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

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioner,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT
FORWARD TECHNOLOGY INDUSTRIES, INC.

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ORIGINAL

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I. INTRODUCTION

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 Title 14 of the Code of Federal Regulations and outside Title 14) 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.¹ 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,

¹ 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.

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 Becker’s reconsideration motion and its denial of Becker’s request for leave to amend the complaint against FTI.² 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 the trial court correctly granted FTI summary judgment dismissal because regulations adopted by the FAA pervasively

² 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.

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?

2. Whether this Court should affirm the trial court's denial of Becker's reconsideration motion because FTI never waived its affirmative defense of implied field preemption, and Becker fully briefed the application of the defense at the summary judgment stage?
3. Whether this Court should affirm the trial court's denial of Becker's motion for leave to file an amended complaint alleging violations of federal regulations as to FTI because FTI was already dismissed from the case, and FTI had already asked Becker to specifically identify which regulations FTI violated, and Becker answered "none"?
4. Whether this Court should affirm the trial court's summary judgment dismissal of FTI on the alternative basis that all of Becker's claims are based in the Washington Product Liability Act, but only product sellers or manufacturers may be liable, and FTI is neither?

IV. SUPPLEMENTAL ARGUMENT

A. FTI WAS CORRECTLY DISMISSED ON PREEMPTION GROUNDS

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. *Braaten*, 165 Wn.2d 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).³ 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, as part of the preemption analysis [courts] must consider whether

³ 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.

the regulations evidence a desire to occupy a field completely.” *Id.* at 470-71.

Congress adopted the FAA to create a “uniform and exclusive system of federal regulation” in the area of aviation safety and commerce.⁴ *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).⁵ In 1994, the House Judiciary Committee “noted that general aviation is unique because it is exclusively, and thoroughly, regulated by the federal government.”⁶ This Court has similarly acknowledged the pervasiveness of 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

⁴ 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.

⁵ *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).

⁶ 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).

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.⁷ “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).

As the cases above demonstrate, implied field preemption analysis begins with identifying the specific area and then determining whether that

⁷ 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.

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).⁸ 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.⁹ Here, the specific area of the engine’s fuel system, including the carburetor and its 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

⁸ “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.

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

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.

Thus, Becker's claims could survive only if she alleged federal standards of care, which she did not. "[A] hypothetical state remedy based on an unsupported federal standard of care does not warrant a trial as to FTI." *Id.* at 82. This Court should affirm FTI's summary judgment dismissal on preemption grounds.

B. THE TRIAL COURT PROPERLY RULED THAT FTI DID NOT WAIVE ITS FEDERAL PREEMPTION DEFENSE, AND THAT BECKER'S MOTION FOR LEAVE TO AMEND WAS UNTIMELY AS TO FTI

In its reconsideration motion, Becker argued for the first time that FTI waived the defense by failing to plead it. The trial court denied the motion and the Court of Appeals affirmed. This Court should also affirm.

An order denying reconsideration is reviewed for abuse of discretion. *Meridian Minerals Co. v. King Cnty.*, 61 Wn. App. 195, 203-204, 810 P.2d 31 (1991). Becker's waiver argument is meritless because FTI expressly raised federal preemption as an affirmative defense when it explicitly incorporated the affirmative defenses (including federal preemption) of its co-defendants. CP at 2487 (¶ 12.20). See CR 10(c). Additionally, federal preemption was clearly at issue under CR 15(b), and therefore was constructively raised in the pleadings. Finally, if a failure to plead an affirmative defense under CR 8(c) "does not affect the substantial rights of the parties, the noncompliance will be considered harmless." *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975). Becker failed to establish that she was surprised or prejudiced by FTI's affirmative defense. She never objected in her summary judgment opposition or in oral argument. Nor did she express surprise. In fact, Becker *extensively briefed* the issue of field preemption. CP 278-84. Accordingly, any objection to a failure to plead an affirmative defense is "waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense." *Mahoney*, 85 Wn.2d at 100. The trial court did not abuse its discretion in denying Becker's reconsideration motion.

Becker also claims that the trial court should have granted her leave to amend her complaint to allege specific violations of federal standards of care. However, Becker requested this leave *after* FTI was dismissed from the case, and leave was correctly denied.

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). Becker's motion for leave to amend was untimely and futile, as Becker had several years to assert specific federal regulations against FTI but waited until after FTI was dismissed to do so. Further, FTI demonstrated that all the regulations Becker sought to assert against FTI did not apply and, therefore, the amendments would have been futile. The trial court properly denied Becker's post-dismissal motion for leave to amend. *See Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 890, 155 P.3d 952 (2007) ("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.") (internal quotation omitted).

C. 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 v. City of Federal Way*, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275 (2013). This Court should affirm FTI's dismissal on the alternative basis that Becker's claims are all based on the Washington Product Liability Act, which does not apply to FTI because it is neither a manufacturer nor product seller.

1. ALL THREE OF BECKER'S CLAIMS ARE BASED IN THE WPLA.

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."¹⁰ 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. 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

¹⁰ 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.

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). 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, 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.

V. CONCLUSION

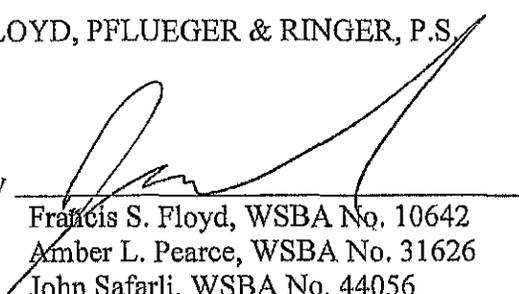
For the foregoing reasons, FTI respectfully requests that this Court affirm the trial court on all grounds.

Dated this 2nd day of September, 2016.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.

By



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CERTIFICATE OF SERVICE

I, Jennifer Jimenez, hereby certify that I filed the foregoing with the Supreme Court and served same upon the following counsel of record via email and legal messenger:

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Subject: Becker v. FTI, Cause No. 92972-6

Good Afternoon,

Please find attached Supplemental Brief of Respondent Forward Technology Industries, Inc. for filing in this matter. The relevant case information is listed below and all counsel of record have been copied on this email.

Case Name: ESTATE OF VIRGIL VICTOR BECKER, JR., Petitioner, v. FORWARD TECHNOLOGY INDUSTRIES, INC., Respondent.	Cause No. 92972-6 Attorney for: Respondent FORWARD TECHNOLOGY INDUSTRIES, INC
Attorneys: Francis S. Floyd, WSBA No. 10642 ffloyd@floyd-ringer.com	Document: Supplemental Brief of Respondent Forward Technology Industries, Inc.

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

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