IV. PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD HAVE BEEN GRANTED

(1) Question Presented

Since there are factual issues in dispute concerning whether the GARA defense is available to HBC, did the trial court err in granting summary judgment and denying Plaintiffs' Motion for Judgment on the Pleadings?(A26-A73; A1155-A1163).

(2) Scope of Review

The court's determination that a pleading was rendered moot is a legal determination which is reviewed de novo. Lopez-Vazquez v. State, 956 A.2d 1280, 1285 (Del. Supr. 2008)

(3) Merits of Argument

The grant of summary judgment did not moot Plaintiffs' Motion for Judgment on the Pleadings, but rather made a decision on this Motion imperative. Plaintiffs were deprived of their opportunity to challenge an affirmative defense HBC did not plead, but was required to plead under Del. Super. Ct. R. 8(c). The failure to plead GARA as an affirmative defense constitutes waiver of the defense. See e.g. Munro v. Beazer Home Corp., 2011 WL 2651910 (Del. Com. Pl. June 23, 2011) Plaintiffs respectfully request this Honorable Court to enter judgment in their favor on the Defendants' affirmative defense of GARA.

CONCLUSION

HBC is not afforded GARA protection when HBC has knowingly misrepresented the safety of the Duke aircraft with split flaps, which resulted in the death of Dan Hart. HBC abused its trusted DOA status and improperly certified the Duke's flap system as interconnected, despite knowing this design was prone to disengagement failures. When the FAA learned of HBC's deception, it required HBC to flight test the Duke with asymmetric flaps. Rather than conduct the tests as required under the Regulations and as planned, HBC abandoned its original protocol it could not pass in favor of testing under the safest possible parameters and misrepresented that the results would be the same if the right flap was tested, and that the Duke was safe for flight. These misrepresentations permeated through the AFM/POH and lack of an emergency shut down switch.

Plaintiffs further showed the flap system had been replaced with HBC authorized parts within 18 years and therefore the Rolling Provision should apply, and evidence of a written warranty.

Plaintiffs respectfully request this Honorable Court to reverse the trial court's December 15, 2011 order and opinion and to give them what GARA specifically preserves for accident victims – the right to have their day in court.

MICHAEL J. GOODRICK, P.A.

/s/Michael J. Goodrick
Michael J. Goodrick, Esq. (DSB # 170)
18B Trolley Square
P.O. Box 134
Wilmington, DE 19899
(302) 778-5360

OF COUNSEL:

Arthur Alan Wolk, Esq. (PA Bar #02091)
Cynthia M. Devers, Esq. (PA Bar #209144)
THE WOLK LAW FIRM
1710-12 Locust Street
Philadelphia, PA 19103
(215) 545-4220

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LISABETH MOORE, Individually and LISABETH MOORE, as Personal Representative of the Estate of Daniel Hart, Deceased,	)	
And	)	
LISABETH MOORE, as Next Friend of ZOE HART-MOORE,	)	C.A. No. N09C-12-010 MMJ
Plaintiffs,	)	
v.	)	
HAWKER BEECHCRAFT CORPORATION,	)	
Defendant.	)	

Submitted: November 10, 2011
Decided: December 15, 2011

On Defendant Hawker Beechcraft Corporation's Motion for Summary Judgment
GRANTED

On Plaintiff's Motion for Judgment on the Pleadings
DENIED AS MOOT

OPINION

Michael J. Goodrick, Esquire, Michael J. Goodrick, P.A., Wilmington, Delaware; Of Counsel: Arthur Alan Wolk, Esquire (argued), Cynthia M. Devers, Esquire, The Wolk Law Firm, Philadelphia, Pennsylvania, Attorneys for Plaintiffs

Katharine L. Mayer, Esquire, McCarter & English, LLP, Wilmington, Delaware; Of Counsel: Michael G. Jones, Esquire (argued), Martin, Pringle, Oliver, Wallace & Bauer, LLP, Wichita, Kansas, Attorneys for Defendant

JOHNSTON, J.

PROCEDURAL CONTEXT

This litigation arises from the death of Daniel Hart, which occurred on December 4, 2007 at the New Castle County Airport. Hart, an experienced pilot, died in an accident involving a Beech Model 60 Duke aircraft manufactured by Defendant Hawker Beechcraft Corporation.

Plaintiffs (decedent's estate and next of kin) filed suit on December 1, 2009 alleging, *inter alia*, negligence on the part of Hawker Beechcraft Corporation. Plaintiffs seek damages under Delaware's Wrongful Death Statute and Survival Statute.

Hawker Beechcraft Corporation has moved for summary judgment, arguing that Plaintiffs' action is barred by the General Aviation Revitalization Act ("GARA"). GARA established an 18-year statute of repose against civil actions for damages involving general aviation aircraft.

Plaintiffs respond that even if GARA's statute of repose is implicated, the knowing misrepresentation exception and the new parts exception apply, permitting prosecution of this action. Plaintiffs also contend that a cause of action exists under an express warranty theory. Plaintiffs have moved for judgment on the pleadings.

FACTUAL BACKGROUND

In 1969, Defendant Hawker Beechcraft Corporation ("HBC") manufactured the Beech Model 60 Duke aircraft ("Subject Aircraft"). On October 30, 1970, ownership of the Subject Aircraft was transferred from HBC to Beechcraft Aviation Company, then to Beechcraft West Oakland, and finally to Skywater Lodge located in Glenbrook, Nevada. Delivery of the Subject Aircraft in Glenbrook, Nevada was completed on October 30, 1970. HBC has neither operated nor had possession of the Subject Aircraft since 1970.

On the morning of December 4, 2007, Daniel Hart was piloting the Subject Aircraft. Hart was an experienced pilot. He had logged approximately 1,158 flight hours (390.5 of which were in the Subject Aircraft). It is undisputed that on the morning of the accident, the Subject Aircraft's flaps became asymmetric, or unsynchronized, due to a defect in the 90° drive. Specifically, a key on the output shaft of the right flap's 90° drive separated from the output shaft. This separation, or fracture, resulted in the right flap's inability to respond to the Subject Aircraft's flap control system.

As a result of the asymmetric flap condition, Hart lost control of the Subject Aircraft. The Subject Aircraft subsequently crashed, killing Hart.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[1] All facts are viewed in a light most favorable to the non-moving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[3] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[4] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[5]

ANALYSIS

General Aviation Revitalization Act[6]

In 1994, Congress enacted GARA in an effort to "revitalize" the general aviation industry following a serious and precipitous decline in the manufacture and sale of general aviation aircraft by United States

---

[1] Super. Ct. Civ. R. 56(c).
[2] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).
[3] Super. Ct. Civ. R. 56(c).
[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[6] Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C. § 40101 note) (hereinafter "GARA").

companies.[7] GARA established a statute of repose to protect the manufacturers of general aviation aircraft and parts "from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years."[8] In essence, GARA "attempts to strike a fair balance by providing some certainty to manufacturers, which will spur the development of new jobs, while preserving victims' rights to bring suit for compensation in certain particularly compelling circumstances."[9]

Section 2(a) of GARA, which sets forth the statute's basic limitation on civil actions, provides, in relevant part:

> Section 2. Time limitations on civil actions against aircraft manufacturers.
>
> (a) In general.-Except as provided in subsection (b), no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred-
>
> (1) after the applicable limitation period beginning on-
>
> > (A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

---

[7] *Burton v. Twin Commander Aircraft LLC*, 254 P.3d 778, 783-84 (Wash. 2011) (citing *Burroughs v. Precision Airmotive Corp.*, 78 Cal.App.4th 681, 690 (2000)).
[8] *Michaud v. Lyne-Stricker-Boulanger*, 2001 WL 34083885, at *1 (Del. Super.) (citing *Burroughs*, 78 Cal.App.4th at 689).
[9] *Burroughs*, 78 Cal.App.4th at 691.

> (B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or
>
> (2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition.

Section 3 of GARA defines the applicable limitation period as 18 years. By establishing an 18-year time bar, GARA implicitly acknowledges that any design or manufacturing defect not prevented or identified by the FAA by then should, in most instances, have manifested itself.[10] Essentially, GARA "recogni[zes] that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury occurring after that much time has elapsed."[11]

A plaintiff may overcome GARA's bar if one of the exceptions set forth in Section 2(b) applies. Two exceptions are pertinent to this case – the knowing misrepresentation exception and the new parts exception.

---

[10] *Burroughs*, 78 Cal.App.4th at 691.
[11] *Id.* (citing *Altseimer v. Bell Helicopter Textron, Inc.*, 919 F.Supp. 340, 342 (E.D. Cal. 1996)).

Knowing Misrepresentation Exception

Plaintiffs first contend that HBC is barred from seeking immunity under GARA's statute of repose because HBC knowingly misrepresented pertinent information to the FAA and concealed material information from the FAA.

GARA's knowing misrepresentation exception offers no repose if:

> [T]he claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft[,] *knowingly misrepresented* to the Federal Aviation Administration, or *concealed or withheld* from the Federal Aviation Administration, *required information* that is *material and relevant* to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is *causally related* to the harm which the claimant allegedly suffered….[12]

A plaintiff, seeking to invoke the knowing misrepresentation exception to the GARA statute of repose, has the burden of pleading with specificity and proving the following five elements: (1) the manufacturer had actual or constructive knowledge of information relevant to FAA type certificate or continuing airworthiness obligations; (2) the manufacturer knowingly misrepresented, concealed or withheld the information from the FAA; (3) the information was required by the FAA; (4) the required

[12] GARA § 2(b)(1) (emphasis added).

information was material and relevant to the performance, maintenance or operation of the aircraft; and (5) the knowing misrepresentation, concealment or withholding was causally related to the harm suffered.

To avail themselves of GARA's knowing misrepresentation exception, Plaintiffs first must prove that HBC *knowingly* misrepresented, concealed, or withheld required information from the FAA. "Knowledge, as a state of mind, applies to each of these forms of keeping information from the FAA – that is, 'knowingly' modifies each of the words 'misrepresented,' 'concealed,' and 'withheld' in the exception."[13]

Plaintiffs also must demonstrate that HBC was required to disclose the information which it withheld from the FAA. A manufacturer's reporting obligations commence when the initial certification of the aircraft is sought.[14] These obligations, however, are ongoing and continuous,[15] requiring a manufacturer to report specific failures, malfunctions, or defects that surface after the type certificate is issued.[16]

Plaintiffs further must prove that any alleged misrepresentation or concealment was causally related to the harm suffered. It is not sufficient to

---

[13] *Burton*, 254 P.3d at 780.
[14] *See* GARA § 2(b)(1).
[15] *Hetzer-Young v. Precision Airmotive Corp.*, 921 N.E.2d 683, 698 (Ohio Ct. App. 2009).
[16] 14 C.F.R. § 21.3. Section 21.3(c) delineates a list of specific occurrences that must be reported.

prove that the product caused the injury. The alleged misrepresentation, itself, must have been the proximate cause of injury.

As the movant, HBC bears the initial burden of demonstrating that Plaintiffs' suit is barred by GARA.[17] If HBC satisfies this initial burden, the burden then shifts to Plaintiffs to set forth facts which show that the knowing misrepresentation exception applies.[18] Specifically, Plaintiffs bear the "burden of pleading 'with specificity the facts necessary to prove,' and the burden to prove a knowing misrepresentation, concealment, or withholding."[19] If Plaintiffs produce evidence sufficient to support a knowing misrepresentation claim, then it is highly unlikely that HBC, for purposes of summary judgment, will be able to rebut those facts.[20] In other words, if "[P]laintiff[s] present[] material facts in support of [their] claim, [HBC] can do little more than proffer contrary facts."[21] Such a factual dispute renders summary judgment inappropriate.[22]

---

[17] *South Side Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Indus., Ltd.*, 927 N.E.2d 179, 193 (Ill. App. Ct. 2010); *Willett v. Cessna Aircraft Co.*, 851 N.E.2d 626, 635 (Ill. App. Ct. 2006)); *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, 2011 WL 2560281, at *3 (E.D. Okla.).
[18] *South Side Trust*, 927 N.E.2d at 193; *Willett*, 851 N.E.2d at 635-36; *Burton*, 254 P.3d at 787.
[19] *Burton*, 254 P.3d at 786 (citing GARA § 2(b)(1)).
[20] *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 923 F.Supp. 1453, 1456 (D. Wyo. 1996).
[21] *Id.*
[22] *Id.* at 1456-57.

Plaintiffs' Contentions

Plaintiffs claim that HBC knowingly misrepresented, concealed, or withheld required information from the FAA concerning the Beech Model 60 Duke's ("Beech Duke") flap system when seeking initial certification. According to Plaintiffs, HBC represented that the Beech Duke's "flap system was interconnected despite knowing [that] the flap system was not interconnected and [was] prone to disengaging just as it had done in the large fleet of other Beech Models with the same basic flap system."

Plaintiffs contend that HBC continued to misrepresent information to the FAA by concealing known design defects with the Beech Duke. Specifically, Plaintiffs argue that HBC was obligated to report that the Beech Duke was not controllable in a right side split flap condition – information which HBC had obtained through approximately 107 Service Difficulty Reports ("SDRs").

Additionally, Plaintiffs argue that HBC misrepresented the flight safety of the Beech Duke to the FAA when flight testing was eventually performed. Plaintiffs claim that HBC manipulated the test procedure to obtain the most favorable conditions and flight parameters. By refusing to implement proper testing procedures, Plaintiffs contend that HBC concealed evidence that the aircraft had inherently dangerous flight characteristics in a

split flap condition. Plaintiffs further claim that despite HBC's knowledge that the Beech Duke may experience a split flap condition, HBC withheld information on how to cope with such an unsafe condition in its Pilot's Operating Handbook or Airplane Flight Manual.

Plaintiffs conclude that HBC's knowing misrepresentation, concealment, and withholding of required information from the FAA ultimately resulted in Hart's death.

FAA's Compliance Review Process

The FAA has promulgated a comprehensive set of regulations that delineate the minimum safety standards with which an aircraft manufacturer must comply before marketing its products.[23] The standards establish requirements for the design, materials, workmanship, construction, operation and performance of the aircraft, aircraft engines, and propellers.[24]

A manufacturer wishing to introduce a new type of aircraft first must obtain FAA approval of the plane's basic design in the form of a type certificate ("TC").[25] In order to obtain a TC, the manufacturer must submit designs, drawings, test reports and computations to demonstrate that the

[23] *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airline*s), 467 U.S. 797, 805 (1984).
[24] 49 U.S.C. § 44701(a)(1).
[25] 49 U.S.C. § 44704(a)(1).

aircraft satisfies FAA regulations.[26] The manufacturer must demonstrate that the aircraft meets airworthiness standards, which is accomplished through ground and flight testing.[27] The manufacturer must show that the aircraft is safely controllable and maneuverable during all flight phases, and that it is possible for the aircraft to make a smooth transition from one flight condition to another without danger of exceeding the limit load factor, under any probable operating condition.[28] With respect to the airworthiness of the flap system, the manufacturer either must: (1) specify whether the main flap wings are synchronized by a mechanical interconnection; or (2) show that the aircraft has safe flight characteristics with the flaps retracted on one side and extended on the other.[29] If the FAA finds that the proposed aircraft design meets the minimum safety standards, a TC is issued.[30]

Once the aircraft is produced,[31] the owner must obtain an airworthiness certificate from the FAA.[32] An airworthiness certificate indicates that the aircraft conforms to the type certificate and is in condition for safe operation.[33]

---

[26] 14 C.F.R. §§ 21.17(a)(1), 21.21(b).
[27] 14 C.F.R. §§ 23.1, 23.141.
[28] 14 C.F.R. § 23.143.
[29] 14 C.F.R. § 23.701.
[30] 49 U.S.C. § 44704(a)(1); 14 C.F.R. § 23.21(b).
[31] *See* 49 U.S.C. § 44704(c).
[32] 49 U.S.C. § 44704(d)(1).
[33] 49 U.S.C. § 44704(d)(1); 14 C.F.R. § 21.183(b).

Because the FAA, alone, is unable to complete this complex compliance review process, the FAA may authorize the delegation of certain inspection and certification responsibilities to properly qualified private persons.[34] Those persons granted Delegation Option Authority ("DOA"), termed "designated engineering representatives," serve as surrogates of the FAA and inspect, examine, and test aircraft for certification purposes.[35] Designated engineering representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design.[36]

No Misrepresentation during Initial Certification of Subject Aircraft

The FAA issued a DOA to HBC, thereby allowing HBC to fulfill a portion of the FAA's certification role. On December 22, 1965, HBC applied to the FAA for a TC for the Beech Duke. As the DOA, HBC was charged with conducting all tests and inspections on the Beech Duke in order to determine its compliance with the regulations. On the Type Inspection Authorization, submitted as part of HBC's application, HBC stated that the entire flap system was interconnected through a centralized drive motor, thus demonstrating compliance with Section 23.701.[37] Based on this representation, HBC was relieved of demonstrating that the Beech

[34] 49 U.S.C. § 44702(d).
[35] *Varig Airlines*, 467 U.S. at 807.
[36] *Id.*
[37] 14 C.F.R. § 23.701. The applicable regulations are those in effect in 1968.

Duke had "safe flight characteristics." After reviewing the data submitted by HBC, the FAA issued a TC for the Beech Duke on February 1, 1968.

Plaintiffs are unable to identity any information that was misrepresented to the FAA. At his deposition, Plaintiffs' own expert, Aaron G. "Tim" Olmsted, admitted that he could not point to a specific piece of information that had been withheld from the FAA concerning the flap system on the Beech Duke. Olmsted offered the following testimony:

> Q: Can you identify me a specific piece of information that [HBC] 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….
>
> * * *
>
> Q: …I'm trying to identify whether you as an expert in this case are going to be coming forward and identifying any pieces of information, that is discrete data points, that [HBC] knew that it was required to tell the FAA that it did not in the context of certification of the flaps in the Duke. And that's it.
>
> A: A specific document? I don't have one.

The Court finds no evidence of misrepresentation to the FAA at the initial certification of the Beech Duke. Specifically, there is nothing in the record to suggest that HBC misrepresented, withheld, or concealed required information from the FAA regarding the flap system when applying for a TC. The Court therefore finds that Plaintiffs have failed to present sufficient evidence of misrepresentation by HBC to the FAA when applying for a TC.

No Misrepresentation in Subsequent Flight Testing

Plaintiffs argue that the flap system was not synchronized by a mechanical interconnection as represented by HBC. According to Plaintiffs, a flap system cannot be considered interconnected if it is prone to disengage. Plaintiffs contend that other aircraft models manufactured by HBC and equipped with the same basic flap system as the Beech Duke had experienced flap system disengagements in the field.

Taking all inferences in favor of Plaintiffs, even if Plaintiffs were able to establish a *prima facie* case of misrepresentation at the initial certification, subsequent flight testing by HBC makes this exception to the statute of repose inapplicable. In order to prove misrepresentation, Plaintiffs must demonstrate, *inter alia*, a causal relationship between any alleged misrepresentation and Hart's injury. Considering the specific facts and sequence of events in this case, the Court find that the subsequent flight testing severs any causal chain stemming from HBC's alleged misrepresentation at the initial certification.

Plaintiffs contend that HBC continued to misrepresent information to the FAA after the initial certification. Plaintiffs claim that HBC knowingly misrepresented, concealed or withheld information from the FAA concerning its subsequent flight testing procedures. In support of this

contention, Plaintiffs point to correspondence between HBC and the FAA, as well as the actual flight test conducted on the Beech Duke.

Beginning in late 1969, extensive communication ensued between the FAA and HBC concerning the flap system on the Beech Duke. By letter dated November 13, 1969, the FAA advised HBC that it had received a report of asymmetric flaps on a Beech Duke aircraft ("P-94 incident"). On December 11, 1969, HBC responded, stating that because the P-94 incident was "an isolated part failure caused by an undetermined system malfunction," no flight testing was necessary. HBC maintained that the flap system was, in fact, interconnected.

In a follow-up letter dated January 13, 1970, the FAA requested that HBC demonstrate compliance with Section 23.701 by conducting flight testing. According to the FAA: "Safe flight characteristics with asymmetric flaps are necessary because the flaps may become unsynchronized."

On January 20, 1970, HBC responded to the FAA's request for flight testing. HBC contended that flight testing was unnecessary because aircrafts with flap systems similar to the Beech Duke's system already had demonstrated safe flight characteristics. HBC requested that the FAA reconsider its position.

On February 11, 1970, the FAA again requested that HBC conduct flight testing or perform "an equally reliable analysis" in order to demonstrate safe flight characteristics for Beech Duke aircraft. Neither the FAA nor the regulations specified the precise manner in which the flight testing was to be conducted.[38]

In response to the FAA's repeated requests, HBC conducted flight testing of the Beech Duke in order to demonstrate compliance with Section 23.701. HBC's proposed test plan called for creating flap asymmetry with the right flap extended and the left flap retracted. Prior to completing the test flight, however, the test plan was altered to complete testing with the left flap extended and the right flap retracted. HBC contended that although the flight test was modified, "there was no significant difference in the results that would require performing the test with one flap retracted as opposed to testing with the other flap retracted."

Following flight testing, HBC provided the FAA with the flight test plan as well as the flight test report. Notably, the flight test report indicated that the actual flight test performed differed from that outlined in the proposed test plan. The report noted that "[w]ith one flap fully extended and

[38] In its February 11, 1970 letter, the FAA conceded that it had mistakenly believed that HBC had already conducted investigations of flight characteristics with asymmetric flaps. The record is unclear, however, as to why the FAA believed that such testing already had been performed.