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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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

Appellant/Plaintiff,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondent/Defendant.

AMENDED BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent Forward Technology Industries, Inc. (“FTI”) respectfully requests that this Court (1) affirm the trial court’s summary judgment dismissal of FTI; (2) affirm the trial court’s denial of Appellant Estate of Virgil Victor Becker, Jr.’s (“Becker”) motion for reconsideration of the dismissal; (3) affirm the trial court’s denial of Becker’s post-summary judgment motion for leave to file an amended complaint against FTI; and (4) affirm the trial court’s denial of Becker’s pre-summary judgment motion for leave to assert punitive damages against FTI. In the alternative, FTI respectfully requests that this Court dismiss Becker’s appeal as untimely.

II. COUNTER-STATEMENT OF THE ISSUES

- (1) Did the trial court properly grant FTI’s motion for summary judgment on the basis of federal preemption? **Yes.**
- (2) Did the trial court properly deny Becker’s motion for reconsideration of FTI’s dismissal? **Yes.**
- (3) Did the trial court properly deny Becker’s post-summary judgment motion to file a third amended complaint against FTI? **Yes.**
- (4) Should this Court affirm FTI’s summary judgment dismissal on the alternative basis that all three of Becker’s claims are based in the Washington Product Liability Act, to which FTI is not subject? **Yes.**
- (5) Did the trial court properly deny Becker’s pre-summary judgment motion to assert punitive damages against FTI? **Yes.**
- (6) Is Becker’s appeal timely? **No.**

III. COUNTER-STATEMENT OF THE CASE

A. Factual background

1. The cause of the crash was not determined by a fact finder

On July 27, 2008, a Cessna aircraft crashed near McMurray, Washington, killing all three on board including Becker. Clerk's Papers ("CP") at 55. The personal representative of Becker's estate filed a product liability lawsuit on July 23, 2010, against multiple defendants, including FTI. CP at 1488. Becker also sued Paul Crews, as personal representative of the estates of Brenda Houston (the pilot) and Elizabeth Crews (another passenger) (collectively, "Crews").¹ CP at 54.

Becker's brief implies that the cause of the crash was determined by a fact finder. Becker asserts, for example, that "[f]ollowing the accident it was discovered that the carburetor float . . . had leaked and filled with fuel, a condition which the evidence shows caused the engine to quit and the airplane to crash." App. Br. at pg. 4. Conspicuously, Becker does not cite to the record in violation of RAP 10.3(a)(5).² Contrary to Becker's suggestions, the cause of the crash was not

¹ Crews filed a parallel product liability lawsuit. The two lawsuits were consolidated in January 2011, and deconsolidated in May 2013. CP at 48, 1445.

² RAP 10.3(a)(5) requires that appellate briefs 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" (emphasis added).

determined by a fact finder and was vigorously contested by the parties in the trial court.³

2. Becker misrepresents FTI's involvement in this case

Becker also sued AVCO Corporation ("AVCO"), the company that built the aircraft's engine.⁴ CP at 1489-1490. The engine was outfitted with a carburetor built by another defendant, Precision Airmotive, LLC ("Precision"). CP at 1490. Inside the carburetor was a "float" – a plastic component that regulated the amount of fuel fed into the engine. CP at 1496. The float was composed of a plastic base and two plastic lid pieces. CP at 1954.

Becker wrongly claims that FTI "assembled" and "manufactured the defective carburetor float." App. Br. at pgs. 4, 7. To the contrary, FTI's involvement in this case was limited to welding the float components for Precision. FTI did not manufacture or design any components of the float; it simply contracted with Precision to weld the components together according to Precision's instructions. CP at 1966:17-1967:11, 1983:13-15, 1989:23-1990:1, 1996:9. The components were

³ On February 25, 2013, the trial court entered a sanctions order against defendant AVCO Corporation. CP at 1670. The order deemed all of the allegations in Becker's complaint as admitted and imposed liability on AVCO as a matter of law. CP at 1682. But the trial court did not establish the factual cause of the accident, as the order was for sanctions. *Id.* Moreover, FTI was not a party to the litigation at the time, as this order was entered more than seven months after FTI was dismissed on summary judgment.

⁴ AVCO is also referred to as Lycoming, which is a division of AVCO. CP at 56.

molded by Synergy Systems and Cashmere Molding, Inc., who were also named in the lawsuit. CP at 54, 360 (102:24-104:3).

Becker also erroneously claims that FTI “sold” the carburetor floats to Precision. App. Br. at pg. 7. FTI never sold any floats to Precision. Scott Olson, FTI’s project manager who worked with Precision on the floats, testified that FTI “was paid to weld the parts together. [FTI] did not sell carburetor floats to Precision Airmotive. [FTI] charged [Precision] a fee for a service.” CP at 1989:23-1990:1.

Jim Nelson, a shop machine foreman at FTI, similarly testified that “[FTI] w[as] contracted just to weld the parts.” CP at 1996:9. Sales acknowledgements from 2000 through 2004 show that FTI charged Precision only for welding and welding-related services. CP at 2000-2007. FTI’s order entries from 1999-2005 confirm this. CP at 2009-2015. Precision verified this in its discovery responses: Precision “sent the molded [float] components to a welding company [*i.e.*, FTI], which welded the pieces together. [FTI] returned [*not sold*] the welded . . . float to Precision.” CP at 2018:34-38.

3. Precision independently tested each float before approving it for use in the field and did not rely on FTI’s random testing

Before approving the floats for sale as carburetor components, Precision inspected and tested “100 percent” of the floats. CP at 1958:10-13, 1960:11-13. Precision followed the specifications set forth in the

Precision Engineering Specification (“PES-4495”), “Assembly, Testing, and Inspection Procedures for 30-804 Molded Delrin Float Assemblies.” CP at 1955:1-1956:2, 2068-70 (PES-4495). PES-4495 established guidelines for visual, pressure, hot water, and vacuum tests. CP at 2069-70. Using its test specification, Precision independently tested each float before approving the float for use in the field. CP at 1958:10-13, 1960:11-13.

In contrast, FTI conducted its own random float testing for the purpose of calibrating its welding tool. CP at 1975:16-24, 1984:14-25. As Mr. Nielson, Precision’s manager, testified, Precision “would always run the parts through [Precision’s] own tests; and even floats that passed leak testing at [FTI] . . . would still . . . fail[] [Precision’s more stringent] testing afterwards.” CP at 1959:12-15. It was “clearly understood” that FTI’s rudimentary tests could not and would not be relied upon for Precision’s quality assurance purposes. CP at 1978:24.

In his deposition, Mr. Olson was asked whether he thought Precision’s tests were adequate, even though FTI was under no obligation to evaluate Precision’s testing methods:

[*Crews’ counsel:*] Okay. Wouldn’t [whether Precision had a process in place to ensure that no leaky floats made it into the field] be something important that you would want to know given the high rate of defective floats?
[*Mr. Olson:*] No.

[*Crews' counsel:*] And why not? That just wasn't a concern to you?

[*Mr. Olson:*] It was not.

[*Crews' counsel:*] Okay.

[*Mr. Olson:*] To me it's just another plastic widget.

[*Crews' counsel:*] Okay. Even though you knew that it's a certain percentage of defective floats [] being produced and they're going into aircraft, and if the defect could create a potential safety issue, you knew all that?

[*FTI's counsel:*] Object to the form. He didn't say that he knew they were going into aircraft.

[*Mr. Olson:*] I did not know.

CP at 1898. Becker implies that Mr. Olson's statement, "To me it's just another plastic widget" is equivalent to stating that 'safety was not important to FTI because, after all, it's just another plastic widget.' App. Br. at pg. 11; CP at 1898. That is not the import of Mr. Olson's testimony. Mr. Olson's statement, taken in its full context, is consistent with his earlier testimony that FTI welds "to the best of [its] ability . . . regardless of what" is being welded. CP at 1876. Mr. Olson's "just another plastic widget" statement conveyed that FTI has the same approach for each welding project and has the same expectations for the quality of its work, regardless of the purpose.

4. FTI had no knowledge that Precision was installing floats with the potential to leak on airplanes

FTI knew that Precision intended to use the floats as components of carburetors on general aviation aircraft. CP at 1965:2-25, 1990:1-1991:17. FTI also was aware that some of the floats it welded had the potential to leak, and that some of the floats shipped to Precision had

actual leaks. CP at 1986:1-13, 1990:25-1991:4. FTI knew this because Precision sent FTI “discrepancy reports” notifying FTI that Precision had “scrapped the bad [floats].” CP at 1986:10-13.

Contrary to Becker’s assertions, FTI had no knowledge of “defective” floats passing Precision’s test and being installed on aircraft. Becker relies on out-of-context quotes from Mr. Olson, who was asked by Becker’s counsel during his deposition, “You were selling them defective floats, right?” Mr. Olson answered, “Yes.” CP at 369. Mr. Olson was later asked, “You understood, though, that Precision was selling the Delrin floats that your company welded and they were going onto aircraft engines?” Mr. Olson replied, “Yes.” CP at 370. Becker claims this testimony is “shocking.” App. Br. at pg. 10. But she has completely distorted the context of Mr. Olson’s statements. At the beginning of his deposition, Mr. Olson was asked, “At that time were the leak failure rates excessive, in your opinion?” He responded,

You know, our – our goal is to strive for a hundred percent yield. Any fallout is a bad thing. So there may have been batches or instances of high rates. And there may have been other batches where they were much lesser rates. But, you know, in reality none of it is acceptable. It’s – our goal is to eliminate any scrap or fallout.

CP at 1873.

Becker’s counsel then asked whether FTI “ever consider[ed] the purpose for which the part would ultimately be used.” CP at 1876. Mr.

Olson responded that FTI did not consider the purpose because “[FTI] [was] welding plastic. [FTI] do[es] it to the best of [its] ability whether – regardless of what it is” that is being welded. *Id.* Mr. Olson was describing FTI’s expectations for the quality of its welding services, which provides the context for his subsequent exchange with Crews’ counsel:

[*Crews’ counsel:*] Okay. Would you agree, though, that [the number of floats with leaks] was an unacceptable amount?

[*FTI’s counsel:*] Object to the form.

[*Mr. Olson:*] I would agree in some batches it was bad.

[*Crews’ counsel:*] I mean, it seemed like over the years it was something that you were concerned with and repeatedly tried to get Precision to address that. Is that right?

[*FTI’s counsel:*] Object to the form.

[*Mr. Olson:*] You know, we made some suggestions. We offered some tooling. You know, we otherwise worked with them to produce parts for them. Parallel they worked on their end to refine their molding processes and make parts that conformed to their tolerances.

[*Crews’ counsel:*] But it was a concern that you had, and the problem was never fixed, right?

[*Precision’s counsel:*] Object to form.

[*Mr. Olson:*] You know, I was – it was a concern that I had. And my concern was that we were making them bad parts. They were paying for bad parts. There would be logistic[al] issues. It was a bad situation. So, yes, in that regard[] I was concerned.

[*Crews’ counsel:*] You were selling them defective floats, right?

[*Mr. Olson:*] Correct.

[*FTI’s counsel:*] Object to the form.

CP at 1896. Mr. Olson was *not* admitting that FTI knew carburetor floats with the potential to leak were being installed on airplanes. Indeed, Crews’ counsel asked Mr. Olson three times whether he knew that floats

with the potential to leak were being installed on aircrafts. Each time, Mr. Olson's answer was the same:

[*Crews' counsel:*] [Y]ou're aware that those floats were then being sold by Precision as part of carburetors that were going on to aircraft engines, is that right?

[*Precision's counsel:*] Object to the form.

[*FTI's counsel:*] Join.

[*Mr. Olson:*] I was not aware – I cannot say what became of those parts after we sent them to Precision Air or what process they were subjected to or which – you know, how they were qualified.

CP at 1897. Yet again, he was asked, “And so you knew that a certain amount of defective carburetor floats were out there in the field on aircraft engines?” CP at 1897. Mr. Olson responded, “No, I did not know that.” *Id.* Crews' counsel asked a third time, “And you knew that Precision was selling [defective carburetor floats] and they were going onto aircraft engines?” Mr. Olson's answer was the same: “I did not know that they were selling those specific carburetor floats. I don't know what became of them once they delivered to my customer.” CP at 1897.

Further, FTI did not have any authority to approve the floats for use on aircraft. That authority resided solely with Precision, who was the holder of the Federal Aviation Administration's (“FAA”) “Parts Manufacturer Approval” (“PMA”) for the carburetor containing the float at issue here. PMA holders are required by federal regulations to inspect and to ensure that each part is airworthy. 14 C.F.R. § 21.33(b)(1)-(4).

Precision had responsibilities under federal regulations to inspect and to approve the floats for use on general aviation aircraft. FTI did not have any such responsibilities. Mr. Olson testified that FTI did not “in any way approve” the floats. CP at 1982:9. In contrast, Peter Nielson, Precision’s manager, testified that “the floats that leaked in the field” were “approved and shipped” by Precision after the floats “had passed [Precision’s] production leak tests.” CP at 1957:21-25.

5. Precision declined to purchase additional testing, services, or equipment from FTI

As an FAA approved manufacturer, Precision was responsible for “mak[ing] all inspections and tests necessary to determine . . . [c]ompliance with the applicable airworthiness . . . requirements.” 14 C.F.R. § 21.33(b)(1). FTI did not hold any FAA certificates and therefore had no such obligation. Nevertheless, FTI offered to sell leak testing equipment to Precision, but the offers were rejected. CP at 1997:7-19, 1979:19-1980:10.

FTI understood that Precision “[one] hundred percent leak tested everything [FTI] sent [Precision]” and that “it was up to [Precision] to do what [it] . . . deemed fit” with the carburetor floats. CP at 1981, 1998. As such, Becker’s allegation that FTI lacked “a product reliability program, a quality assurance program, a product failure analysis program, any product risk assessment procedures, a product tracking program, or a

manufacturing review board” is of no consequence. App. Br. at pg. 10. FTI had no obligation to implement these programs: FTI’s proposals for additional testing, equipment, and services were contractual offers that were rejected.

B. Procedural background

Becker filed (1) an original complaint against FTI on July 23, 2010, CP at 1488; (2) a first amended complaint on September 16, 2010, CP at 1; and (3) a second amended complaint on May 10, 2011. CP at 54. All three complaints alleged product liability claims against FTI. Specifically, Becker alleged claims for strict liability, negligent design and manufacturing, and breach of warranty. CP at 1511-1513, 24-27, 75-79.

In December 2010, FTI answered Becker’s first amended complaint⁶ by denying all allegations and expressly “incorporat[ing] any applicable affirmative defense or other defense asserted by any other Defendant in this action.” CP at 2487. These affirmative defenses included federal preemption, which Precision asserted in its answer in December 2010 and AVCO asserted in its answer in April 2011. CP at 2477-2478, 2482-2483, 2486-2487, 2490-2491.

⁶ FTI did not file a separate answer to Becker’s second amended complaint because the amendments did not affect FTI. See *Duryea v. Wilson*, 135 Wn. App. 233, 239-40, 144 P.3d 318 (2006).

Becker's second amended complaint contains only a vague and cursory reference to federal regulations. She alleged that "the design and/or construction of the subject product and/or components thereof was not in compliance with specific mandatory government specifications relating to safe design and construction, including the Federal Aviation Regulations (14 CFR et seq)."⁷ CP at 77. Becker did not assert that FTI violated any specific federal regulation or law.

In April 2012, FTI served discovery on Becker, asking her to identify (1) specific regulations within Title 14 of the CFR that FTI violated, and (2) any regulations outside Title 14 that FTI may have violated. CP at 2044-2064. Specifically, FTI asked Becker in Interrogatory 1(g) to identify the federal regulations that FTI's "construction" of the float allegedly violated. CP at 2048. FTI also requested in Interrogatory 1(h) that Becker enumerate the particular regulations, if any, establishing that FTI's welding was subject to the FAA's governance in the first place. *Id.* Becker's response to Interrogatories 1(g) and 1(h) was to "[s]ee response to [1](c)." CP at 2049. Becker's response to Interrogatories 1(c) was "With respect to defendant FTI – None." *Id.*

FTI further queried Becker in Interrogatory 2(g) about which federal regulations FTI's "design[]" of the float allegedly violated. CP at

⁷ Title 14 of the Code of Federal Regulations contains thousands of regulations that apply to everything from space shuttles to pilot schools.

2051. FTI similarly asked Becker to identify the regulations, if any, that subjected FTI to the FAA's oversight in the first place. *Id.* Once again, Becker's response to both interrogatories was "see response [2](c)." CP at 2052. The response to Interrogatory 2(c) was "Plaintiff Becker is not alleging that FTI violated any specific mandatory government design specification." CP at 2051. FTI also asked Becker to identify the sources of her claims for inadequate instructions, failure to warn, and breach of warranty. Becker did not identify any specific federal regulations, laws, or standards. CP at 2053-2058. Her only reference to federal authority was a vague and conclusory statement that "[t]he engine, its carburetor component, including its Delrin float, did not meet federal minimum standards." CP at 2049.

In May 2012, Becker filed a motion to assert punitive damages against FTI under Minnesota law. CP at 88. FTI is a Minnesota corporation doing business in Washington. CP at 33. Becker's motion relied on gross misrepresentations of Mr. Olson's deposition testimony. The motion was denied. CP at 201-214, 231-233.

FTI filed a summary judgment motion in June 2012, arguing that federal law preempted state law standards of care in the field of aviation safety. Because Becker had failed to allege that FTI violated any federal regulations, laws, or standards, her claims could not survive. FTI

alternatively argued that all three of Becker's claims fell within the scope of the Washington Product Liability Act ("WPLA"), ch. 7.72 RCW, and that only "product sellers" or "manufacturers" could be liable under the WPLA. Because FTI did not meet either definition, Becker's claims against FTI were meritless. CP at 234-260. The trial court granted FTI's motion on federal preemption grounds on July 16, 2012. CP at 666, 2281-2343, *see also* Verbatim Report of Proceedings (July 13, 2012).

On July 25, 2012, Becker filed a motion for reconsideration. For the first time, she argued that FTI had waived federal preemption by not explicitly raising the issue in its answer. CP at 804. Becker also argued that the trial court's federal preemption ruling was erroneous. CP at 800-803. Two weeks later, Becker filed a motion for leave to file a third amended complaint against FTI and the other defendants that alleged violations of specific federal regulations. CP at 828-838. In its opposition to the motion for leave, FTI demonstrated how the amendment would be futile because none of the putative regulations applied to FTI. CP at 1129-1142. On August 24, 2012, the trial court denied Becker's motion for leave as to FTI but granted it against the other defendants. CP at 1224-1225. Six days later, the trial court denied Becker's reconsideration motion. CP at 1397-1398.

After FTI was dismissed, six defendants remained in Becker's lawsuit. Four of the six defendants were subsequently dismissed. CP at 1660-1662 (Crest Airpark, Inc.), 1666-1667 (Precision), 1685-1689 (Synergy Systems, Inc.), 1699-1702 (Auburn Flight Service, Inc.). Two defendants remained in Becker's lawsuit—AVCO and Crews. On February 25, 2013, the trial court entered a sanctions order against AVCO for purported discovery violations. CP at 1670-1684. The order deemed the allegations in Becker and Crews' complaints admitted and struck AVCO's affirmative defenses. CP at 1682. Because AVCO's liability was established as a matter of law, the trial was limited to damages only. *Id.* The order also allowed Becker and Crews to assert punitive damages against AVCO. CP at 1683. The lawsuits of Becker and Crews were deconsolidated, CP at 1445, and Crews proceeded with a damages trial against AVCO, which resulted in separate appeal before this Court.⁸ Becker dismissed AVCO by order dated July 30, 2013. CP at 1766-1767.

Becker voluntarily dismissed Crews by stipulated order on July 7, 2014. CP at 1768-1770. Even though Crews was the last remaining defendant in Becker's lawsuit, she asked the trial court to enter a "final judgment," which the trial court signed and filed on August 1, 2014. CP at 1771-1775. On August 28, 2014—48 days after Crews was dismissed—

⁸ *AVCO Corp. v. Crews*, No. 70756-6 (argued Jan. 12, 2015).

Becker filed a notice of appeal with this Court. CP at 1457-1462. FTI filed a motion to dismiss the appeal as untimely. *Spindle* (Motion to Dismiss Untimely Appeal). The Commissioner denied the motion, but invited FTI to brief the issue further before this Court. *Spindle* (Commissioner’s Ruling Denying Motion to Dismiss) at pg. 11.²

IV. ARGUMENT

A. **The trial court properly granted FTI’s summary judgment motion on the basis of federal preemption**

1. Standard of review

This Court reviews summary judgment decisions *de novo* to determine if the moving party is entitled to summary judgment as a matter of law and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). Unsupported conclusory statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Hash v. Children’s Orthopedic Hosp. & Medical Ctr.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987). A nonmoving party “may not rely on speculation [or] argumentative assertions that unresolved factual matters remain”; rather, “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a

² For clarity, the remainder of the procedural background regarding Becker’s untimely appeal is set forth in Section IV.F, *supra*.

material fact exists.” *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986).

2. FTI did not waive federal preemption in the trial court

Becker argues that FTI waived its federal preemption argument in the trial court. App. Br. at pgs. 38-42. Becker did not raise this argument in her summary judgment opposition. *See* CP at 278-284. Instead, she asserted it for the first time in her reconsideration motion, which was denied.¹⁰ CP at 804, 1397. Becker has not assigned error to the denial of her reconsideration motion, and does not separately address the reconsideration motion in her brief. Accordingly, she has failed to preserve her waiver argument. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 128, 138 n.4, 331 P.3d 40 (2014).

In any case, Becker’s waiver argument is meritless. The only Washington state court cited by Becker is *Schneider v. Snyder’s Foods, Inc.*, 95 Wn. App. 399, 976 P.2d 134 (1999), which does not support her argument. *Schneider* simply listed federal preemption as one of four affirmative defenses raised by the defendant. *Id.* at 401. *Schneider* did not

¹⁰ Because Becker raised this argument for the first time in her reconsideration motion when she could have asserted it in her summary judgment opposition, the argument should not be considered by this Court. *See Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (refusing to consider arguments on appeal that were raised for the first time on a reconsideration motion when no explanation was provided for why arguments could not have been raised in the trial court earlier); *JDFJ Corp. v. Int’l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (same).

hold that federal preemption is waived unless raised as an affirmative defense, nor did it hold that federal preemption is an affirmative defense.

In the absence of any binding state law authority, Becker argues by analogy. First, she claims that federal courts in Washington and elsewhere have held that a party must allege federal preemption in an answer. Second, Becker contends that Washington Civil Rule 8(c) and Federal Rule of Civil Procedure 8(c) “follow each other nearly word for word.” App. Br. at pg. 39. She then concludes that in Washington, federal preemption is waived unless pled as an affirmative defense. But this conclusion does not necessarily follow from the premises. “Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance in interpreting the state rule.” *Washburn v. City of Federal Way*, 178 Wn.2d 732, 750, 310 P.3d 1275 (2013). “However, [courts] follow the federal analysis only if [courts] find its reasoning persuasive.” *Id.*

CR 8(c) provides that a responsive pleading “shall set forth . . . any . . . matter constituting an avoidance or affirmative defense.” However, CR 15(b) provides that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” This rule is to be liberally construed. *Burlingham-Meeker Co. v. Thomas*, 58 Wn.2d 79, 81,

360 P.2d 1033 (1961). Federal preemption is a legal doctrine that commonly appears in aviation-related lawsuits. Indeed, AVCO and Precision both pled federal preemption as an affirmative defense in their answers, which FTI incorporated by reference. CP at 2477-2478, 2482-2483, 2486-2487, 2490-2491. Additionally, FTI served discovery requests on Becker that clearly indicated that federal preemption was at issue. *See, e.g.*, CP at 2048. Accordingly, Becker was indisputably on notice that federal preemption was at issue. *See Dep't of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 504, 694 P.2d 7 (1985) (holding that although statute of limitations was not expressly pled, the defense was a “focus” of the case, raised under CR 15(b), and not waived); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 767-68, 733 P.2d 530 (1987); *Shaffer v. Victoria Station, Inc.*, 18 Wn. App. 816, 572 P.2d 737 (1977).¹¹

Additionally, FTI expressly raised federal preemption as an affirmative defense when it explicitly incorporated the affirmative defenses of AVCO and Precision. CP at 2487 (¶ 12.20). CR 10(c) provides that “[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.” In sum, FTI did not waive federal preemption in the trial court.

¹¹ *Rev'd on other grounds*, 91 Wn.2d 295, 588 P.2d 233 (1978)

3. **The trial court correctly concluded that state law standards of care in the aviation safety field are preempted by federal law**

a. *Preemption generally*

Pursuant to 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).¹² There are several different categories of preemption. The first distinction is between express and implied preemption. In the trial court, FTI conceded that this case does not involve express preemption. CP at 243. Oddly, Becker discusses express preemption extensively in her opening brief, while failing to fully address implied preemption—the actual basis of the trial court’s decision. *See* App. Br. at 23-29.

Within the implied preemption category, there is conflict and field preemption. This case concerns 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). The “comprehensiveness” of federal law in the field is an indication of “preemptive intent.” *Id.* Another indication is “pervasiveness of the regulations enacted pursuant to the relevant statute to find preemptive

¹² 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 discusses *Montalvo* in her opening brief.

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

b. *There is field preemption in the aviation safety field*

The question of whether federal law preempts state law for aviation safety was answered in the affirmative in *Montalvo*. *Id.*, 508 F.3d at 470-74. In *Montalvo*, plaintiffs brought, among other causes of action, 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 a medical condition 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.

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, Third, Sixth, and Tenth Circuits reached the same conclusion. *French v. Pan Am Express, Inc.*, 869 F.2d 1, 5 (1st Cir. 1989); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367-68 (3d Cir. 1999); *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 129 (3d Cir. 2010); *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).

Similar to Ninth Circuit listing “airworthiness standards” as a preempted field, the Third Circuit in *Abdullah* also specifically cited regulations concerning “certification and ‘airworthiness’ requirements for aircraft parts” as an area preempted by federal law. *Abdullah*, 181 F.3d at 367-68.

In 2009, the Ninth Circuit decided *Martin v. Midwest Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009), which clarified *Montalvo*'s expansive holding. In *Martin*, the plaintiff alleged that the airplane's stairs were defectively designed because they only had one handrail. The airline settled the claim then sued the manufacturer 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.

In 2013, the Ninth Circuit created a two-part test modeled after *Montalvo* and *Martin*. In *Gilstrap v. United Airlines, Inc.*, 709 F.3d 995 (9th Cir. 2013), the Ninth Circuit first analyzed the Third Circuit's leading FAA preemption case, *Abdullah*, which holds that "federal law establishes the applicable *standards of care* in the field of air safety" but does not preempt state remedies. *Gilstrap*, 709 F.3d at 1005 (quoting *Abdullah*, 181 F.3d at 367 (emphasis in original)).

In so holding, *Abdullah* followed the Supreme Court's reasoning in the landmark case of *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). *Silkwood* established, in the context of atomic energy regulation, that "federal preemption of [state and territorial] standards of care can coexist with state and territorial tort remedies." *Abdullah*, 181 F.3d at 375. The Ninth Circuit soundly adopted the holding of *Abdullah* "that federal law generally establishes the applicable standards of care in the field of aviation safety." *Gilstrap*, 709 F.3d at 1005 (quoting *Montalvo*, 508 F.3d at 468) (emphasis in original).

The *Gilstrap* Court also adopted from *Abdullah* the Third Circuit's "division of the FAA's field preemptive effect into two components: 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.

With this in mind, the Ninth Circuit established a two-part framework for evaluating whether field preemption applies under the FAA. *Id.* "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.” *Id.*

Applying this framework, *Gilstrap* held that the federal Air Carrier Access Act and its implementing regulations preempted the state standard of care under which airlines must provide assistance to passengers with disabilities moving through airports. “The ACAA does not, however, preempt any state remedies that may be available when airlines violate those standards.” *Id.* at 1010.

In 2014, the Eastern District of Washington relied on the two-part test of *Gilstrap* and held that based on field preemption, “federal law *exclusively* establishes the standard of care as to the design, test, and approval of the [aircraft] stall/spin characteristics, *preempting any state standards.*” *McIntosh v. Cub Crafters*, No. 13-3004, 2014 U.S. Dist. LEXIS 21491, at *14 (E.D. Wa. Feb. 19, 2014) (emphasis added) (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).

Applying *Gilstrap* here, two conclusions are clear. First, the particular *area* of aviation commerce and safety implicated in Becker’s lawsuit is governed by pervasive federal regulations. 14 C.F.R. § 21 *et*

seq.—a section governing aircraft products, parts, airworthiness, and certification procedures for airworthiness—contains *hundreds* of regulations administered by the FAA. Likewise, the Federal Register, Parts 13 and 33, establish standards of federal compliance for issuing certificates for engines used on aircraft. *See* CP at 2524-39 (explaining the 1956 federal rules and regulations for airworthiness standards). As such, any applicable state standards of care are preempted. Second, in those areas, the preemption extends only to the standard of care. Thus, under *Montalvo* and progeny, Becker’s claims could have survived only if they alleged violations of federal standards of care, which they did not.

c. The trial court’s preemption ruling is supported by contemporaneous legislative history

Becker relies on the legislative history of the General Aviation Revitalization Act (“GARA”—a federal statute of repose) to suggest that “Congress did not intend FAA implied field preemption.” App. Br. at pg. 25. However, GARA is not helpful because—unlike the FAA—GARA contains an express preemption provision. GARA’s legislative history discusses preempting “state liability law”—not just state-based standard of care or regulation as discussed in *Montalvo* and *Martin*. Again, Becker conflates causes of action with the applicable standard of care.

In this case, there is a significant contemporaneous legislative history favoring preemption (directly from the FAA—not other

congressional acts, such as GARA, which are wholly unrelated to this case). Supportive legislative history is particularly persuasive because the United States Supreme Court held that “contemporaneous legislative history” is illuminating when divining Congress’s purpose. *Edwards v. Aguillard*, 482 U.S. 578, 595, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987); *see also Ventress v. Japan Airlines*, 747 F.3d 716, 721 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 164 (2014) (“The purpose, history, and language of the FAA leads us to conclude that Congress intended to have a single, uniform system for regulating aviation safety.”) (internal quotations omitted); *Abdullah*, 181 F.3d at 369 (the “legislative history reveals that Congress intended the Administrator, on behalf of the [FAA], to exercise sole discretion in regulating air safety. And that is exactly what Congress accomplished through the FAA.”)

First, in the section entitled “Purpose of Legislation,” a House Report on the Federal Aviation Act of 1958 explained that one of the purposes of the Act is to give “[t]he Administrator of the new Federal Aviation Agency . . . full responsibility and authority for the advancement and promulgation of civil aeronautics generally, including promulgation and enforcement of safety regulations.” H.R. Rep. No. 2360, 1958 U.S.C.C.A.N. 3741 (emphasis added).

Second, in a letter to the House Committee on Interstate and Foreign Commerce, the Chairman of the Airways Modernization Board, an executive agency, explained the motivation behind the Act: “It is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation.” *Id.* at 3761.

Finally, a Senate Report describing the Act supports preemption:

[A]viation is unique among transportation industries in its relation to the federal government—it is the only one whose operations are conducted almost wholly within the federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.

S. Rep. No. 1811, 85th Cong., 2d Sess. at 5 (1958) (emphasis added).

In sum, Becker has failed to establish any errors in the trial court’s preemption ruling. Precedent from the Ninth Circuit and the United States Supreme Court, legislative history, and extensive federal regulations all support the trial court’s conclusion. It should not be disturbed.

4. Becker’s second amended complaint did not adequately plead violations of federal standards of care

Becker’s second amended complaint made only cursory references to Title 14 of the Code of Federal Regulations (“C.F.R.”). *See* CP at 77. Becker did not allege that FTI violated any regulations. FTI served interrogatories asking Becker to identify the specific provisions within

Title 14 of the C.F.R. that FTI allegedly violated, as well as any other applicable federal regulations outside Title 14 of the C.F.R. Becker responded that FTI did not violate any particular federal regulations. *See* CP at 2049 (stating “none” in response to interrogatory requesting identification of any federal regulations that FTI allegedly violated), 2051-2052 (same answers for design defect claim), 2053 (no identification of any federal regulations regarding claim for inadequate instructions), 2055 (same for post-sale duty to warn claim), 2058 (same for breach of warranty claim).

FTI moved for summary judgment, arguing that state law standards of care were impliedly preempted by federal law, and that Becker failed to allege violations of federal law standards of care. FTI did not argue that the state law causes of action were preempted.

As explained above, Becker attempts to conflate these two issues by arguing that “if the state law claims remained ‘intact’, they could not be dismissed on the theory they were preempted.” App. Br. at pg. 35. Not so. Becker fails to recognize the distinction between (1) preempting a state law cause of action, which is comprised of several elements, and (2) preempting the state law standard of care, which is only one element in the

cause of action.¹³ FTI acknowledged that Becker's state law causes of action were not preempted, but argued that the claims could only survive if they alleged federal standards of care. Becker did not identify any such standards applicable to FTI, and her claims were rightly dismissed.

Becker also claims that her second amended complaint adequately pled violations of federal standards of care and, alternatively, that she was not required to plead particular standards of care. App. Br. at pgs. 34-36. Both arguments fail. FTI moved for summary judgment, which required Becker to respond by "articulat[ing] the legal grounds for [her] claim." *McGahuey v. Hwang*, 104 Wn. App. 176, 184, 15 P.3d 672 (2001) (summary judgment was proper where plaintiffs failed to articulate specific legal grounds for claim); *see also Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 814, 6 P.3d 30 (2000). Becker was required to articulate all the elements of her claim to survive summary judgment. She could not rely on vague references to an entire title of federal regulations.¹⁴

¹³ *See Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (holding that parties were free to bring state law indemnification cause of action but because the particular field was preempted by the federal Employee Retirement Income Security Act ["ERISA"], the parties had to use ERISA's "prudent man" standard for determining when indemnification was required, not the state law "gross negligence" standard).

¹⁴ Becker's only references to federal standards of care were (1) a vague allegation in her second amended complaint that "the design and/or construction of the subject product and/or components thereof was not in compliance with specific mandatory government specifications relating to safe design and construction, including the Federal Aviation Regulations (14 CFR et seq)," CP at 77; and (2) a conclusory statement in her discovery responses that "[t]he engine, its carburetor component, including its Delrin float, did not

In sum, this Court should affirm FTI's summary judgment dismissal on the basis of federal preemption. The trial court correctly concluded that federal law preempts state law standards of care in the field of aviation safety. Becker acknowledged in her discovery responses that she was not alleging FTI violated any federal regulations or other standards. She attempts to backtrack on that position by asserting that her second amended complaint adequately pled violations of federal standards of care and that, in any event, she was not required to plead such violations. Both arguments are meritless. FTI was properly dismissed based on federal preemption.

B. The trial court properly denied Becker's reconsideration motion

Becker sought reconsideration of FTI's dismissal. CP at 798. Although Becker's notice of appeal designates the order denying her reconsideration motion, her brief does not assign error to the order. CP at 1458; App. Br. at pg. 2; RAP 10.3(a)(4). Nor does her brief separately address the order. Becker should be precluded from appealing the order denying her reconsideration motion. *SentinelC3*, 181 Wn.2d at 138 n.4

If this Court reaches the order denying reconsideration, it should be affirmed. An order denying reconsideration is reviewed for abuse of discretion and reversed only if it is manifestly unreasonable, exercised on

meet federal minimum standards." CP at 2049. These were woefully inadequate to survive summary judgment.

untenable grounds, or exercised for untenable reasons. *Meridian Minerals Co. v. King Cnty.*, 61 Wn. App. 195, 203-04, 810 P.2d 31 (1991).

Becker argued in her reconsideration motion that FTI should not have been dismissed on federal preemption grounds because carburetor floats are not “pervasively regulated at the federal level.” CP at 803. She contends that “[t]he only general [federal] regulation [applicable to carburetor floats] is that they be airworthy and in a safe condition,” and that this general regulation “does not conflict with Washington product liability law.” App. Br. at pg. 31. This argument is without merit.

Becker’s error is twofold. First, she assumes that implied field preemption occurs only when a particular *component*, as opposed to an *area* of aviation, is pervasively regulated. Second, she asserts that the float at issue in this case was not pervasively regulated. *See* App. Br. at pg. 28-29. Becker heavily relies on *Martin* while completely ignoring *Montalvo*, upon which the trial court relied. However, both *Montalvo* and *Martin* hold that implied field preemption can exist when an area within aviation—rather than a particular component—is thoroughly regulated by federal law. *See Montalvo*, 508 F.3d at 472-75; *see also Martin*, 555 F.3d at 811.

The FAA has extensively regulated the field of aviation safety, especially the process for testing and certifying aircraft component parts

for airworthiness. Chapter 21 of Title 14 of the Code of Federal Regulations, entitled “Certification Procedures for Products and Parts,” sets forth pervasive regulations for airworthiness. Because this field is preempted, Becker’s claims fail insofar as they are based on state law standards of care. And Becker has not alleged any violations of federal standards, regulations, or laws by FTI.

Because she did not assign error or devote a specific section of her brief to the order denying her reconsideration motion, FTI has responded to the other arguments from Becker’s reconsideration motion throughout this brief.¹⁶ In any event, Becker has not shown that denying Becker’s reconsideration motion was an abuse of discretion.

C. The trial court properly denied Becker’s post-summary judgment motion for leave to file an amended complaint against FTI

This Court reviews a trial court’s denial of a motion to amend pleadings for abuse of discretion. *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986). “‘The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.’” *Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 889, 155 P.3d 952 (2007) (internal quotation omitted). “In

¹⁶ See Section IV.A.4 (addressing argument that Becker adequately pled violations of federal standards of care and that, in the alternative, she was not required to plead them); Section IV.A.2 (addressing waiver argument). These were both arguments that Becker raised for the first time in her reconsideration motion, though nothing precluded her from raising them in her summary judgment opposition. Accordingly, this Court should not consider these arguments. *Wilcox*, 130 Wn. App. at 241; *JDFJ Corp.*, 97 Wn. App. at 7.

determining prejudice, a court may consider undue delay and unfair surprise as well as the futility of amendment.” *Id.* (citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987)). Becker argues that a post-summary judgment amendment would not have prejudiced FTI. App. Br. at pg. 38. She is mistaken.

Becker had ample opportunity to amend her complaint before FTI was dismissed on summary judgment. “When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.” *Doyle v. Planned Parenthood of Seattle-King Cnty.*, 31 Wn. App. 126, 130, 639 P.2d 240 (1982). Becker unsuccessfully attempted to amend her complaint in May 2012 to assert punitive damages, but did not use that opportunity to allege violations of specific federal regulations, even though FTI had served discovery on Becker in April 2012 asking her to identify specific federal regulations that FTI allegedly violated. CP at 88, 2044-2064. Accordingly, Becker’s post-summary judgment motion to amend was untimely. *See Haselwood*, 137 Wn. App. at 890.

Becker’s post-summary judgment motion for leave to amend was also futile. “In addition to timeliness, the court may consider the probable merit or futility of the amendments requested.” *Doyle*, 31 Wn. App. at

130. “A lawsuit is futile where there is no evidence to support or prove existing or additional allegations and causes of action.” *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 279, 191 P.3d 900 (2008). “Futility is a reasonable ground for denying a motion to amend a complaint.” *Id.* Becker’s proposed third amended complaint cited nine provisions of the Federal Aviation Regulations (“F.A.R.”)¹⁸ and six provisions of the Civil Air Regulations (“C.A.R.”). CP at 897. In the trial court, FTI presented a chart establishing why none these provisions applied to FTI. CP at 1137-1139. The chart is reproduced as Appendix A to this brief.

Becker’s proposed third amended complaint also included a catch-all phrase of “including but not limited to.” CP at 897. This language does not adequately plead a federal standard of care because it is the same type of vague and general statement that was contained in Becker’s second amended complaint, which did not survive summary judgment. *McGahuey*, 104 Wn. App. at 184.

The only authority potentially adverse to FTI is *Sikkelee v. Precision Airmotive Corp.*, in which a district court in Pennsylvania found implied field preemption and allowed the plaintiff to amend her complaint “so that she can list violations of federal regulations by number.” *Id.*, 731 F. Supp. 2d 429, 439 (M.D. Pa. 2010). The plaintiff did not set forth what

¹⁸ Title 14 of the Code of Federal Regulations is commonly known as the Federal Aviation Regulations or FAR.

regulations she intended to assert and there was no analysis of whether those regulations applied to the defendants. Here, Becker set forth the federal regulations that she sought to assert against FTI and none of them applied.¹⁹ Thus, “there [wa]s no legal basis for her claim to stand.” *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 339, 229 P.3d 893 (2010).²⁰ Accordingly, the trial court properly denied Becker’s post-summary judgment motion to amend.²¹ See *Oliver v. Flow Int’l Corp.*, 137 Wn. App. 655, 664-65, 155 P.3d 140 (2006).

D. This Court should affirm FTI’s summary judgment dismissal on the alternative basis that all three of Becker’s claims are grounded in the WPLA and FTI is not a product seller or manufacturer

This Court may affirm a trial court’s disposition of a summary judgment motion on any ground supported by the record. *Washburn*, 178 Wn.2d at 753 n.9; *Fagg v. Bartells Asbestos Settlement Trust*, 184 Wn. App. 804, 815 n.6, 339 P.3d 207 (2014). This Court may affirm FTI’s dismissal on the alternative ground that (1) all three of Becker’s claims are based in the Washington Product Liability Act (“WPLA”); (2) only

¹⁹ Although Becker made no reference in her appellant’s brief, Becker responded to FTI’s summary judgment dismissal by disclosing an expert witness at the eleventh hour. CP at 1051-1070. This expert, however, did *not* opine that FTI was subject to any regulations; instead, he concluded that the carburetor float had to comply with federal regulatory standards. This was never disputed. But only PMA and Type Certificate holders bear the obligation of ensuring that aircraft components meet federal regulatory standards. FTI has never been a PMA or Type Certificate holder. The disclosure of this expert witness was not only extremely untimely, but his testimony also had no probative value.

²⁰ *Rev’d on other grounds*, 173 Wn.2d 643 (2012).

²¹ Becker will likely argue that the trial court applied a double standard because Becker was allowed to file a third amended complaint against defendants other than FTI. Becker cannot be heard to complain on this point. Unlike the remaining defendants, FTI had already been dismissed when Becker sought leave to amend her complaint.

product sellers or manufacturers may be liable under the WPLA; and (3) FTI does not meet the definition of either.

1. All three of Becker's claims are based in the WPLA

Becker's second amended complaint asserts three claims against FTI: (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. App. Br. at pg. 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.²² *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. App. Br. at pg. 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."²³ CP at 76-77. This claim falls under RCW 7.72.030(2)

²² The WPLA is attached herewith as Appendix B.

²³ 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.

of the WPLA, which imposes strict liability on a product manufacturer for products that are not reasonably safe in construction.

Second, Becker's negligence claim alleges that "[t]he crash . . . was caused by the negligence . . . of . . . FTI . . . in that the subject product and/or components thereof were negligently . . . designed, manufactured, assembled, [etc.]." CP at 77. This claim mirrors RCW 7.72.040(1)(a) of the WPLA, which creates liability for negligent product sellers.

Third, Becker's claim for breach of warranty arises out of the RCW 7.72.040(1)(b) and RCW 7.72.030(2) of the WPLA because the WPLA is the only source of warranty claims related to product liability actions. CP at 78-79; *Wash. Water Power Co.*, 112 Wn.2d at 853.

2. 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 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.

3. 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) (interpreting the WPLA). Importantly, 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 1989.²⁴ 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 Industries, Inc.*, 119 Wn. App. 249, 260, 76 P.3d 1025 (2003), *review denied*, 151 Wn.2d 1016 (2004). The undisputed evidence establishes that 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

²⁴ In the trial court, Becker tried to create a genuine issue of material fact by citing to an excerpt from Mr. Olson’s deposition when he was asked, “You were selling [Precision] defective floats, right” and he responded, “Yes.” CP at 272, 369. This out-of-context quote does not create a genuine issue of material fact. Read in full context, the excerpt establishes Mr. Olson was concerned that the carburetor floats returned to Precision may have had leaks. Mr. Olson was not testifying that FTI was “engaged in the business of selling” carburetor floats. Becker was attempting to create an “unreasonable inference,” to which he was not entitled on summary judgment. *Marshall v. Ac&S, Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (1989).

“[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.*, 119 Wn. App. 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, all of Becker’s claims undeniably fall within the scope of the WPLA, which only imposes liability on “product sellers” or “manufacturers.” FTI does not meet either definition. As such, this Court may affirm FTI’s summary judgment dismissal on this alternative basis.

E. The trial court properly denied Becker's pre-summary judgment motion for leave to assert punitive damages against FTI

1. Standard of review

This Court reviews a trial court's denial of a motion to amend pleadings for abuse of discretion. *Del Guzzi Constr. Co.*, 105 Wn.2d 878 at 888. A trial court's decision will be reversed under this standard only if it is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *SentinelC3, Inc.*, 181 Wn.2d at 144.

Becker assumes that Minnesota's de novo standard of review applies. App. Br. at 42-43. Becker provides no analysis of why this Court should apply the standard of review used by Minnesota courts. This Court should not consider arguments that are unsupported by pertinent authority or meaningful analysis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, where the choice of law is disputed, Washington's standard of review should apply. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 266, 259 P.3d 129 (2011); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008).

2. Under the "most significant relationship" test, Washington law controls the issue of punitive damages

In the trial court, Becker failed to establish that Minnesota law applied to the issue of punitive damages. To settle choice of law questions, Washington uses the most significant relationship test as articulated by Restatement (Second) of Conflict of Laws § 145 (1971).

FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 967, 331 P.3d 29 (2014). These factors include (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

The only connection between this case and Minnesota is that FTI performed its welding services there. In contrast, Washington has an overwhelming number of contacts: (1) the aircraft crash occurred in Washington; (2) the decedents were all Washington residents; (3) the aircraft was rented in Washington from a Washington corporation; (4) the aircraft was overhauled in 2001 by a Washington corporation; (5) a Washington corporation performed yearly inspections on the aircraft; (6) Precision, who designed the float and manufactured the carburetor, is a Washington corporation; (7) the companies who molded the plastic parts for the floats are both Washington corporations; and (8) after the float was welded in Minnesota, it was shipped to Washington, where it was inspected, tested, and sold by Precision, a Washington corporation. CP at 55-60, 1832.

Under the most significant relationship test, Washington law controls the issue of punitive damages because a vast majority of the contacts occurred here. Punitive damages are prohibited absent express legislative authorization. *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996). The legislature did not authorize punitive damages under the WPLA, under which Becker brings all three of her claims. *McFarland v. App. Pharms. LLC*, No. 10-11746, 2011 U.S. Dist. LEXIS 62560, at *13 (W.D. Wash. June 13, 2011) (“However, plaintiffs’ claim for punitive damages cannot be saved by repleading because the WPLA does not provide for punitive damages.”).

Singh v. Edwards Lifesciences Corporation, the only case relied on by Becker, is inapposite. There, a California corporation manufactured a heart monitor device with faulty software. During a heart bypass surgery in Washington, the monitor overheated and damaged the patient’s heart. The California corporation knew about a flaw in the software prior to the surgery, but did not recall the monitor or warn any users of the monitor. Instead, the corporation fixed the software flaw only when the monitors were returned to California for other repairs. The hospital in Washington had returned three of its eleven monitors to California for repairs. The corporation fixed the software flaw on those three monitors, but knew that the remaining eight monitors were defective.

The Court of Appeals upheld the award of punitive damages because the corporation committed fraud, and “Washington has no interest in protecting companies who commit fraud.” *Singh*, 151 Wn. App. 137, 147-48, 210 P.3d 337 (2009). In contrast, the governmental interest of California was significant: “The conduct that serves as the basis of the punitive damages award here occurred in California and that state has an interest in deterring its corporation from engaging in such fraudulent conduct.” *Id.* at 148. This case is distinguishable from *Singh* because a vast majority of the contacts occurred in Washington, whereas in *Singh* there were significant contacts in California and California had a strong interest in applying punitive damages to a California corporation that engaged in fraud. Accordingly, the trial court correctly refused to allow Becker to plead punitive damages.²⁵

3. **Assuming Minnesota law applies to the issue of punitive damages, Becker failed to offer any evidence to support the imposition of punitive damages**

Minnesota allows recovery of punitive damages only “upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.”²⁶ Minn. Stat. § 549.20(1)(a).

²⁵ The trial court allowed Becker to seek punitive damages against ACVO at trial. CP at 1683. However, this was part of the trial court’s sanctions order against AVCO. There was no choice-of-law analysis performed by the trial court. The trial court’s sanctions order also deemed as admitted Becker’s complaint against AVCO and struck AVCO’s affirmative defenses. CP at 1682-1683.

²⁶ A defendant has “deliberate disregard for the rights or safety of others” if the defendant “has knowledge of facts or intentionally disregards facts that create a high probability of

The defendant's conduct must be "done with malicious, willful, or reckless disregard for the rights of others." *Admiral Merchants Motor Freight v. O'Connor & Hannan*, 494 N.W.2d 261, 1992 Minn. LEXIS 371, at *17 (Minn. 1992).

Under Minnesota law, a plaintiff is allowed to plead punitive damages only if the plaintiff's motion and supporting affidavits would "reasonably allow a conclusion that clear and convincing evidence will establish" that the defendant's conduct met the standard under § 549.20. *McKenzie v. Northern States Power Co.*, 440 N.W.2d 183, 184 (Minn. Ct. App. 1989). "Punitive damages are an extraordinary remedy to be allowed with caution and within narrow limits." *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 904 (Minn. Ct. App. 2009). Becker offered no evidence to satisfy this high threshold.

As in the trial court, Becker's argument for punitive damages relies on a gross distortion of Mr. Olson's deposition testimony. *See* CP at 203-207. Becker claims that this testimony "establishe[s] that FTI knew it was selling defective floats that were being installed on aircraft." App. Br. at pg. 47. As explained above, Mr. Olson's testimony establishes no such thing. Becker also cites to a declaration of Dr. Paul Gramann, which was

injury to the rights or safety of others" and either (1) "deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others" or (2) "deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others." Minn. Stat. § 549.20(1)(b).

submitted by Becker in opposition to FTI's summary judgment motion. CP at 642-646. Becker did not submit this declaration with her motion for leave to assert punitive damages, and therefore Dr. Gramann's declaration should not be considered as support for her punitive damages request. *See* CP at 99-200. In any event, the speculative opinions of Dr. Gramann do not satisfy the prima facie evidentiary threshold.

Because FTI was properly dismissed on summary judgment, this Court need not reach the punitive damages question. If it does, this Court should affirm the trial court's denial of Becker's motion for leave to assert punitive damages against FTI.

F. Becker's appeal is not timely

Finally, this Court need not reach any of the substantive issues discussed above because Becker's appeal is untimely and should be dismissed. Becker's dismissal of Crews with prejudice on July 10, 2014, was the "final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties." CP at 1768-1170; RAP 2.2(d). Becker had 30 days from July 10, 2014, to file her notice of appeal. RAP 5.2(a). She did not file until August 28, 2014. CP at 1457-1462. This was 48 days after Crews had been dismissed.

FTI filed a motion to dismiss Becker's appeal, which was heard by the Commissioner of this Court. The Commissioner summarily dismissed

most of Becker's arguments, but ultimately concluded that AVCO may have had an outstanding claim, count, right or liability when Crews was dismissed. *Spindle* (Ruling) at pg. 10. The Commissioner thus denied FTI's motion to dismiss, but expressly provided that FTI may address the timeliness issue in its brief on the merits.

After the trial court denied AVCO's motion to withdraw three previously-entered sanctions orders, CP at 1698, Becker filed a motion to dismiss AVCO with prejudice. CP at 1703. AVCO opposed this motion, arguing that dismissal was premature because AVCO intended to seek reconsideration of the trial court's refusal to withdraw the previously-entered sanctions orders. CP at 1709-1713. Five days later, AVCO filed the reconsideration motion. CP at 1756-1763. The trial court did not rule on the reconsideration motion; instead, it granted Becker's motion to dismiss AVCO with prejudice. CP at 1766-1767.

The Commissioner expressed reservation that, when Crews was dismissed in July 2014, AVCO's motion for reconsideration may still have been pending. *Spindle* (Ruling) at pg. 10. However, the trial court's dismissal of AVCO necessarily denied AVCO's motion for reconsideration. When Crews was dismissed on July 10, 2014, there were no outstanding "claims, counts, rights, and liabilities." RAP 2.2(d). Even though it did not contain the precise language of a final judgment, Crews'

dismissal order nevertheless represented the final judgment that brought up previous orders for appeal. Because Becker did not file her notice of appeal within 30 days from July 10, 2014, this Court should dismiss her appeal as untimely.

V. CONCLUSION

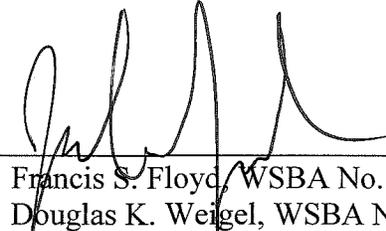
For the reasons above, FTI respectfully requests that this Court affirm the trial court on all grounds or, in the alternative, dismiss Becker's appeal as untimely.

Dated this 23 day of April, 2015.

Respectfully submitted,

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By



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CERTIFICATE OF SERVICE

I, Sopheary Sanh, hereby certify that I filed the foregoing with the Court of Appeals, Division I, and served same upon the following counsel of record via U.S. mail, email and/or legal messenger below:

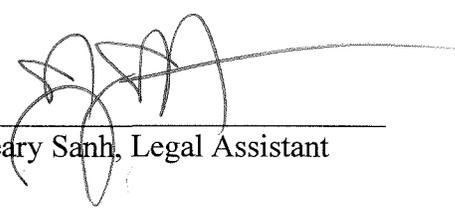
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DATED this 23rd day of April, 2015 at Seattle, Washington.



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