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.	:	

APPELLANTS' [REDACTED] REPLY BRIEF

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I. INTRODUCTION

The record establishes that Hawker Beechcraft Corporation's ("HBC") is not afforded protection under the General Aviation Revitalization Act (GARA)[1] because it knowingly misrepresented, concealed, and withheld information about the dangerous condition of the Beech Duke flap system, which caused the accident that took the life of Daniel Hart. Further, GARA does not apply because the flap system was replaced within 18 years of the accident, and there was a written warranty of airworthiness. While HBC's response brief attempts to explain away these facts, the only way to resolve these disputes is with a jury.

- HBC misrepresented to the FAA that the Duke's flap system was synchronized through a mechanical interconnection in an effort to avoid flight testing. (A221-A222; A234-A242; A1005; A1008; A1016; A1108).
- After the FAA ordered asymmetric flap flight testing, HBC misrepresented to the FAA that the Duke was safe for flight with asymmetric flaps based on a flight test that ignored unfavorable routine real world conditions. (A1053 at 61-65; B165-B178).
- HBC misrepresented to the FAA that right flap extended asymmetric flap flight testing was not necessary because there would be no

[1] The General Aviation Revitalization Act, Pub. L. No. 103-298, 108 Stat. 155, 49 U.S.C. § 40101, note.

significant difference between right flap extension verses left flap extension. (B165-B178).

- HBC misrepresented to the FAA that the aircraft was safe for flight in all flight regimes. (B165-B178).

- HBC failed to disclose to the FAA and correct the defective condition of the Duke's flap system despite knowledge of the pervasive failures the Duke and similar flap systems experienced in the field. (A230-A231; A234-A242).

- HBC falsely represented that the flap system had an emergency deactivation system, which does not activate when pilots experience right flap extended split flaps, such as occurred here. (A658; A661; A868).

- HBC failed to provide critical safety information on how to handle the Duke with asymmetric flaps in the Airplane Flight Manual, despite its obligation to do so. (A1108).

HBC's response brief merely rebuts this evidence by making excuses for its lack of candor; however, only a jury can weigh the evidence presented by each side. Contrary to the record, HBC contends the flap system that was repeatedly failing to remain synchronized in the field was synchronized by a mechanical interconnection. (Appellee Br. at 7-8). Contrary to the record, HBC claimed the asymmetric flap flight test was done only with left extension, out of convenience,

and that the flight test pilots believed there would be no significant difference in for the right. (Appellee Br. at 10-11). Contrary to the record, HBC contends that the repeated flap system failures of the Duke and other similar models were disclosed to the FAA and therefore did not have to correct these defects. (Appellee Br. at 11). The trial court summarily accepted HBC's explanations in response to the record. Each and every one of these issues concerning HBC's knowledge should have been entrusted to a jury, as the law requires.

HBC did not rebut the evidence establishing HBC's misrepresentation to the FAA that the Duke had an emergency shut-down switch, or absence of emergency recovery procedures in the Airplane Flight Manual.

With respect to GARA's Rolling Provision, the record demonstrates that the flap system was replaced within eighteen years of the accident, which HBC's response brief fails to rebut. (A154; A962 at 30; A974 at 25; A969 at 63-A970 at 66.) Plaintiffs further submitted evidence that that the aircraft was sold with a written warranty certifying it was airworthy. (A333-A1154; A1203-A1242). HBC's brief again illustrates questions of fact that exist.

Based on findings of fact in the light most favorable to the defense, the trial court entered summary judgment under GARA and consequently denied Plaintiffs' Motion for Judgment on the Pleadings. Considering the grave consequences of

judgment entered for the defense, the question whether GARA was properly pled by the defense was critical, and the court erred in denying Plaintiffs' Motion.

Each and every finding of fact decided by the trial judge was a jury question. Plaintiffs request this Court to give Plaintiffs their constitutional right to a jury trial, as mandated by Congress when passing GARA as a compromise between manufacturers and airplane accident victims, and as mandated by the law of this State affording victims the right to a jury trial.

II. LEGAL ARGUMENT

A. DEFENDANT'S RESPONSE BRIEF DEMONSTRATES THE EXISTENCE OF MATERIAL FACTS THAT THE TRIAL COURT WEIGHED IN THE LIGHT MOST FAVORABLE TO THE MOVING PARTY

> Where, as here, the defendant asserts that the plaintiff cannot produce admissible evidence in support of a "knowing misrepresentation" claim, the Court begins its analysis by examining the plaintiff's response. The Court begins here because if the plaintiff has produced facts to support her "knowing misrepresentation" claim, then it is highly unlikely that the defendant will be able, for summary judgment purposes, to rebut those facts. **If, in other words, the plaintiff presents material facts in support of her claim, the defendant can do little more than proffer contrary facts. Faced with two sets of conflicting and material facts, the Court cannot grant summary judgment**.

Rickert v. Mitsubishi Heavy Industries, Ltd., 923 F. Supp. 1453, 1456-57 (D. Wyo. 1996) (emphasis added).

Plaintiffs produced evidence to support the application of the General Aviation Revitalization Act's "Knowing Misrepresentation" Exception. However, HBC's brief demonstrates that there are numerous issues of material fact on whether the affirmative defense of GARA applies in this case – issues that can only be decided by a jury.

1. First Instance of Knowing Misrepresentation – HBC Claimed that the Duke Flap System is Synchronized by Mechanical Interconnection, Knowing it was Not

First, HBC abused its DOA Authority and knowingly misrepresented that it demonstrated compliance with all applicable regulations during initial certification of the Duke aircraft. (A221-A222; A234-A242; A1005; A1008; A1016; A1108). HBC was aware of the propensity of the flap system used in the Duke and other Beech models to disengage and cause split flaps, but yet misrepresented that the flap system was mechanically interconnected in accordance with 14 C.F.R. § 23.701. (A221-A222; A234-A242; A1005; A1008; A1016; A1108). The term "interconnected" is a term of art in aviation, which means mechanically interconnected independent of the flap drive system. (Advisory Circular 23-17). [redacted] (B307). The Beech Duke's flap system is not synchronized through an interconnection and never was. (A221-A222; A234-A242; A1005; A1008; A1016).

HBC's response brief attempts to explain this representation as a mere difference of opinion, but this characterization does not nullify the ability of a reasonable juror to find as Plaintiffs contend that it was indeed a misrepresentation.

2. Second Instance of Knowing Misrepresentation – HBC Manipulated the Flight Test by Testing only the Most Favorable Conditions, Abandoning Portions of the Test it Could Not Pass, and Falsely Represented that the Duke had Safe Flight Characteristics with Asymmetric Flaps

When the FAA advised HBC that the flap system was unreliable and mandated flight testing to test whether the Duke had safe flight characteristics with split flaps, HBC knowingly misrepresented that the Duke passed. (B165-B178).

HBC knew that the Duke could not pass the originally planned test with the right flap fully extended and left flap retracted. The aircraft has a tendency to roll toward the direction of the retracted flap (left). (A1053 at 61-65). The Duke also has a left turning tendency because of P-factor and torque. (A1053 at 61-65). HBC explained P-factor:

> When you pitch the airplane up nose high relative to the incoming air, the propeller has a rotation preference, in this case what we'd call to the right, such that the right-hand blade is down-going, the left hand blade is up-going, and that adds or subtracts from the angle of attack on the blade causing two things to happen. One, it will cause a side force on the propeller at the propeller plane itself. The other thing it will do is there's the slipstream of the propeller over the airplane aft of the-- downstream of the propellers, and that will have an effect on the aerodynamics of the rest of the airplane.

(A1053 at 61-63). HBC then admitted that P-factor and torque entice the Duke, just like other conventional twins, to yaw and roll to the left.

> Q. And then the P factor also wants to cause the airplane to roll to the left, doesn't it?

> A. Well, yaw to the left.
> Q. Yes. And then the torque, the engine torque and the propeller torque wants to cause the airplane to roll to the left, doesn't it?
> A. The torque does, yes.

(A1053 at 61-65). Those involved in the flight test would certainly have been aware of these basic aerodynamic principles, but falsely represented that the right flap extended (left flap retracted) position was not tested and had they done so [redacted] (B169).

The flight test pilots also manipulated the flight test by testing it at maximum gross weight, which made the aircraft more controllable. However, HBC admits [redacted] (A1054 at 66-67). HBC also failed to test the aircraft at takeoff speeds, which is slower than other flight regimes, despite that fact that it is a normal flight condition where flaps are deployed. (B165-B178). HBC did not test the engine out scenario. (B165-B178).

Knowing that the test was [r]igged to test only the most favorable conditions, HBC falsely represented [redacted]

[redacted] (B169).

HBC's brief suggests that Plaintiffs' criticism of the flight testing is a mere difference of opinion on what should have been tested – this is not the case. It is an objective fact that HBC represented that the aircraft was safe for flight based on the flight test done in the most extremely controllable configuration. HBC abandoned the original flight test plan that it created. Yet, HBC was aware of the aerodynamic effect of testing the aircraft in a left flap extended position, P-factor, torque, loading the aircraft to maximum gross weight, and testing at higher speeds – facts of aerodynamics which are recognized as aerodynamic facts of conventional twin engine aircraft. HBC took advantage of these principles so it could "represent" that the Duke passed.

HBC's brief attempts to seek safe harbor because the FAA believed the results of the flight test; however, whether or not the FAA believed HBC's misrepresentation is irrelevant. *See Robinson v. Hartzell Propeller, Inc.*, 326 F.Supp.2d 631 (E.D. Pa. 2004); *Hinkle v. Cessna Aircraft Co.*, No. 247099, 2004 WL 2413768 (Mich. App. Oct. 28, 2004).

In *Robinson*, the court denied summary judgment when the results of vibration testing were falsified, even though the FAA approved the test. 326 F. Supp.2d at 649-650. In *Hinkle*, summary judgment was denied when the FAA

approved the single engine climb rate flight testing and the results were falsified. 2004 WL 2413768, at *11-12. The *Hinkle* court reasoned that even though the data was provided to the FAA, it was still a jury question whether the manufacturer misrepresented the results. *Id.* Similarly here, the question whether HBC concocted a bogus flight test to support the false claim that the aircraft is safe for flight in all normal flight regimes with split flaps is one for a jury.

3. Third Instance of Knowing Misrepresentation – HBC was Aware of the Defective Design of the Duke Flap System and Withheld this Critical Information from the FAA

HBC's brief claims that the communication between HBC and the FAA was open and candid, but omits any discussion of a critical misrepresentation - that the Duke had the asymmetric flap shut down switch, such as installed on similar HBC flap systems.

On October 20, 1969, the FAA advised HBC of an incident involving a Duke aircraft that occurred in England; "the P-94 incident", which involved split flaps caused by the failure of the **right flap drive shaft assembly** (such as occurred on the subject accident flight) on an aircraft with only 52 operating hours. (A230-A231). HBC's response to the FAA merely blamed this "isolated" incident on improper rigging or misalignment, and rejected the idea that the Duke flap system required an emergency shutdown switch:

[redacted]

[redacted]

[redacted]

[redacted]

(A230-A231). Not only did HBC represent the cause of this incident without having performed any analysis or inspection, it claimed that the flap system's flap limit switch and flap circuit breaker would deactivate the system, making a flap cut-out switch unnecessary.(A230-A231). However, this statement misrepresented the design of the aircraft because the limit switch is only on the left wing and will

only trigger failure from the left side. (A658; A661; A868). Thus, like the P-94 incident, the right side flap failure of the Hart aircraft left the pilot unprotected by this purported safety mechanism. Neither the trial court nor HBC's brief address this misrepresentation.

Rather than correct the problem of the defective flap system, or add the switch, HBC issued several quick fixes and even authorized a new robust 90 degree drive for later built Duke aircraft in an effort to conceal the real problem, rather than correct the fundamental design flaw in these aircraft. The real problem remains an insufficient flap system vulnerable to an unannunciated single point failure – just as occurred in this accident.

Further, HBC failed to report the defective condition of the flap system to the FAA as required under 14 CFR § 21.3. HBC's brief suggests that the FAA was aware of the defective condition of the flap system. (Appellee Br. at 5). However, the FAA's receipt of information in no way exonerates from its duty to disclose and investigate failures of the flap system.

HBC's brief describes these communications as open and candid discussions concerning the Duke flap system, when they are not. Plaintiffs' briefs demonstrate that these are anything but open and candid. Ultimately, this is a question only a jury can decide.

4. Fourth Instance of Knowing Misrepresentation – HBC was Aware of the Emergency Condition Created with Asymmetric Flaps but Withheld this Information and Failed to Include it in the Airplane Flight Manual

[redacted] (A1108). During the flight test, HBC noted, [redacted] (A1029). However, this information is provided nowhere in the Airplane Flight Manual.

Neither HBC's brief, nor the trial court's order, address this misrepresentation. This should be sent to a jury to determine.

5. Direct Evidence of Scienter is Not Required to Establish the Knowing Misrepresentation Exception.

GARA's Misrepresentation Exception requires proof that the defendant committed (1) a knowing misrepresentation, or concealment, or withholding; (2) of

required information that is material and relevant; (3) that is causally related to the harm they suffered. 49 U.S.C. § 40101 note § 2(b)(1); *Moyer v. Teledyne Continental Motors, Inc.*, 979 A.2d 336, 345-46 (Pa. Super. 2009).

HBC's characterization of the Knowing Misrepresentation Exception as the "Fraud Exception" ignores the requisite proof to establish the Exception as mandated by Congress. GARA's only scienter term is "knowingly," and cases interpreting the standard of "knowingly" in the context of GARA require a showing that a party acted "[w]ith knowledge; consciously; intelligently; willfully; intentionally." *Hetzer-Young v. Precision Airmotive Corp.*, 921 N.E.2d 683, 695 (Ohio App. 3d 2009). Similarly, the scienter term "knowledge" as used in other federal statutes is defined as "'knowledge of the facts that constitute an offense', but not necessarily with knowledge that the facts amount to illegal conduct." *See United States of America v. Barbarosa*, 271 F.3d 438, 458 (3d Cir. 2001); *United States of America v. Gesualdi*, 660 F.2d 59 (2d Cir. 1981)(interpreting the 21 U.S.C. § 843(a)(5) use of a knowing scienter); *United States of America v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000) (stating "knowingly" means with awareness of conduct). The burden of proving a specific unlawful intent or motive to deceive is eliminated when a statute includes the consciousness element of "knowingly." GARA's Knowing Misrepresentation, Concealment, and Withholding Exception's language imposes a standard that actions be done with knowledge – not "fraud."

While HBC's brief suggests that direct evidence is necessary to establish the Knowing Misrepresentation Exception, the law requires otherwise. "A manufacturer's failure to produce evidence of its investigation into reported component failures is sufficient to raise an inference of concealment or withholding. Direct evidence of intentional concealment…is not necessary to survive summary judgment." *Robinson*, 326 F.Supp. 2d at 658.

Further, Delaware law does not require direct evidence of scienter to establish misrepresentation and has held that summary judgment is inappropriate when determining issues of scienter that should be left to a jury. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 446 (Del. 2005) ("Where the inference or ultimate fact to be established concerns intent or other subjective reaction, summary judgment is ordinarily inappropriate."). "To prove scienter, a plaintiff "need not produce direct evidence of the defendant's state of mind." "Circumstantial evidence may often be the principal, if not the only, means of proving bad faith." *Deloitte LLP v. Flanagan*, CIV.A. 4125-VCN, 2009 WL 5200657, *8 (Del. Ch. Dec. 29, 2009). Therefore, whether HBC *knowing* misrepresented, concealed, or withheld critical information from the FAA is a jury question.

6. The Rolling Provision - Defendant's Response Brief Fails to Rebut Plaintiffs' Evidence which Establishes that the Flap System was Replaced within 18 Years of the Accident.

Plaintiffs established that GARA's second repose period, known as the Rolling Provision, applies to the flap system components which were replaced within 18 years of the accident. HBC disagrees. The answer to this question lies with a jury. The logbooks that are available establish that the manufacturer recommended 2,000 hour replacement period would have been between 1995 and the date of the accident in 2008 (13 years). (A154; A969 at 63-A970 at 66). The mechanic primarily responsible for subject aircraft testified that the system had been replaced in accordance with the manufacturer's recommendations. (A969 at 63-A970 at 66).

While HBC's response brief disclaims responsibility for manufacturing the flap system components, the record evidence suggests the opposite. (Appellee Br. at 22-23). HBC is the only one who could have caused these parts to be made, as they are made by HBC contracted vendors in accordance with HBC's proprietary drawings. (A962 at 28-A963 at 30; A974 at 25).

HBC then suggests that the 90 degree drive must be more than 18 years old because it was the original style, ignores the fact that the robust redesigned 90 degree drive was not available for the subject aircraft. (Appellee Br. at 22-23).

These disputes are jury questions.

B. DELAWARE'S SUMMARY JUDGMENT STANDARD DOES NOT PERMIT THE TRIAL COURT TO ASCRIBE TO THE MOVING PARTY'S EXPLANATION OF EVENTS THAT ARE EQUALLY EXPLAINABLE IN THE FAVOR OF THE NON-MOVING PARTY

"Where both sides put forth conflicting evidence such that there is an issue of material fact, summary judgment must be denied. A fact is material if it 'might affect the outcome of the suit under the governing law.' There is a genuine issue of material fact 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Deloitte LLP*, 2009 WL 5200657, at *8.

In granting Defendant's Motion for Summary Judgment, the trial Court deviated from the summary judgment standard of review and made numerous findings of fact that should have been left for a jury's determination in favor of the defense. *See Merrill v. Crothall-American, Inc.*, 606 A.3d 96, 99-100 (Del. 1992); *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

III. CONCLUSION

The record before this Court establishes that HBC is not afforded protection under GARA and that this case should be sent to a jury to decide.

HBC knowingly misrepresented, concealed, and withheld information from the FAA and represented that the Duke aircraft was safe with split flaps. HBC abused its position of trust as DOA and improperly certified the Duke's flap system as interconnected, when it was not. Meanwhile, the service history of the flap systems with the same basic flap system design revealed that they were prone to fail.

When the P-94 incident caused the FAA to query, HBC, at the FAA's insistence, performed a flight test manipulating every factor to create the safest possible split flap scenario, and misrepresented it to be safe. HBC knew that the right flap down, takeoff conditions, and engine out were critical to test and had planned to test these situations, and abandoned the position it could not pass.

Through these misrepresentations, HBC allowed pilots to fly completely unguarded with any information in the AFM, without the benefit of an asymmetric flap shut down switch, and without any protection whatsoever.

HBC's response brief rebutting this evidence in no way undermines the role of a jury. The response brief illustrates that there are many issues in dispute which must be resolved by the trier of fact.

HBC further failed to rebut the record that the parts in the flap system were replaced within 18 years of the accident, and that HBC had exclusive control over the manufacture of those parts. HBC also failed to establish that the written warranty exception is not available.

In entering summary judgment, the Court made numerous findings of fact which should have been reserved for a jury to decide.

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