 2016).

In 2009, the Ninth Circuit narrowed its reach in *Martin v. Midwest Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009). In *Martin*, the plaintiff sued Midwest Express for negligence and Fairchild Dornier for strict liability alleging that the airplane's stairs were defectively designed because they only had one handrail. Midwest Express settled the claim then sued the manufacturer, Fairchild Dornier, for indemnification. *Id.* at 808. *Martin* explained that *Montalvo* "neither precludes all claims except those based on violations of specific federal regulations, nor requires federal courts to independently develop a standard of care when there are no relevant federal regulations." *Id.* at 811.

Instead, *Montalvo* means that "when an agency issues 'pervasive regulations' in an area, like passenger warnings, the FAA preempts all state claims in *that* area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable." *Id.* *Martin* held that since "airstairs" were not pervasively regulated, the FAA did not preempt state law. *See also Nat'l Fed'n of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 734 (2016) (noting that *Martin* "emphasized the importance of delineating the pertinent area of regulation with specificity before proceeding with the field preemption inquiry" and holding that the ACAA and federal regulations impliedly preempted the Federation's state-law

claims).

In *Gilstrap v. United Airlines, Inc.*, 709 F.3d 995 (9th Cir. 2013) the Ninth Circuit created a two-part test modeled after *Montalvo* and *Martin*.<sup>7</sup> “First, we ask whether the particular *area* of aviation commerce and safety implicated in the lawsuit is governed by ‘pervasive [federal] regulations.’” *Id.* (quoting *Martin*, 555 F.3d at 311) (emphasis added). If yes, then any applicable state standards of care are preempted. *Id.* Second, “[e]ven in those *areas*, however, the scope of field preemption extends only to the standard of care.” *Id.* (emphasis added). Accordingly, “local law still governs the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies.” *McIntosh v. Cub Crafters*, No. 13-3004, 2014 U.S. Dist. LEXIS 21491, at \*14 (E.D. Wash. Feb. 19, 2014) (emphasis added) (applying the two-part test of *Gilstrap* and holding that 14 C.F.R. § 21 *et seq.*, which contained the FAA’s federal standards for airworthiness certification, pervasively regulate the design, testing, and approval of manufactured parts for light-sport aircraft).

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<sup>7</sup> The *Gilstrap* Court adopted the Third Circuit’s division of “FAA’s field preemptive effect into two component parts: state standards of care, which may be field preempted by pervasive regulations, and state remedies, which *may* survive *even if* the standard of care is so preempted.” *Gilstrap*, 709 F.3d at 1006, citing *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367-68 (3d Cir. 1999). The Ninth Circuit’s use of the words “may” and “even if” supports the conclusion in *Martin* that preemption is created only when the FAA has explicitly regulated the particular aspect of safety involved in the state lawsuit. In April 2016, the Third Circuit decided *Sikkelee v. Precision Airmotive Corp.* 822 F.3d 680, 683 (2016) and clarified the scope of *Abdullah*. *Sikkelee* held that “neither the Act nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims” and field preemption is determined solely by the principles of conflict preemption.

As the cases above demonstrate, implied field preemption analysis begins with identifying the specific area and then determining whether that area is pervasively regulated. The Court of Appeals correctly held that “the specific area at issue here in the engine’s fuel system, which includes the carburetor and its component parts.” *Becker*, 192 Wn. App. at 76.

The Court of Appeals also rightly concluded that this area is pervasively regulated. Congress gave the Federal Aviation Administration the authority to establish minimum standards “for the design, material, construction, quality of work, and performance of *aircraft engines*, and propellers.” 49 U.S.C. § 44701(a)(1) (emphasis added).<sup>8</sup> Under FAA regulations, an engine manufacturer can be held liable for defects in the carburetor because it is the type certificate holder of the engine.<sup>9</sup> Here, the specific area of the engine’s fuel system, including the carburetor and its

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<sup>8</sup> “General aviation includes the manufacture and operation of any type of aircraft that has been issued an airworthiness certificate by the FAA[.] General aviation includes personal-use aircraft, business aircraft, helicopters, aircraft operated by flight schools, and on-demand passenger or cargo transportation under Federal Regulation Part 135.” Contributions of General Aviation to the US Economy in 2013 at 2 (2013). “The FAA is responsible for overseeing the safety of general aviation.” U.S. Gen. Acctg. Off., GAO-01-916, General Aviation: Status of the Industry, Related Infrastructure, and Safety Issues 3 (Aug. 2001). Additionally, the FAA “works to improve the safety of general aviation in a variety of initiatives with other federal agencies and industry organizations,” such as Safer Skies, “to improve the safety record of commercial and general aviation.” *Id.* at 8. The FAA also works with other groups “to research and develop technology that will improve aircraft safety. For example, in 1994, the National Aeronautical and Space Administration (NASA) created the Advanced General Aviation Transport Experiments (AGATE), a consortium of industry, higher education, and government entities, including NASA and FAA, that focuses on developing advanced technologies for general aviation, including technologies that will reduce accidents.” *Id.* at 9.

<sup>9</sup> See generally 14 C.F.R. §§ 21.11-21.55 (stating requirements for eligibility and issuance of a type certificate).

component parts are pervasively regulated by 14 C.F.R. § 33.35(a); 14 C.F.R. § 23.951(a); 14 C.F.R. § 23.955(a); 14 C.F.R. § 23.1093(a)(1)-(2); 14 C.F.R. § 23.1095(a); 14 C.F.R. § 33.67(a); 14 C.F.R. § 23.1099; 14 C.F.R. § 25.1337(c); 14 C.F.R. § 25.1337(f)(1)-(2); 14 C.F.R. § 25.951(a); 14 C.F.R. § 25.951(b); and 14 C.F.R. § 25.951(c), among others. *See generally Becker*, 192 Wn. App. at 76. After examining these regulations, the Court of Appeals explained:

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

*Becker*, 192 Wn. App. at 79.

The record is clear. Federal law intended to preempt state law standards of care. This is supported by a substantial regulatory regime, a long legislative history, and federal appellate case law from across the country.

**C. FEDERAL LAW PREEMPTS STATE LAW STANDARDS OF CARE IN MANUFACTURING DEFECT CLAIMS. MANUFACTURING DEFECT CLAIMS DO IMPOSE A STANDARD OF CARE. FTI IS NOT A MANUFACTURER.**

AAJ circuitously argues that state manufacturing defect claims do not impose state law standards. Instead, it argues that the "standard" in

manufacturing defect claims is the manufacturer's "own standard." This rule, however, is imposed by state law and, therefore, *is* a state law standard.

To begin, AAJ patently misrepresents the holding of the Court of Appeals. AAJ contends that the lower court held that state law "product liability *claims*" are preempted. This is untrue. As detailed extensively above, FTI argues, and the lower court held, that state law *standards of care* are preempted by federal law. All state law causes of action remain in effect.

AAJ then argues, relying exclusively on the law in foreign jurisdictions, that this holding does not apply to manufacturing defect claims because such claims do not impose a standard of care. This argument fails for two reasons.

First, manufacturing defect claims absolutely impose a standard of care. A manufacturing defect claim arises when "the product deviated in some material way from the design specifications or performance standards of the manufacturer." RCW 7.72.030. The standard of "the manufacturer's standard" is imposed statutorily. Simply because the standard is subjective does not mean that it is not a standard imposed by law. Clearly, a state law standard applies to manufacturing defect claims and, as discussed at length

above, such standards are preempted by federal standards and promulgated by the FAA.

Even if the Court accepts AAJ's circular logic, it makes no difference. Strict liability for product defect claims apply only to manufacturers. As clearly demonstrated by the record, FTI was not a manufacturer. It was at all times a welder—a service provider—and not subject to product liability actions in Washington.

Becker's second amended complaint asserted claims against FTI for (1) strict liability; (2) negligent design and manufacturing; and (3) breach of warranty. CP at 75-79. All three claims sound in product liability. Becker herself refers to her claims as such. *See* Appellant's Opening Br. at 2 ("The trial court erred in holding that federal regulations impliedly preempt state law standards of care in aircraft *product liability actions*." (emphasis added)). The WPLA is Washington's exclusive product liability law. *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853, 774 P.2d 1199 (1989). There is no common law for products liability. *Id.* Although Becker does not explicitly reference the WPLA in her second amended complaint, all three claims against FTI arise out of the WPLA. *See* Appellant's Opening Br. at 49 (referring to her action as a "product liability action[]").

First, under the strict liability claim, Becker alleges that FTI is “strictly liable” for “creat[ing] a defective and unsafe product in the subject product.”<sup>10</sup> CP at 76-77. This claim falls under RCW 7.72.030(2) of the WPLA, which imposes strict liability on a product manufacturer for products that are not reasonably safe in construction.

**1. ONLY “PRODUCT SELLERS” AND “MANUFACTURERS” MAY BE LIABLE UNDER THE WPLA.**

The WPLA imposes liability on only two types of parties: product sellers and manufacturers. *See* RCW 7.72.030-.040. Product sellers may be liable for (1) negligence, (2) breach of an express warranty, or (3) intentional misrepresentation or concealment about facts related to the product. RCW 7.72.040(1). Manufacturers may be liable for (1) a product that was not reasonably safe as designed; or (2) inadequate warnings or instructions. RCW 7.72.030(2). Manufacturers may be strictly liable for (1) products that are not reasonably safe as constructed; or (2) a breach of an implied or express warranty. RCW 7.72.030(1). The WPLA does not impose liability on any other type of party.

Whether a party is a product seller or manufacturer is a question of law. *Almquist v. Finley Sch. Dist. No. 53*, 114 Wn. App. 395, 404-05, 57 P.3d 1191 (2002) (holding that “[t]he question of what legal consequences

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<sup>10</sup> Becker defined “subject product” as “the engine, its fuel delivery system, the carburetor component of the engine’s fuel delivery system, and the carburetor’s component parts that were on [the aircraft] at the time of the accident.” CP at 61.

might flow from these activities—whether this constitutes manufacturing—was then properly decided by the court as a matter of law”); *Sepulveda-Esquivel v. Central Mach. Works., Inc.*, 120 Wn. App. 12, 17-20, 84 P.3d 895 (2004). The undisputed facts establish that FTI does not fall within the scope of the WPLA as a matter of law.

**2. FTI IS NOT A “PRODUCT SELLER” UNDER THE WPLA.**

A product seller is defined as any person or entity that is “engaged in the business of selling products, whether the sale is for resale, or for use or consumption.” RCW 7.72.010(1). The person must be in the business of selling the specific product that gives rise to the product liability lawsuit. *Pardo v. Olson & Sons*, 40 F.3d 1063, 1066-67 (9th Cir. 1994). The WPLA excludes from the definition of product seller “[a] provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider.” RCW 7.72.020(1)(b). FTI is not a product seller because it is not “engaged in the business of selling” carburetor floats. RCW 7.72.010(1). Mr. Olson, FTI’s product manager, testified that “[FTI] did not sell carburetor floats to Precision Airmotive.” CP at 1989. The carburetor float components were shipped to FTI, who then welded them together. FTI then returned the welded floats back to Precision. CP at 2018. FTI charged Precision only for welding and welding-related services. CP at 2000-2007, 2009-2015.

If anything, FTI was a “provider of professional services,” which is expressly excluded from the definition of product seller. RCW 7.72.020(1)(b). To distinguish between sellers or providers of professional services, courts look to the “primary purpose” of the contract. *Anderson Hay & Grain Co. v. United Dominion Industr., Inc.*, 119 Wn. App. 249, 260, 76 P.3d 1025 (2003), *review denied*, 151 Wn.2d 1016 (2004). The undisputed evidence establishes that the primary purpose of the contract between FTI and Precision was for professional welding services. Mr. Olson testified that “[FTI] was paid to weld the parts together” and “[FTI] charged [Precision] a fee for a service.” CP at 1989-1990. Mr. Nelson, FTI’s machine shop foreman, testified that FTI was “contracted just to weld the parts.” CP at 1996.

This case is directly analogous to *Anderson Hay*, in which the plaintiff contracted with a designer and a builder to create a home. The designer provided prefabricated parts, which the builder agreed to construct. When the roof of the home collapsed after a heavy snowstorm, the plaintiff sued the builder, arguing that it was a product seller under the WPLA. The Court of Appeals affirmed the builder’s dismissal, holding that the builder’s contract was primarily for a service and that the prefabricated building components were “incidental” to the services. *Id.* at 261. There, as here, the primary purpose of the contract was for a service. The components of

the carburetor float were “incidental” to FTI’s welding service, just as the building parts were “incidental” to the builder’s construction service. *Anderson Hay* confirms that the service provider exception is not limited to professions such as architects and engineers.

FTI was not “engaged in the business of selling” carburetor floats. RCW 7.72.010(1). Instead, the “primary purpose” of the contract between FTI and Precision was for welding services. CP at 1996. Accordingly, FTI is not a product seller as defined by the WPLA.

#### **4. FTI IS NOT A “MANUFACTURER” UNDER THE WPLA.**

Under the WPLA, the definition of a 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.” RCW 7.72.010(2) (emphasis added). As demonstrated above, FTI is not a product seller and therefore does not qualify for this definition of a manufacturer. The WPLA also defines a manufacturer as an “entity not otherwise a manufacturer that holds itself out as a manufacturer.” RCW 7.72.010(2). The entity must hold itself out as the manufacturer of the specific product that gives rise to the product liability lawsuit, and not as a manufacturer generally. *Progressive N. Ins. Co. v. Fleetwood Enters, Inc.*, No.04-1308, 2006 U.S. Dist. LEXIS 34395, at \*13 (W.D. Wash. Apr. 14, 2006). There is no evidence that FTI

represented itself to be a manufacturer of carburetor floats, or of any other component of the engine or carburetor in question. Nor did Becker allege that FTI held itself out as a manufacturer.

In sum, state law imposes a standard of care in manufacturing defect claims. Federal preempts those state law standards. Even if the Court finds otherwise, the WPLA does not apply to FTI because FTI is not a product manufacturer or seller.

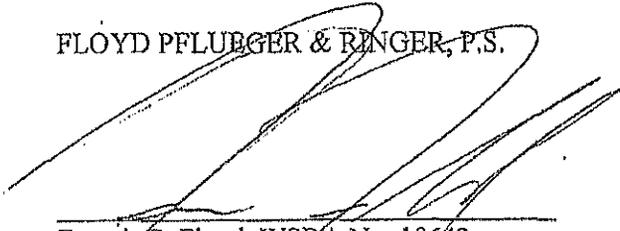
V. CONCLUSION

For the foregoing reasons, FTI respectfully requests that this Court affirm the trial court on all grounds.

Dated this 25<sup>th</sup> day of October, 2016.

Respectfully submitted,

FLOYD PFLUEGER & RINGER, P.S.



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## CERTIFICATE OF SERVICE

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Good Afternoon,

Please find attached Forward Technology Industries, Inc.'s Answer to AAJ Amicus Curiae Brief and Forward Technology Industries, Inc.'s Answer to WSAJ Amicus Curiae Brief for filing in this matter. The relevant case information is listed below and all counsel of record have been copied on this email.

<b>Case Name:</b> ESTATE OF VIRGIL VICTOR BECKER, JR.,  Petitioner,  v.  FORWARD TECHNOLOGY INDUSTRIES, INC.,	<b>Cause No.</b> 92972-6  <b>Attorneys for Respondent Forward Technology Industries, Inc.:</b> Francis S. Floyd, WSBA No. 10642 <a href="mailto:ffloyd@floyd-ringer.com">ffloyd@floyd-ringer.com</a>
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<b>Documents:</b>	
<ul style="list-style-type: none"> <li>• Forward Technology Industries, Inc.'s Answer to AAJ Amicus Curiae Brief, and</li> <li>• Forward Technology Industries, Inc.'s Answer to WSAJ Amicus Curiae Brief</li> </ul>	

Please feel free to contact me with any questions. Thank you,

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