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Case Number 13,2012

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

LISABETH MOORE, Individually and as Personal Representative of the Estate of Daniel Hart, Deceased, *et al.*,	:	No. 13, 2012
Plaintiffs Below, Appellants,	:	Court Below - Superior Court of the State of Delaware in and for New Castle County C.A. No. N09C-12-010 MMJ
v.	:	
HAWKER BEECHCRAFT CORPORATION,	:	
Defendant Below, Appellee.	:	

APPELLEE'S ANSWERING BRIEF

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Dated: July 5, 2013

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NATURE OF PROCEEDINGS

The trial court correctly determined that plaintiffs' claims against Hawker Beechcraft Corporation ("HBC" or "Beech") were barred by the statute of repose provided by the General Aviation Revitalization Act ("GARA") of 1994, 49 U.S.C. § 40101 (Note 1994); Pub. L. 103-298, 108 Stat. 1552 (1994). The order granting HBC's motion for summary judgment should be affirmed.

In GARA, the United States Congress preempted state law and imposed a nation-wide, 18-year statute of repose to all manufacturers of general aviation aircraft. It is uncontroverted that the general aviation aircraft involved in this case, a Duke, was over 37 years old when the accident occurred.

Plaintiffs relied on GARA's fraud and new parts exceptions in an attempt to withstand summary judgment. Once HBC, as movant, established GARA's core elements, it became plaintiffs' burden to come forward with facts supporting each element of the fraud or new parts exceptions. Despite the volume of proffered expert opinions, plaintiffs could not meet their burden to establish a disputed question of material fact concerning GARA's application. Summary judgment was properly granted.

Plaintiffs' warranty claim and motion for judgment on the pleadings were equally unavailing. The trial court's order granting summary judgment on all claims should be affirmed.

RESPONSE TO PLAINTIFFS' SUMMARY OF ARGUMENT

1. Denied. The trial court correctly determined that there were no issues of material fact concerning GARA's fraud, new parts, and warranty exceptions. Plaintiffs offered unsupported allegations, not evidence, in opposition thereto.

2. Denied. Plaintiffs did not identify any "required information" that was misrepresented, concealed, or withheld from the FAA during the Duke's initial certification. There is no evidence of HBC's scienter, or of a causal connection between failure to relay required information and the accident; and each is independently required to defeat summary judgment under the fraud exception.

3. Denied. Plaintiffs have not offered any evidence that HBC knowingly falsified and manipulated the post-certification flight test of the Duke.

4. Denied. Plaintiffs have no evidence that HBC knowingly failed to relay required information related to the continuing airworthiness of the Duke.

5. Denied. Plaintiffs contend that components of the flap system may have been overhauled or replaced during the repose period. But there is no evidence that a new 90° drive (the failed part) was installed; the exception requires installation of a new part within 18-years that is causally related to the accident.

6. Denied. Plaintiffs' contention that the airworthiness certificate constitutes a written warranty is incorrect as a matter of law. The certificate speaks only to the time of issue, and recognizing it as a written warranty extending GARA's repose period would emasculate GARA.

STATEMENT OF FACTS

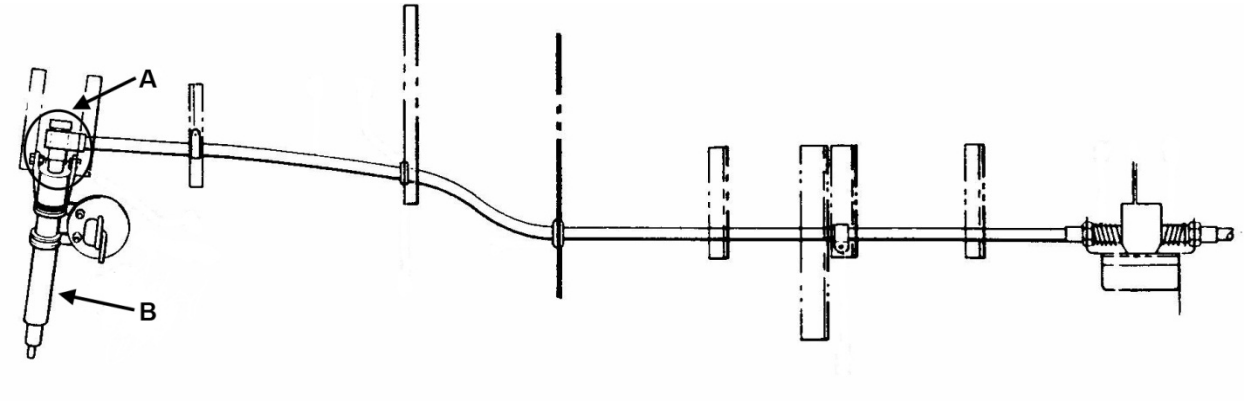
Plaintiffs sued HBC in its capacity as the manufacturer of a Beech Model 60 Duke aircraft, serial number P-105 ("Subject Aircraft"). (A45-A48.) Manufacture of the Subject Aircraft was completed by Beech Aircraft Corporation in 1969. (B70 at ¶ 4.) On October 30, 1970, the Subject Aircraft was sold and the aircraft was delivered to its new owner. (B70 at ¶ 5.)

On the accident date, December 4, 2007, the Subject Aircraft had been in service over 37 years. (B70 at ¶ 6.) HBC had not maintained, operated, modified, repaired or possessed the aircraft since its initial delivery in 1970. (B71 at ¶ 7.)

Claims against HBC resulting from this accident are barred, unless GARA's exceptions apply. To avoid GARA's bar, plaintiffs tried to raise fact questions to trigger the fraud, new parts and warranty exceptions. The trial court correctly held that plaintiffs failed to raise fact questions regarding any exception.

A. Background on Flap System Design and Fractured Key

The following diagram depicts the Duke flap system's central drive motor (to the right) with a flex cable leading to one of the flap system's 90º drives (A) and actuator (B) (to the left). (B100 at ¶ 5.)



The flex cable, 90º drive and actuator operate the flap on the left wing. A similar flex cable, 90º drive and actuator are attached through the same drive motor (to the right) and extend to the flap on the aircraft's right wing. (B100.) Before the pilot ("Hart") set the flaps for takeoff, a key on the output shaft of the right flap's 90º drive separated, or fractured, from the 90º drive's output shaft. This was the only part on the Subject Aircraft's flap system that failed. (A956 at p. 77:24 – 79:23.) The key on the 90º drive allows the 90º drive to rotate the threaded flap actuator shaft in and out, extending and retracting the flaps. (B100 at ¶ 7.) Following fracture of the key, the inability of the right flap to respond to the Subject Aircraft's flap control system allowed the flaps to become out of sync, or asymmetric. Due to this asymmetry, the aircraft would tend to roll left unless corrected by the pilot.

B. No Evidence Triggering Fraud Exception

1. Required Information

GARA's fraud, or knowing misrepresentation, exception provides relief from GARA's repose if a plaintiff can show that the manufacturer defrauded the FAA by (1) *knowingly* (2) misrepresenting, concealing or withholding (3) *required information* from the FAA that is (4) material and relevant and (5) the fraud *caused* the accident. Plaintiffs offered no facts supporting any of the five essential elements of the exception—and the absence of just one element entitled HBC to summary judgment. (*Infra* at 27.)

GARA's fraud exception arises from a manufacturer's duty to provide *required information* about its products to the FAA. Material information relating to initial certification of an aircraft model or continuing airworthiness obligations under the regulations are examples of information that is generally "required." In general, a manufacturer or type certificate holder is required under 14 C.F.R. §21.3 to report certain failures, malfunctions, and defects to the FAA. This reporting requirement includes monitoring and feedback between industry and FAA.

Reporting under 14 C.F.R. §21.3 may be accomplished in writing, by telephone or in meetings with the FAA. (B156 at ¶ 34.) Under 14 C.F.R. §21.3, repeated reporting of an issue is not required. (*Id.*)

2. Use of Delegation Option Authorization

The Model 60 Beech Duke was certified through the use of Delegated Option Authorization ("DOA"). During aircraft certification, the FAA determines early on which specific findings it wants to make itself and which findings it will delegate with oversight. (B152 at ¶ 17.) The FAA also identifies the data it needs to support a certification project. (*Id.*)

The FAA issued HBC a DOA (DOA-CE-2) under 14 C.F.R. §21(J) long before certification of the Model 60 Beech Duke. (B152 at ¶ 19.) The HBC DOA is the organization that represents and assists the FAA in ensuring that HBC shows compliance with the applicable Federal Aviation Regulation ("FAR") requirements. (B152 at ¶ 20.) The DOA is not the whole company. (*Id.*) Rather, the DOA is an organization within HBC that represents the FAA in the completion of certification activities. (*Id.*)

DOA personnel are considered to be the FAA when performing their functions, and frequent communications take place between the FAA and the HBC DOA. (B153 at ¶ 22.) These communications include phone calls, written communications and frequent formal and informal coordination meetings. (*Id.*) In addition, the FAA conducts audits of the DOA and also reviews a representative sample of the DOA's reports and approvals to ensure the representative is acting according to FAA rules and regulations. (B153 at ¶ 21.)

3. Interaction Between HBC and the FAA

As with all type certification projects, FAA aircraft certification flight test pilots and engineers participated in the testing for certification of the Duke. (B157 at ¶ 42.) Based on the rigorous analysis and testing completed by HBC, DOA, and the FAA, the FAA determined that HBC demonstrated compliance with all applicable airworthiness requirements for certification of the Duke. (B158 at ¶ 43.) If the FAA did not find that HBC showed compliance with all of the regulations, it would not have issued a Type Certificate. (*Id.*)

Yet, plaintiffs claim that HBC did not comply with all certification requirements. They devote significant space in their opening brief to the interconnectedness of the Duke's flaps. The design of the flap system at the time of certification of the Duke was governed by FAR 23.701, which required that the Duke's flaps *either* be mechanically interconnected *or* that the aircraft be demonstrated to have safe flight characteristics with asymmetric flaps. (B186.) HBC, the DOA and the FAA relied upon the Duke flap system's interconnection through the drive motor to satisfy the "mechanically interconnected" option of compliance with FAR 23.701. (B78-82; B181-B182.)

Plaintiffs' own experts recognize the Duke's flap system is mechanically interconnected through the drive motor. (B355 at 76:19-25; B357 at 134: 13-21.) Indeed, one of plaintiffs' allegations is that the design of the flex drive cable

connection to the motor allowed the cable to become disengaged from the motor. This argument acknowledges that the flap system was mechanically interconnected to begin with. In order for the flex drive cable to become disconnected, the flap system must have first been interconnected. Based on the "mechanically interconnected" design employed in the Duke flap system, HBC was not required to satisfy FAR 23.701 through flight testing for initial certification.

The Duke was initially certified in 1968. In February 1970, the FAA asked HBC to flight test the Duke with asymmetric flaps. (B158; B184.) The FAA's letter referenced a "misunderstanding" between HBC and FAA, because the FAA thought HBC was flight testing the Duke with asymmetric flaps rather than relying solely on the flap system's interconnectivity. (*Id*.) The FAA's letter acknowledged that HBC believed it had disclosed its reliance on mechanical interconnectivity to satisfy FAR 23.701. (*Id*.) However, "regardless of the misunderstanding," the FAA requested flight testing to confirm compliance with FAR 23.701. (B814.) The FAA did not restrict or direct how the testing was to be performed. (*Id*.)

Plaintiffs allege that HBC lied to the FAA when it represented that the Duke's flap system was interconnected for compliance with FAR 23.701 and that the FAA's flight test request proves the lie. Plaintiffs' allegation that the FAA "specifically stated that the flap system was not interconnected" is patently false. (Appellants' Br. at 23, and throughout.) Plaintiffs cite to the FAA's letter as

authority for this bald allegation. Despite plaintiffs' repeated claims that the FAA determined the flap system was not interconnected, the FAA's letter stated, "it is our position that the existing flexible shaft flap ***interconnections*** are unreliable and split flap configurations must consequently be investigated." (B184, emphasis added.) Plaintiffs contend that the "FAA confirmed HBC had misled it" in the February 1970, letter, and that this FAA letter "confirms HBC concealed the lack of investigation." (B307.) (Appellants' Brief at 6-7.) These statements do not appear in the FAA's letter or in any other communication.

In fact, nowhere in any of the numerous pages of FAA correspondence does the FAA make any of the findings alleged and relied upon by plaintiffs. In no way does the FAA's February 1970 letter state that HBC misled it or concealed any information. Yet plaintiffs repeatedly make such groundless statements. Plaintiffs' bald allegations are wholly lacking in evidentiary support. The trial court appropriately disregarded these baseless statements.

The FAA's February 1970 letter does not accuse HBC of making any misrepresentation about interconnectivity, much less a *knowing* misrepresentation as required by GARA. (B307.) HBC believed that the flap system was interconnected, and it told the FAA just that. Instead of withholding required information, HBC openly communicated its belief to the FAA. Having different beliefs than the FAA does not trigger GARA's fraud exception. (*Infra* at 30.)

The trial court correctly observed that plaintiffs did not present any evidence that HBC's alleged misrepresentation regarding interconnectivity caused the accident. Indeed, *by requesting flight testing, the FAA removed any question about interconnectivity from the equation.* Regardless of what understanding or misunderstanding the FAA and HBC had in the past, *compliance with FAR 23.701 from that point forward was determined by the flight testing.*

This moots any issue related to interconnectivity: The FAA determined that compliance would be handled by flight testing rather than interconnectivity *more than 35 years before this accident*. Thus, the trial court was correct in finding no possible connection between mechanical interconnection and the accident.

4. Flight Testing

The Duke was flight tested in 1970 in response to the FAA's request. (B158 at ¶ 44; B165-B175.) HBC issued Flight Test Report 60E100F, including the test plan, showing that the Duke has safe flight characteristics with asymmetric flaps, in compliance with FAR 23.701. (*Id*.) The Test Plan set forth an initial, handwritten proposal for the test. (*Id*.) The initial proposal called for creating flap asymmetry with the right flap extended and the left flap retracted. (*Id*.) Before completing the test flight, the Test Plan was altered to conduct testing with the left flap extended and the right flap retracted. (*Id*.) The change resulted from concerns that creating flap asymmetry with the right flap extended and the left flap retracted

would damage the flap system's limit switches and rigging. (*Id*.) In the opinions of the flight test pilot and HBC, there was no significant difference in testing with one flap retracted, as opposed to the other. (B169.) There is no evidence that HBC held any contrary belief when it tested and reported to the FAA (or at any other time), which is necessary to trigger GARA's fraud exception.

Flight Test Report 60E100F was provided to the FAA along with the initial Test Plan. (B158 at ¶ 44; B165-B175.) Plaintiffs contend that there is no evidence that the Test Plan was included with Flight Test Report 60E100F. However, the Test Plan was stamped as Attachment I to Flight Test Report 60E100F and was kept in the ordinary course of HBC's business as an attachment to Flight Test Report 60E100F. (B72 at ¶¶ 13-14.) Further, it is HBC's standard practice to attach test plans to final reports and there is no evidence that HBC deviated from custom and practice here. (*Id*.)

Plaintiffs' experts seized on the difference between the original test plan and the flight testing as evidence that HBC knowingly concealed, misrepresented, or withheld required information from the FAA. The uncontroverted facts, however, show that HBC submitted both the Test Plan and the Test Report to the FAA. (B72 at ¶ 14; *see* B188-B219.) The evidence is that HBC did not withhold anything from the FAA. Moreover, had the FAA wanted additional or different testing, it could have said so.

The FAA periodically audits its DOAs and reviews a representative sample of DOA reports and approvals. (B158 at ¶ 45.) As part of a DOA audit, the FAA later evaluated Duke Flight Test Report 60E100F, including the Test Plan, and *agreed with the testing methods and results* that the Duke complied with 14 C.F.R. §23.701. (*Id.*) This shows open communication between HBC and the FAA in initial certification and continuing airworthiness activities in the years after initial certification. (B178.)

5. No Evidence of Failure to Report Required Information

There is no evidence that HBC misrepresented, concealed or withheld required information from the FAA about the Duke's flap system. (B161 at ¶ 58.)

Plaintiffs' own experts could not identify any required information that HBC misrepresented, concealed or withheld from the FAA. Expert Fiedler testified:

> Q. [C]an you identify a single failure, malfunction, or defect that you claim was reportable under 21.3 by Hawker Beechcraft, but wasn't reported?[1]
>
> A. Not as I sit here.
>
> Q. And there isn't one identified in your report either, is there?
>
> A. I don't see one specific reference to that.

(B117 at 176:23 – 177:4.) Mr. Fiedler admitted that he had no evidence and could not identify even a single known failure that was required to be reported to the FAA but was not. (B122 at 242:10-20.)

[1] The references to "21.3" are to 14 C.F.R. § 21.3.

Plaintiffs' expert Twa gave similar testimony. He testified that he could not "specifically" point to any required information that was not reported, "because I have not seen any." (B229 at 243:3 – 244:4.)

Plaintiffs' expert Rivers admitted that he has no evidence to support the idea that Beech did engine pullback tests with split flaps and hid the results from the FAA. (B223 at 224:21 – B224 at 225:6; B224 at 225:9-13, B224 at 227:12-19.) Rivers admitted that if the FAA received both the test report and the test plan, then it had the same information at its disposal that he considered, although the FAA found the testing to be sufficient and Mr. Rivers disagrees. (B226 at 238:3– 239:2.)

Likewise, plaintiffs' expert Olmsted testified as follows:

> Q. Can you identify me a specific piece of information that Beech had that it was required to give the FAA that it did not? For purposes of complying with 23.701.
>
> A. I don't think as we sit here today that I can do that.

(B249 at 210:10-15.) When Mr. Olmsted was asked whether he could identify "any piece of information, that is discreet data point, that Beech knew that it was required to tell the FAA that it did not in the context of certification of the flaps in the Duke," he admitted that he could not. (B250 at 213:8-16.) Further, he was unable to identify a single malfunction, failure, or defect that should have been reported under 21.3 but was not reported. (B252 at 300:16-20.) Mr. Olmsted admitted that he had not identified even one issue that should have been reported to

the FAA but was not. (B251 at 296:5-10.) He had no evidence that Beech withheld any information it was required to give to the FAA. (B242 at 144:11-23.)

Likewise, plaintiffs' expert Sommer was unable to identify specific information that Beech was required to report to the FAA but failed to report. Rather, Mr. Sommer opined that Beech should have performed different testing than it did, but he did not point to any specific piece of required information that Beech failed to report. (*See generally* B136 at 224:8-11; B138 at 231:18-24.)

Since the time of initial certification, the Model 60 Duke has accumulated decades of flying hours. (B72 at ¶12.) Contrary to plaintiffs' claims, throughout this history, there was never a single failure of the Model 60 Duke's 90° drive key, with the exception of the failure in this case. (*Id.*) Given plaintiffs' failure to produce an incident involving the failure of the Duke's 90º drive key, there cannot be any showing that an incident was required to be reported to the FAA, or that the FAA would have taken some action that would have avoided this accident.

Due to this lack of evidence, plaintiffs' experts resort to discussing the flap system as a whole (and even the flap systems in entirely different models of HBC aircraft), so as to cast a wider net and attempt to identify FAR 21.3 reportable events over a "flap system" as a whole. Specifically, plaintiffs attempt to trigger GARA's fraud exception by generally complaining that the Duke's flap system

was poorly designed, leading to the potential for asymmetric flaps (for unspecified reasons), which result in an uncontrollable condition for the aircraft.

The letters, testing, and FAA audit establish, without dispute, open communication between the FAA and Beech about the safe flight characteristics of the Duke with asymmetric flaps. Any claim that HBC knowingly withheld, concealed, or misrepresented required information is not only unsupported, but it is also directly contradicted by the exchange resulting in the issuance *and the FAA's approval* of Flight Test Report 60E100F. Thus, plaintiffs' broad and general allegations regarding the safe flight characteristics of the Duke with asymmetric flaps do not raise a fact question regarding GARA's fraud exception.

Based on the 14 C.F.R. §21.3 reports issued by HBC, along with the Service Difficulty Reports ("SDR") that the FAA reviewed on HBC flap systems, the FAA was aware of all required information pertaining to the Model 60 flap system. (B157 at ¶ 36.) Although it is plaintiffs' burden to raise material fact questions regarding the fraud exception, not HBC's to disprove fraud, the evidence unequivocally demonstrates that HBC shared all material information with the FAA. Many of the Service Bulletins and other communications between HBC and the FAA that plaintiffs' experts rely upon actually support the trial court's grant of summary judgment. These communications constitute evidence of robust, open

communication between HBC and the FAA, and not evidence of misrepresentation, concealment, or withholding.

6. No Evidence of Knowing Misrepresentation

Plaintiffs' experts admit that they are unable to show what HBC did or did not know with respect to the alleged problems concerning the Duke's flap system. In that respect, plaintiffs' expert Sommer gave the following testimony:

> Q. The question is: you're not claiming, are you, that Beech actually reached a conclusion itself that if it had failed the right one down and the left one up, that the aircraft would have been – had unsafe flight characteristics, are you?
>
> A. I have no way to know the thinking of Beech.

(B137 at 228:4-16.) He also testified:

> Q. You're not claiming in this case, are you, that Beech, in fact, believed that if it had failed the right instead of the left, there would have been significant differences in the performance?
>
> A. I don't know what Beech believed.

(B138 at 230:3-7.)

Expert Fiedler gave similar testimony. When asked whether his opinion was that HBC "actually reached the conclusion that, oh, there's a trend, there's a defect in our part," he answered, "I can't tell you what Hawker Beechcraft thinks." (B118 at 178:11-15.) Likewise, Mr. Fiedler admitted that he "would have no way of knowing what Beech believed at that time" when asked whether he had any

evidence suggesting that Beech did not believe the flap system was mechanically interconnected when it filled out the Type Inspection Report. (B119 at 191:12-22.)

Likewise, plaintiffs' expert Olmsted admitted that he did not know what Beech knew concerning whether the Duke was controllable or uncontrollable with asymmetric flaps. (B241 at 123:6-11.) Similarly, Mr. Olmsted had no evidence to dispute that Beech felt that no significant difference would result had the test flight been conducted exactly as outlined in the initial test plan. (B249 at 211:4-8.)

The existent evidence is uncontroverted that HBC has confidence in the integrity and reliability of the entire Duke flap system, including the 90° drives, providing they are properly inspected and maintained. (B101 at ¶ 12.)

7. More or Different Testing

Instead of identifying *required information* that was *knowingly* misrepresented, concealed, or withheld from the FAA, plaintiffs' experts uniformly focused their efforts on criticizing the flight testing that was actually done. In Mr. Rivers' opinion, the testing was not sufficient. (B226 at 238:3 – 239:2.) Mr. Sommer also opined that Beech should have performed different testing than it did. (B136 at 224:8-11; B138 at 231:18-24.) And Mr. Twa opined that exercising the flap 50 times during testing was inadequate. (B233 at 273:6 – 274:18.) Mr. Olmsted was critical because Beech passed up the opportunity to do more testing. (B248 at 208:8-11; B249 at 209:16-17. *See also* B249 at 209:20 – 210:1.)

Each of these experts, however, admitted that it was the FAA's decision to make whether the correct tests were done and whether enough testing was done and that the FAA could have required more or different testing had it wanted to do so. (B222 at 220:15 – 221:2; B225 at 234:14-18; B226 at 238:3 – 239:2; B120, at 201:12-23; B239 at 84:6-9; B242 at 142:9-13; B243 at 147:12 – 15; B243 at 147:25 – 148:23; B244 at 156:24 – B245 at 157:9; B246 at 173:8-13; B247 at 194:6-7; B247 at 195:6-9; B247 at 195:23-24; B248 at 207:2-7; B137 at 226:2 – 227:5; B230 at 261:24 – B233 at 274:18; B234 at 279:5 – 280:23; B235 at 284:25 – B236 at 285:11.)

C. No Facts Supporting the New Parts Exception

In an effort to trigger the new parts exception, several of plaintiffs' experts rely on a statement made by Robert Pinto of Star Aero concerning overhaul or replacement of parts on the Subject Aircraft's flap system. Star Aero was the primary maintenance provider for the Subject Aircraft at the time of the accident. Plaintiffs' expert Fiedler testified that he does not have an independent opinion, but Mr. Pinto thought the entire flap drive system was either *overhauled* or replaced in the 1990's. (B116 at 122:19 – 123:19.) (If HBC manufactured a *new* part that was installed within 18 years of the 2007 accident, and if the new part caused the accident, then GARA's repose would not apply.)

1. No Evidence of Replacement

Plaintiffs do not have any evidence that a specific and material component of the 90° drive was replaced within 18 years of the accident. In order to be material, GARA requires that a new part be causally related to the accident. Even if plaintiffs had evidence that a specific part was replaced by a new part *and* that the new part caused the accident, GARA still bars their claims. As outlined below, GARA requires plaintiffs to direct their claims against the manufacturer of the new part. Here, *there is not one shred of evidence that a new part was manufactured by, or purchased from, HBC for installation on the Subject Aircraft at any time since 1970*. The record is uncontroverted on this point.

If a new part had been installed on the flap system of the Subject Aircraft, the maintenance logbooks would record it. (B125 at ¶ 4.) The Subject Aircraft's maintenance logbooks from 1995 on vanished after the accident. (B125 at ¶5; B128-B130.) The missing logbooks included: airframe book #3, which should have covered March 1995 through the date of the accident; the left engine book; the right engine book; the left propeller book; and the right propeller book. (B125 at ¶5.) Standard industry practice is to keep logbooks in a logbook holder, binder, brief case or bag. (B125 at ¶6.) No traces of any of the logbooks or the container that they would have been in were found in the wreckage. (*Id.*) The remains of the pilot's operating handbook and checklist were, however, recovered. (*Id.*)

Only airframe logbooks #1 and #2 were produced. (B125 at ¶7.) These logbooks cover the period up through February 24, 1995. (B116 at 124:9 – 11.) If any flap components were replaced prior to that date, there would be entries in the logbooks reflecting such replacement. (B116 at 124:20 – 24.) There are none; the logbooks do not reflect that the 90° drive was ever replaced on the Subject Aircraft. (B113 at 126:2 – 127:6; B134 at 101:19 – 102:9.)

The majority of aircraft owners do not carry logbooks on the aircraft unless they are travelling to or from the maintenance shop because the logbooks represent as much as one-third of the value of the aircraft. (B125-B126 at ¶ 8.) For this reason, they are kept in a safe place at home or in the care of the primary aircraft maintenance provider. (*Id.*; see also B140.) Mr. Pinto had possession of the logbooks as of October 10, 2007. (*See* B125 at ¶ 7.) The accident occurred on December 4, 2007. In fact, Mr. Hart previously stated via email that, "Bob Pinto has all of the books in the fire safe." (B140.) There is no evidence that Mr. Hart was traveling for aircraft maintenance, or that he had the logbooks with him.

Additionally, the hard drive on Mr. Pinto's office computer (with invoices and work detail on the Subject Aircraft) crashed and was discarded soon after the accident. (B108 at 89:13 – 90:6, 90:20 – 91:17.) Mr. Pinto testified that his computer hard drive failed and that no data was retrieved. *(Id.*)

In short, plaintiffs have not provided any evidence indicating that the right-hand 90º drive was replaced within 18 years of the accident. Likewise, there is no evidence that HBC manufactured or sold a new right-hand 90º drive that was installed within 18 years of the accident. Nothing in HBC's customer support records for the Subject Aircraft relates to the flap system's right-hand 90° drive. (B72 at ¶ 11.) In fact, there is no record indicating that anyone ever requested a replacement right-hand 90° drive from HBC for the Subject Aircraft. (*Id.*)

The lack of evidence that the right-hand 90º drive was replaced with a new HBC part is crucial because plaintiffs claim the right-hand 90º drive caused the accident. But Pinto did not testify that the right-hand 90º drive was replaced. After making the general statement that everything was overhauled or replaced in the flap system, Pinto specifically identified the actuators, cables and flap motor as being overhauled or replaced in or after the 1990s. (B107 at 65:6-18.) He did not testify that the 90º drives were replaced. When this lack of evidence is combined with plaintiffs' failure to produce logbooks showing that the right-hand 90º drive was replaced, it is clear that there is no evidence indicating that the subject 90º drive was replaced with a new drive any time within the 18 year repose period.

Further, plaintiffs' reliance on Mr. Pinto's testimony is misplaced because Pinto testified that the flap system components were either overhauled *or* replaced. (*Id.*) As discussed in the argument section, overhaul does not trigger GARA's new

parts exception. The fact that Pinto could not differentiate between overhaul or replacement further highlights plaintiffs' complete lack of evidence on this issue.

2. Evidence the Right-Hand 90º Drive Was Original Equipment

Examination of the flap system parts from the wreckage is the only evidence available, and it demonstrates that the right-hand 90º drive was original equipment that was not replaced for over 37 years, much less within 18 years before accident. The 90º drives originally designed and installed in the flap actuator assembly on the Duke carried the part numbers 50-380113-1 and -2. (B101 at ¶ 8.) The approved manufacturers of these original drives were Janitrol (H & E Aircraft) and Sedco. (*Id*.) The drives manufactured by Janitrol and Sedco were the only drives approved for factory installation through the end of manufacture of the Model 60, Duke series in 1983. (B101 at ¶ 9.) HBC did not manufacture the drives, nor did any of its predecessors. (*Id*.) The broken 90° drive on the Subject Aircraft had the characteristics of the older versions. (B101 at ¶ 11.)

An alternate manufacturer of the 90º drive was approved in 1978. (B101 at ¶ 10.) The alternate manufacturer, APPH, manufactured the 90º drives as alternate spares under a new part number, 50-380113-7 and -8. (*Id*.) The 90º drive part numbers 50-380113-1 and -2 made by Janitrol and Sedco lacked a black anodized finish on the drive housing that the alternate versions manufactured by APPH have. (*Id*.) The original -1 and -2 versions also featured an output shaft design with a

1/4" long formed key that differed from the design of the -7 and -8. (*Id*.) The drives recovered from the wreckage are consistent with the older Janitrol or Sedco versions. (B101 at ¶ 11.) GARA's new parts exception requires that the part that failed be a new part, replaced within 18 years of the accident, and that HBC manufactured it. The only evidence on these issues is that the 90º drive was not replaced within 18 years of the accident and that no new 90º drive was manufactured by or purchased from HBC.

D. No Evidence of a Written Warranty

Next, plaintiffs attempted to avoid GARA's bar by claiming that the airworthiness certificate constitutes a written warranty. GARA provides that a written warranty extending beyond GARA's 18-year repose period will toll GARA. But an airworthiness certificate is not a written warranty.

The Standard Airworthiness Certificate issued for the Subject Aircraft on September 16, 1969, in preparation for transfer to its first purchaser – like all other airworthiness certificates – states: "This airworthiness certificate is issued pursuant to the Federal Aviation Act of 1958 and certifies that, *as of the date of issuance*, the aircraft to which issued has been inspected and found to conform to the type certificate therefore, to be in condition for safe operation…." (B369.) An airworthiness certificate demonstrates airworthiness at a point in time and is only

effective as long as "maintenance, preventative maintenance, and alterations" are performed according to the requirements of the federal regulations. FAR 21.181.

The most recent airworthiness certificate for the Subject Aircraft is a replacement certificate dated October 7, 1976, six years after the Subject Aircraft left HBC's hands. (B371.) Even if it constituted an express warranty, then, the original airworthiness certificate was no longer in effect at the time of the accident, and the certificate in effect at the time of the accident could not be a warranty from HBC because HBC would not have applied for, or had anything to do with, issuance of the then-current airworthiness certificate.

E. No Waiver of GARA

Plaintiffs claim that HBC waived the GARA defense by failing to plead it. (Appellants' Br. at 34.) .HBC's answer (filed in January 2010) invokes GARA by name: "Admitted that the General Aviation Revitalization Act of 1994 imposes an 18 year statute of repose against claims based on the subject aircraft, which was 38 years old at the time of this accident." (A61 at ¶29.) HBC averred that, "Plaintiffs' claims may be barred by the doctrine of preemption." (A70 at ¶113.) (GARA preempts state law unless state law provides stricter standards. 49 U.S.C. §40101 (Note 1994) at §2(d).) Additionally, HBC incorporated the defenses raised by all other defendants, two of which plead GARA. (A71 at ¶126; B542 at ¶¶113-14; *see* A69 at ¶106.) HBC also denied plaintiffs' allegations concerning

exceptions to the statute of repose. (A43-45 at ¶¶28-35; A61 at ¶¶28-35.) In short, HBC raised GARA as a defense to this suit.

Additionally, GARA was a focal point since the inception of the case. The complaint identifies GARA by name. (A43-44 at ¶28.) At least eight paragraphs of the complaint were drafted specifically to avoid GARA. (A43-45 at ¶¶28-35.) Plaintiffs' discovery requests specifically targeted documents relevant to GARA's new parts and fraud exceptions. (B391-406.) And GARA played a central role in plaintiffs' motion to compel, where plaintiffs' counsel acknowledged in open court that plaintiffs had a duty to prove fraud under GARA "as part of our rebuttal to the affirmative defense under [GARA], which is an 18-year statute of repose…." (B411 at p. 8:5-15.) GARA was prominent in the parties' written communications, court hearings, scheduling conferences, depositions, and expert opinions. (*See* B413-14 at p. 16:20 – 19:21; B415-16 at p. 22:5 – 25:1; B419 at ¶28; B422; B432; B434 at ¶¶15 – 18; B447 at ¶23; B452 at ¶43.)

In its response to plaintiffs' motion for judgment on the pleadings, HBC argued that it had not waived GARA, and in the alternative, that plaintiffs should be estopped from taking the position that GARA was not at issue, given GARA's significant role in the case, or that HBC should be granted leave to amend its answer to conform to the evidence, if necessary. (A373-389.)

ARGUMENT AND AUTHORITIES

A. GARA's Fraud Exception

1. Question Presented

Should the trial court's summary judgment order be affirmed where plaintiffs failed to raise a fact issue on GARA's fraud exception because there is no evidence that HBC misrepresented "required information" to the FAA – either during the Duke's initial certification or during continuing airworthiness activities? (B50 – B65, B335 – B340.)

2. Scope of Review

An order granting summary judgment is reviewed *de novo.* *Simpson v. Colonial Parking,* 36 A.3d 333, 335 (Del. 2012). The trial court will be affirmed where there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v Catrett*, 477 U.S. 317, 325 (1986).

3. Merits of Argument

The uncontroverted evidence clearly establishes open communication, marked by correspondence, flight testing, reporting, Service Difficulty Reports, face-to-face meetings between the FAA and HBC, and an FAA audit. Plaintiffs do not have evidence of HBC's knowing state of mind or intentional misconduct; they cannot identify any required information that HBC withheld from the FAA; and they cannot establish a causal connection between a failure to relay required

information and the accident. *See, e.g.*, *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 923 F. Supp. 1453, 1456 (D. Wyo. 1996), *rev'd on other grounds*, 929 F. Supp. 380 (D. Wyo. 1996).

a. No Evidence of Fraud – Through Experts or Otherwise

To invoke GARA's fraud exception for HBC's conduct during initial type certification or regarding continuing airworthiness, plaintiffs must plead, with specificity, the facts necessary to prove that HBC (1) knowingly (2) misrepresented, concealed, or withheld from the FAA, (3) required information that is (4) material and relevant to the Duke's performance, maintenance, or operation that is (5) causally related to plaintiffs' damages. 49 U.S.C. § 40101 (1994 Note) at Sec. (2)(b)(1); *e.g.*, *Rickert*, 929 F. Supp. at 381. Knowingly "applies to each of these forms of keeping information from the FAA." *Burton v. Twin Commander Aircraft, LLC*, 254 P.3d 778, 780 (Wash. 2011). That is, "knowingly" modifies the words misrepresented, concealed, and withheld. *Id.*

"GARA requires more than innuendo and inference; it demands 'specificity.'" *Rickert*, 923 F. Supp. at 1462. A claimant cannot avoid GARA "simply by dressing up her evidence" because "[t]he terms 'misrepresentation' and 'concealment' are not infinitely malleable." *Id.* Where, as here, a plaintiff fails to submit any proof that a manufacturer violated "even the broadest language in the exception, which refers vaguely to defendant's obligations to provide required

information…" summary judgment is appropriate. *Cartman v. Textron Lycoming Reciprocating Engine Div.*, 1996 WL 316575, *3 (E.D. Mich. 1996) (internal punctuation omitted). In short, "If the plaintiff does not point to specific information showing the prerequisite knowledge, the fraud exception does not apply." *Grochowske v. Romey*, 813 N.W.2d 687, 701 (Wis. Ct. App. 2012).

Rickert, Burton, Cartman, and *Grochowske* are seminal opinions regarding the construction and application of GARA's fraud exception, particularly in the context of summary judgment. These decisions demonstrate plaintiffs' heavy burden to come forward with specific evidence, not mere allegations.

In this case, plaintiffs' experts parroted GARA's "knowing misrepresentation" catchphrase – but each expert admitted that he could not identify even a single piece of "required information" that was misrepresented, withheld, or concealed from the FAA. (*Supra* at 12-14.) As the trial court correctly ruled, this is not sufficient to withstand a summary judgment motion. *See, e.g., Grochowske,* 813 N.W.2d at 701. In *Grochowske,* plaintiffs' expert executed an affidavit opining that "the documents [he] reviewed indicate[d] that" required information was "withheld and/or concealed" from the FAA. *Id*. The Wisconsin Court of Appeals rejected the affidavit and affirmed the order granting summary judgment:

> Sommer points to no specific facts or evidence that [defendant] knowingly withheld or knowingly concealed any information required by

> [GARA]. Without any specific evidence that [defendant] had the requisite knowledge that they were concealing or withholding information, Sommer's conclusory statement is simply an opinion and does not satisfy GARA's requirement that the claimant plead and prove with specificity facts that show the fraud exception applies. Because the plaintiffs have provided no specific evidence that [defendant] knowingly withheld any information it was required to report to the FAA, there is no genuine issue of material fact….

Grochowske, 813 N.W.2d at 701. Plaintiffs' experts in this case "are not pointing to any actual evidence of knowing misrepresentation, concealment, or withholding, but are instead operating from the premise that [HBC] had a responsibility to do more than it did." *See Burton*, 254 P.3d at 790. This is similar to standard of care evidence in negligence; it does not afford evidence of a knowing misrepresentation under GARA. *Id.*

Plaintiffs attempted to sidestep their failure to raise a genuine issue of material fact under GARA's fraud exception by: (1) alleging that HBC lied when it represented the flap system was mechanically interconnected; (2) quibbling with flight testing the FAA approved both contemporaneously and during a later FAA audit; and (3) discussing the "flap system" generally on other models of HBC aircraft rather than the 90° drive that broke. Each issue will be considered in turn.

b. Interconnectedness

It was – and still is – HBC's position that the flap system is mechanically interconnected through the drive motor. (*Supra* at 7-8.) The FAA never accused

HBC of misrepresentation. Rather, it said there was a misunderstanding concerning whether flight testing was done earlier than 1970. (*Supra* at 8.)

Moreover, mere disagreement between a manufacturer and the FAA is not the stuff of the fraud exception. *E.g.*, *Hetzer-Young v. Precision Airmotive Corp.*, 921 N.E.2d 683, 697 (Ohio Ct. App. 2009), and cases cited therein. The FAA had, and exercised, its prerogative to require HBC to demonstrate safe flight characteristics with split flaps through flight testing. *(Supra* 10-12, 17-18.)

Indeed, it is uncontroverted that HBC conducted the flight testing requested by the FAA decades before the accident. (*Supra* at 3, 9, 10-11.) The trial court's finding that the flight tests broke any causal link between initial certification (based on mechanical interconnectivity) and the accident (decades after flight testing proved safe flight characteristics with split flaps) must be affirmed.

Even assuming, *arguendo*, that plaintiffs produced evidence to raise a fact question that HBC knowingly misrepresented required information to the FAA at initial certification regarding the Duke's flap system being mechanically interconnected (which it quite clearly did not), any alleged misrepresentation is not causally related to the accident. It is undisputed that the accident flight occurred decades after the Duke proved continuing airworthiness through flight testing its safe flight characteristics with split flaps. (*Supra* at 3, 9, 10-11.)

c. Disagreement Over Flight Tests Insufficient

Plaintiffs baldly allege that HBC improperly manipulated the flight testing. (Appellants' Brief at 7-11.) But their complaint in this regard is that HBC should have performed *different* tests, using a different asymmetric flap configuration. This is inapposite to the requirements of GARA's fraud exception. In *Burton*, the plaintiff argued that the manufacturer's failure to conduct certain tests raised material fact questions. 254 P.3d at 787. The Washington Supreme Court soundly rejected this claim: "[D]isagreements over what tests should have been performed or what caused the crashes do not establish knowing misrepresentation…." *Id.*

Plaintiffs' reliance on *Robinson v. Hartzell Propeller, Inc.,* 326 F.Supp.2d 631 (E.D. Pa. 2004) is misplaced. There, the manufacturer misrepresented to the FAA that a propeller stress test was "approximately" within allowable limits, when it knew the allowable limit had been exceeded. *Id.* at 650. Likewise, in *Hinkle v. Cessna Aircraft Co.,* 2004 WL 2413768 (Mich. Ct. App. 2004), *appeal denied*, 703 N.W.2d 809 (Mich. 2005), the manufacturer told the FAA that its aircraft met the single engine climb requirements of a federal regulation, but it used engine horsepower in excess of the operating limits of the engine. *Id.* at *11. In both *Robinson* and *Hinkle,* the manufacturers argued the aircraft were GARA-protected because they submitted accurate back-up data with their false conclusions.

There is a stark contrast between *Robinson*, *Hinkle*, and this case. Here, plaintiffs did not identify one piece of required information – be it accident, incident, defect, or document – that HBC knowingly failed to disclose to the FAA. (*See supra* at 12-17.) *See Burton*, 254 P.3d at 791 ("In these cases, there was evidence of a knowing misrepresentation, concealment, or withholding, unlike in the present case where there is no such evidence."). There is a fundamental difference between telling the FAA that a numerical measurement meets an objective standard that it does not meet (as in both *Robinson* and *Hinkle*) and reporting flight test results to the FAA regarding "safe flight characteristics" – a determination that involves professional judgment. If plaintiffs could avoid GARA without identifying any required information that was not relayed to the FAA, then the statute would be eviscerated.

Moreover, the FAA audited and gave a specific "compliance" finding to HBC's flight test. (*Supra* at 11-12; B178.) Here, unlike *Robinson* and *Hinkle*, there is no evidence that HBC misrepresented required information; held a different opinion than what it disclosed to the FAA; or had different knowledge about its testing procedures than what it told the FAA. (*Supra* at 16-18.) And the FAA approved the flight testing and continued airworthiness twice – at the time it was accomplished and during the FAA audit. (*Supra* at 10-12; B165-75; B178.)

d. The "Flap System" on Other Models

Plaintiffs claimed that they are critical of the design of the Duke's flap system as a whole and they need not identify any required information that HBC knowingly withheld for the part that yielded in this accident. Plaintiffs offered no authority for this contention and GARA does not support it. Nor does GARA let a plaintiff scream fraud while steadfastly refusing to identify any knowing misrepresentation. Likewise, defective design claims will not survive GARA's repose without a specific link to a knowing misrepresentation.

Plaintiffs' "flap system" complaint is merely a design defect claim with no evidence of a knowing misrepresentation. They have not identified a single design defect that allegedly caused this accident. In fact, except for this accident, there is not another known failure of the 90° drive in a Duke. (*Supra* at 14; B72 at ¶12.) The P-94 incident in England involved a cable that broke near the motor, not a key that broke in the 90° drive out at the wing. (B296-301.) (*See* Appellants' Br. at 6.) Likewise, the 106 other SDRs plaintiffs cited relate to other service issues with the flaps; none are relevant to the 90◦ drive at issue here. (B363 at p. 110:11 – 113:3, admission of expert.) Moreover, the FAA receives these SDRs. (B154 at ¶26.)

GARA does not require HBC to piece together information and SDRs relating to other HBC models, repackage them (or derive some unspecified "required information" from them), and remind the FAA of issues about which it is

already aware. *E.g.*, 14 C.F.R. § 21.3(d)(1)(ii); *Burton*, 254 P.3d at 790-91 (manufacturer has no duty to reinvestigate or repackage information already in the FAA's hands). HBC communicated openly with the FAA regarding flap asymmetry in the Duke: it completed flight testing at the FAA's request, provided the Test Plan and Flight Test Report, and received the FAA's approval of its findings. (*Supra* at 6-12, 15-16, 17-18.)

The federal regulations require a manufacturer to report "failures, malfunctions, or defects" in its products "that it determines has or could result in specified safety risks." *Burton*, 254 P.3d at 788. There is an exception for information already reported to the FAA. And the manufacturer's reporting requirement applies "only if it determines" that "specified safety risks" exist. *Id.* at 790, 791; 14 C.F.R. § 31.3(a), (b), and (d). There is no evidence of any events that HBC "determined" must be reported but were not.

Manufacturers need not report all differences of opinion, because requiring them to do so would produce the "absurd" result of allowing suit decades after an aircraft's manufacture simply because an article, letter, or report critical of an aircraft's design was not reported to the FAA. *Rickert v. Mitsubishi Heavy Indus. Ltd. ("Rickert II")*, 929 F. Supp. 380, 384-85 (D. Wyo. 1996).

In short, plaintiffs failed to identify evidence of fraudulent intent on HBC's part, and this is dispositive. *E.g.*, *Burton*, 254 P.3d at 780. Likewise, plaintiffs

failed to produce evidence of "required information" that was intentionally kept from the FAA, or to raise a fact question linking the required information to the accident. *Deutsche Bank Trust Co. Ams. v. Royal Surplus Lines Ins. Co.*, 2012 Del. Super. LEXIS 244, at *30 (Del. Super. Ct. May 30, 2012) ("It is settled law that the 'party opposing the motion for summary judgment has the duty to come forward with admissible evidence showing the existence of a genuine issue of fact.").

B. GARA's New Parts Exception

1. Question Presented

Should the trial court's summary judgment order be affirmed where plaintiffs failed to raise a fact issue on GARA's new parts exception because there is no evidence that a new part manufactured by HBC was placed on the accident aircraft within the repose period, or that a new part caused the accident? (B44 – B50, B341 – B349.)

2. Standard of Review

An order granting summary judgment is reviewed *de novo*. *Simpson*, 36 A.3d at 335. The trial court will be affirmed where there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325.

3. Merits of Argument

Plaintiffs contend that the entire flap system was replaced within 18 years of the accident, so GARA does not bar their claim. (Appellants' Br at 30 – 31.) Plaintiffs argue that HBC bears the burden of proof regarding whether a new or overhauled part was placed on the aircraft. (*Id.* at 31.) And they argue that HBC is responsible under GARA even if it did not actually manufacture the new part. (*Id.*) Plaintiffs are wrong on all counts.

The new parts exception requires a plaintiff to: (1) identify a *new* (not overhauled) part; (2) that was placed on the aircraft within 18 years of the accident; (3) direct his claims at the manufacturer of the new part; and (4) demonstrate causation between the new part and the accident. *E.g., South Side Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Indus. Ltd.*, 927 N.E.2d 179 (Ill. Ct. App. 2010), *appeal denied*, 938 N.E.2d 531 (Ill. 2010). There is no evidence raising a fact question on any prong of this test – and plaintiffs must raise a fact question on each prong in order to avoid GARA's bar.

a. No Evidence of New Part

There is no evidence that a new 90° drive for the right-hand flap was installed on the Subject Aircraft within 18 years of the accident. The only evidence that exists indicates that the original, 37-year-old 90° drives were found in the wreckage. (*Supra* at 18-23.) Plaintiffs' mechanic could not distinguish

between new and overhauled parts when testifying that he thought the flap system was replaced. (*Supra* at 21.) Further, he listed flap components *other than* the 90° drive that may have been overhauled or replaced.

It is well established that placing an overhauled part on an aircraft does not roll GARA under the new parts exception. *United States Aviation Underwriters v. Nabtesco Corp.*, 697 F.3d 1092, 1094, 1100 (9th Cir. 2012) (new parts provision is only triggered by replacement of new part, not used part); *Robinson*, 326 F.Supp.2d at 663-64 (tolling repose period for overhauled part would eviscerate GARA because aircraft are routinely overhauled); *Willett v. Cessna Aircraft Co.*, 851 N.E.2d 626, 636 (Ill. App. Ct. 2006) (overhaul does not reset GARA); *Hiser v. Bell Helicopter Textron, Inc.*, 4 Cal.Rptr.3d 249, 257 (Cal. Ct. App. 2003) (replacing a single part in an aircraft system does not restart repose period for entire system).

In *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, 2011 WL 2560281 (E.D. Okla. 2011), plaintiff produced evidence demonstrating that the part at issue "might" or "should" have been replaced, given historical data concerning wear. *Id.* at *5. There was not, however, actual evidence – like maintenance records or other documents – that the part actually was replaced within 18 years before the accident. *Id.* Giving every inference to plaintiffs, this is the very most that can be said in this case too. And it simply is not enough.

Further, plaintiffs' mechanic did not even testify that the 90° drive was replaced. His testimony concerning replaced parts was limited to the drive motor, cables, and actuators, specifically leaving out the 90° drives. (B107 at 64:16 – 65:24.) S*ee, e.g., In re Barker Trust Agreement,* 2007 Del. Ch. LEXIS 87, *47 (Del. Ch. 2007) (stating that mere speculation is no substitute for factual evidence on summary judgment).

Plaintiffs failed to produce any evidence that a new 90° drive was installed within 18 years of the accident. The trial court should be affirmed.

b. Direct Claims at the Manufacturer

Plaintiffs also failed to direct their claims at the manufacturer of the allegedly new part. In fact, they didn't even try. Instead, plaintiffs argue (apparently for the first time) that "HBC manufactured these components through contracted vendors who manufacture the parts pursuant to HBC's proprietary drawings." (Appellants' Br. at 31.) Those sixteen quoted words can be summarized succinctly: Even if a new 90° drive had been installed on the aircraft, HBC did not manufacture it. (*See supra* at 22-23.)

It is uncontroverted that HBC last saw this aircraft in 1970, upon delivery to its first purchaser. (*Supra* at 3.) It is uncontroverted that – even if there were a new 90° drive – HBC would not have manufactured, installed, or even seen it. (*Supra* at 22-23.) And contrary to plaintiffs' contention, HBC's status as the

original equipment manufacturer does not make it liable for components manufactured by others. *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 426 – 29 (Pa. 2006) (no liability for designer, original equipment manufacturer, or type certificate holder for replacement part it did not manufacture); *Campbell v. Parker-Hannifin Corp.*, 82 Cal.Rptr.2d 202, 209 (Cal. Ct. App. 1999) (purpose of rolling provision is to give victims recourse against new component part manufacturers, not to re-start 18-year clock against aircraft manufacturer); 1994 U.S. Cole & Admin. News at p. 1647 (same); and *Sheesley v. Cessna Aircraft Co.*, 2006 WL 1084103, *4 (D.S.D. 2006) (rolling provision only restarts GARA clock against manufacturer of new part that actually caused the accident).

c. Plaintiffs' Burden of Proof

Numerous well-reasoned cases recognize that the plaintiff bears the burden of proof on GARA's new parts exception. Recent examples include: *South Side Trust,* 927 N.E.2d at 193; *Hetzer-Young v. Precision Airmotive Corp.*, 921 N.E.2d at 691; *Willett,* 851 N.E.2d at 636; *Agape,* 2011 WL 2560281, *5; *Bianco v. Cessna Aircraft Co.*, 2004 WL 3185847, *3 (Az. Ct. App. 2004); and *Reynolds v. Textron, Inc.*, 1999 WL 33603654 (Ak. Super. Ct. 1999), full text at (B456-71.) Indeed, the rule seems to be so well established that diligent research did not uncover even one case where the burden of proof on GARA's new parts exception was at issue. Likewise, diligent research did not uncover any authority for

plaintiffs' novel argument that defendant should disprove the exception. *See, e.g., Smith v. Mattia,* 2010 Del. Ch. LEXIS 14, *18 – 19 (Del. Ch. 2010) (plaintiffs' burden to plead facts tolling statute of limitations). Plaintiffs, as indicated by its counsel's remarks in open court, agrees with this position. (B411 at p. 8:5-14.)

C. GARA's Warranty Exception is Not Applicable

1. Question Presented

Should the trial court's summary judgment order be affirmed where GARA's warranty exception does not apply as a matter of law because an airworthiness certificate is not a warranty under GARA and, in any event, it only states that an aircraft is airworthy on the date of issue, not decades later? (B350 – B351.)

2. Standard of Review

An order granting summary judgment is reviewed *de novo. Simpson,* 36 A.3d at 335 (Del. 2012). A trial court's legal conclusions are also reviewed *de novo. Bermel v. Liberty Mut. Fire Ins. Co.,* 56 A.3d 1062, 1066 (Del. Super. Ct. 2012); *Poliak v. Keyser, et al*., 2013 Del. LEXIS 225, at *5 (Del. May 6, 2013).

3. Merits of Argument

GARA's written warranty exception removes from GARA claims made under a written warranty that extends beyond the 18-year repose period. GARA

§(2)(b)(4). Plaintiffs claim the airworthiness certificate is such a warranty. They are wrong.

In *Bianco v. Rivera*, 2004 WL 3185847 (Az. Ct. App. 2004), plaintiffs identified numerous alleged warranties, including the airplane's airworthiness certificate, in an attempt to avoid GARA's bar. *Id.* at *8. The Arizona Court of Appeals rejected the argument outright:

> If we adopted this interpretation of the warranty provision, we would effectively hold that the GARA never applies. For example, a warranty that the airplane is worthy and has a type certification would be available to every plaintiff, and the GARA repose provision would never bar a claim. That cannot be the law.

Id. Further, plaintiffs fail to identify how the airworthiness certificate can be a warranty running from HBC to plaintiffs. The certificate HBC procured – like all other airworthiness certificates – only states that the aircraft conformed to type certification and was in condition for safe operation "as of the date of issuance" – back on September 16, 1969. (*Supra* at 23-24.)

The most recent airworthiness certificate was issued in 1976, six years after the aircraft left HBC's hands.[2] (*Supra* at 24.) Even if it constituted an express warranty, the original airworthiness certificate was not in effect at the time of the accident, and the then-current 1976 certificate could not be a warranty from HBC because HBC would not have procured it or had anything to do with its issuance.

[2] Delaware warranty claims have a statute of limitations of four (4) years. 6 Del. C. §2-725.

Plaintiffs' reliance on *Limited Flying Club, Inc. v. Wood*, 632 F.2d 51 (8th Cir. 1980) is misplaced. (Appellants' Br. at 32 – 33.) *Wood*, as plaintiffs readily admit, was not a GARA case. Instead, it involved the sale of a used aircraft and the seller's representation to the buyer – through logbooks and an airworthiness certificate – that the aircraft was airworthy *at the time of sale*. *Id.* at 56.

D. Plaintiffs' Motion for Judgment on the Pleadings

1. Question Presented

Did the trial court exercise proper discretion in rejecting plaintiff's claim that HBC waived the GARA defense where HBC plead GARA in its answer; incorporated the affirmative defenses of other defendants that asserted GARA; denied the allegations in plaintiffs' complaint concerning GARA; and where GARA has been central to fact/expert discovery, depositions, written communications, court hearings, and scheduling conferences in this case? (B376 – B388.)

2. Standard of Review

This issue will be reviewed on an abuse-of-discretion standard. *Fletcher v. Ratcliffe*, 1996 WL 527207, *2 (Del. 1996).

3. Merits of Argument

The trial court exercised sound discretion in rejecting plaintiffs' contention that GARA was waived. *E.g.*, *Fletcher*, 1996 WL 527207, *2. First, GARA was

invoked, by name, in the complaint, answer, and HBC's adoption of other defendants' defenses. (*Supra* at 24-25.) Second, it was a focal point in depositions and expert reports. (*Supra* at 24-25.) Third, both HBC's counsel and plaintiffs' counsel discussed GARA in open court during plaintiffs' motion to compel – almost a full year before plaintiffs filed their motion for judgment on the pleadings. (A26; B410.) Where a plaintiff is on notice, well before trial, that a defendant intends to raise a defense, there is no prejudice and no waiver. *Id.* *See also Johnson v. Cullen*, 925 F.Supp. 244, 247, n.2 (D. Del. 1996) (same).

The Superior Court Rules do not require specific "technical form" in pleading a claim or defense, and the courts are instructed to construe pleadings "to do substantial justice." Del. Super. Ct. Civ. R. 8(e)(1) and 8(f). Pleadings are to include support for a party's defense stated in a simple, concise manner. *See* Del. Super. Ct. Civ. R. 8.

Judicial estoppel precluded plaintiffs' attempt to extract GARA from the lawsuit. Given the omnipresence of GARA in this case, HBC argued that plaintiffs should be estopped from arguing that it waived the GARA defense. (B386.) *Motorola Inc. v Amkor Tech.*, 958 A.2d 852, 859 (Del. 2008). On the one hand, plaintiffs plead GARA in their complaint and relied upon HBC's intent to pursue a GARA defense in their motion to compel discovery. On the other hand, they tried to extract GARA from the lawsuit.

HBC's request for leave to amend its answer to conform with the evidence was authorized under Del. Super. Ct. Civ. R. 15(b), had the trial court deemed amendment necessary. (B386-87.)

CONCLUSION

GARA "creates an explicit right not to stand trial." *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1110 (9th Cir. 2002). HBC presented uncontroverted facts to the trial court demonstrating that it was entitled to rely upon GARA's bar. In addition, HBC voluntarily undertook the task of demonstrating that plaintiffs could not bear their burden of pleading and proving application of either the fraud or new parts exceptions to GARA.

HBC established all the necessary uncontroverted facts relevant to the application of GARA and it voluntarily proved that none of the exceptions apply. This action presents the exact scenario that led to GARA being passed in the first instance – a civil action for damages arising more than eighteen years after the aircraft was first delivered to its first purchaser. To overturn the trial court's ruling would eviscerate GARA and deprive HBC of the very protection this federal statute is intended to provide. Accordingly, the trial court's order granting HBC summary judgment based upon the GARA statute of repose should be affirmed.

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