No. ________

In The
Supreme Court of the United States

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,

Petitioners,

v.

HAWKER BEECHCRAFT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Delaware

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1994, Congress enacted a limited eighteen-year aviation statute of repose, known as the General Aviation Revitalization Act (GARA).[1] Congress carefully limited this statute to preserve the rights of aircraft accident victims to pursue tort law claims against manufacturers while curtailing general aviation manufacturers' liability for accidents involving products older than eighteen years. This Petition for Certiorari concerns the nullification of the provisions of the statute protecting the rights of accident victims. Therefore, the very foundation for constitutionality that Congress penned into the statute in the first place was judicially legislated out of the statute by a state court.

Congress struck the balance between competing interests by including the "Misrepresentation Exception", which forecloses immunity to manufacturers who "knowingly" misrepresent, conceal, or withheld required safety information from the Federal Aviation Administration (FAA). § 2(b)(1). Congress also included an additional repose period, known as the "Rolling Provision", which applies to replacement components, systems, subassemblies, or other parts that caused the accident. § 2(a)(2). Finally, Congress included another exception which does not permit repose for

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[1] Pub. L. No. 103-298, 108 Stat. 1552 (1994) (codified as amended at 49 U.S.C. § 40101, note).

breaches of a written warranty. § 2(b)(4). Without these provisions, general aviation manufacturers would have blanket immunity for torts they have committed; through the foregoing provisions, Congress ensured this unconstitutional result would not be the law of this nation.

This case presents significant questions of federal law on the application of these three provisions of GARA, which have gone without the benefit of this Court's guidance for almost two decades. As can be expected, there is no uniformity among the many state and federal courts that have considered GARA. In this case, the Supreme Court of Delaware interpreted GARA in a manner which jeopardizes the safeguards afforded by the tort law system, which this Court recognized to be so important in *Wyeth v. Levine*, 555 U.S. 555 (2009). Thus, the questions presented are:

1. Whether an interpretation of GARA judicially nullifying the Knowing Misrepresentation Exception, Rolling Provision, and Warranty Exception is unconstitutional.

2. Whether the GARA statute should be applied according to its plain language.

Petitioners respectfully answer each of the foregoing questions in the affirmative.

PARTIES TO THE PROCEEDINGS

Petitioner is Lisabeth Moore, who is the widow of Daniel Hart. She brings this appeal, individually and as Personal Representative of the Estate of Daniel Hart, Deceased, and as Next Friend to her and Daniel's child, Zoe Hart-Moore. Respondent is Hawker Beechcraft Corporation which is the company that manufactured the aircraft which took Daniel Hart's life.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
A. HBC's First Misrepresentation	6
B. HBC's Second Misrepresentation	7
C. HBC's Third Misrepresentation	9
D. The Causative Effect of HBC's Misrepresentations on Daniel Hart's Accident	10
E. Flap System Replacement	11
F. Written Warranty	12
G. Relevant Procedural Facts	12
REASONS FOR GRANTING THE PETITION	15
The Consequence of Judicial Nullification of Statutory Safeguards That Congress Included to Assure Constitutionality in the First Instance is a Paramount National Concern Deserving This Court's Attention	16

TABLE OF CONTENTS – Continued

Page

A. Judicial nullification of GARA's Misrepresentation Exception is antithetical to the constitutional notion of preserving core common-law rights and the goal of the Federal Aviation Act to foster safety in aviation 22

B. Judicial nullification of GARA's Rolling Provision by treating it as an exception rather than a separate repose period as provided in the plain language of the statute is unconstitutional 28

C. Judicial nullification of GARA's Warranty Exception for the benefit of the manufacturers at the expense of accident victims and stripping the states of their ability to protect their citizens is unconstitutional 34

CONCLUSION 36

APPENDIX

September 5, 2013 Order of the Supreme Court of the State of Delaware .... App. 1

December 15, 2011 Order of the Superior Court of the State of Delaware, In and For New Castle County, granting Defendant Hawker Beechcraft Corporation's Motion for Summary Judgment .... App. 3

TABLE OF AUTHORITIES

Page

CASES:

Agape Flights, Inc. v. Covington Aircraft Engines, Inc., No. Civ. 09-492 FHS, 2011 WL 2560281 (E.D. Okla. June 28, 2011)........................29

Atl. Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970) 19

Avco Corp. v. Neff, 30 So.3d 597 (Fla. App. 2011) 31

Bianco v. Rivera, No. CA-CV-03-0647, 2004 WL 3185847 (Ariz. App. Oct. 19, 2004).........................35

Brickerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930)..19

Brown v. Gerdes, 321 U.S. 178 (1944)........................19

Burton v. Twin Commander Aircraft, LLC, 254 P.3d 778 (Wash. 2011) 27

Butler v. Bell Helicopter Textron, 109 Cal.App.4th 1073 (2003) 24, 25

Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155 (9th Cir. 2000)...29

Campbell v. Parker Hannifin Corp., 82 Cal.Rptr.2d 202 (Cal. App. 1 Dist. 1999)................31

Carson v. Heli-Tech, Inc., No. 2:01-cv-643-FtM-29SPC, 2003 WL 22469919 (M.D. Fla. Sept. 25, 2003) 29

Crandon v. United States, 494 U.S. 152 (1990).........32

TABLE OF AUTHORITIES – Continued

Page

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) 17

Flores v. RAM Aircraft Corp., No. 96-1507, 2000 WL 34017118 (S.D. Fla. Aug. 31, 2000).........29

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)..20

Glover v. Am. Res. Corp., No. 163672, 1996 WL 33484136 (Cal. App. Sept. 13, 1996) 30

Goad v. Celotex Corp., 831 F.2d 508 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988)..............19

Gregory v. Ashcroft, 501 U.S. 452 (1991)..................20

Hinkle v. Cessna Aircraft Co., No. 247099, 2004 WL 2413768 (Mich. App. Oct. 28, 2004)..........24, 25

In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 644 F.2d 594 (7th Cir. 1981) 21

In re Brock, 499 N.W.2d 752 (Mich. 1993)................18

Limited Flying Club Inc. v. Wood, 632 F.2d 51 (8th Cir. 1980) 35

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)..18

Moyer v. Teledyne Cont'l Motors, Inc., 979 A.2d 336 (Pa. Super. 2009)...22

Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)..20

New York Central R.R. v. White, 243 U.S. 188 (1917)..18

TABLE OF AUTHORITIES – Continued

Page

Pridgen v. Parker Hannifin Corp. (Pridgen I), 905 A.2d 422 (Pa. 2006) 31, 32, 33

Pridgen v. Parker Hannifin Corp. (Pridgen II), 916 A.2d 619 (Pa. 2007) 32, 33

Printz v. United States, 521 U.S. 898 (1997) 20

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 18

Rickert v. Mitsubishi Heavy Indus., Ltd., 923 F. Supp. 1453 (D. Wyo. 1996) 22

Robinson v. Hartzell Propeller, Inc., 326 F. Supp. 2d 631 (E.D. Pa. 2004) 22, 23, 24, 25

Sheesley v. Cessna Aircraft Co., Nos. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006) 26, 27, 29, 31

Southside Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Industries, Ltd., 927 N.E.2d 179 (Ill. App. Ct. 2010) 30

Tillman v. Raytheon Co., 2013 Ark. 474, ___ S.W.3d ___, 2013 WL 6122298 (Ark. Nov. 21, 2013) 26, 27

United States v. Lopez, 514 U.S. 549 (1995) 20

United States v. Morrison, 529 U.S. 598 (2000) 20

United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) 6, 14, 25, 26

Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997) 19

TABLE OF AUTHORITIES – Continued

Page

Willett v. Cessna Aircraft Co., 851 N.E.2d 626 (Ill. App. 2006) 29

Wyeth v. Levine, 555 U.S. 555 (2009) .... ii, 19

CONSTITUTIONAL PROVISIONS

Del. Const. Art. IV, § 11 1

U.S. Const. amend. X 4, 5, 20, 21

U.S. Const. amend. XIV, § 1 .... 4, 18, 28

FEDERAL STATUTES

28 U.S.C. § 1257(a) 1

49 U.S.C. § 40120(c) 16

Pub. L. No. 103-298, 108 Stat. 1552 (1994) (codified as amended at 49 U.S.C. § 40101) .... *passim*

FEDERAL RULES & REGULATIONS

Sup. Ct. R. 13 1

14 C.F.R. § 21.3 11

14 C.F.R. § 23.143 .... 7, 9

14 C.F.R. § 23.701 .... 6, 7

14 C.F.R. § 23.1585 .... 9, 11

STATE STATUTES

6 Del. C. § 2-313(1)(a), (b) 35

OPINIONS BELOW

The Order of the Delaware Supreme Court affirmed summary judgment to a general aviation aircraft manufacturer under a federal statute of repose called The General Aviation Revitalization Act. (App. 1-2). The opinion of the Delaware Superior Court granting summary judgment is unreported. (App. 3-32).

JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Supreme Court of Delaware's Order affirming summary judgment was entered on September 5, 2013. The Superior Court of Delaware entered an order granting summary judgment on December 15, 2011. This petition for certiorari is timely. Sup. Ct. R. 13.

The Supreme Court of Delaware had jurisdiction over the appeal from the opinion of the Superior Court of Delaware pursuant to Del. Const. Art. IV, § 11 because it is an appeal from a final order and was timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The significant issues of federal importance presented in this case involve the misapplication of the federal statute, The General Aviation Revitalization Act, Pub. L. No. 103-298, 108 Stat. 1552 (1994) (codified as amended at 49 U.S.C. § 40101, note), and the Due Process Clause of the United States Constitution.

GARA is a statute of repose barring tort actions against manufacturers of general aviation aircraft if the accident giving rise to a cause of action occurs after the statutory eighteen-year period of limitation expires. GARA § 2(a). GARA provides:

> **Sec. 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

(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.

(b) EXCEPTIONS – Subsection (a) does not apply –

(1) if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness 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 component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered;
>
> . . .
>
> (4) to an action brought under a written warranty enforceable under law but for the operation of this Act.
>
> . . .

Sec. 3. Other definitions.

. . .

(3) the term "limitations period" means 18 years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft;. . . .

The application of this Statute is intertwined with the Due Process Clause of the United States Constitution and the Tenth Amendment of the United States Constitution, which provide:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X

STATEMENT OF THE CASE

This strict liability, negligence, and breach of warranty case arises from the December 4, 2007 crash of a Beech Duke twin engine aircraft at the New Castle Air Park, which killed the pilot, Daniel Hart. Respondent, Hawker Beechcraft Corp. (HBC), the manufacturer and type certificate holder of the aircraft, does not dispute the accident was caused by a malfunction of the aircraft's flap system that led to flap asymmetry (known as "split flap"). This resulted in a loss of control because the extended right flap coupled with engine/propeller torque rolled the aircraft over while it was less than one hundred feet above the ground during takeoff. Daniel Hart was killed in the post-crash fire.

On December 1, 2009, Daniel Hart's widow filed this lawsuit against HBC asserting causes of action sounding in strict liability, negligence, and breach of warranty. Petitioners asserted claims that (1) HBC knowingly misrepresented, concealed, and withheld required safety information from the Federal Aviation Administration (FAA); (2) the parts that caused the subject accident were replaced within eighteen-years

and supplied by HBC; and (3) HBC breached the express warranty of airworthiness of the accident aircraft.

A. HBC's First Misrepresentation

HBC self-certified the Beech Duke through its Delegated Option Authorization ("DOA"). This Court explained the DOA process in its opinion, *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 804-05 (1984), which is addressed below in more detail. In short, an HBC employee sat in the shoes of the FAA and approved the certification of the Duke.

As part of that self-certification process, HBC knowingly misrepresented that it demonstrated compliance with all applicable regulations. Of particular importance here, HBC affirmatively represented that the aircraft flap system was "mechanically interconnected" in accordance with 14 C.F.R. § 23.701. However, the Beech Duke's flap system is not synchronized through an interconnection, and never was. This was an affirmative misrepresentation by HBC. However, by the time the FAA exposed HBC's misrepresentation, which has permeated throughout the Duke's existence, these aircraft were being mass produced and flown in the field.

It took an incident in the field where a Duke aircraft suffered a split flap failure to turn the FAA's attention to the flap system design, known as the P-94 incident. After evaluating the flap system

design, the FAA condemned HBC because the Duke failed to comply with § 23.701 since "the flaps may become unsynchronized" and demanded flight testing to demonstrate compliance. The FAA's demand for flight testing is no coincidence since 14 C.F.R. § 23.143 required flight testing to establish that the Duke could be safely controllable in all foreseeable flight configurations, and controllable "without exceptional piloting skill, alertness, or strength . . . under any probable operating condition". 14 C.F.R. § 23.143.

Therefore, the Beech Duke's initial certification was procured through an abuse of HBC's DOA authority vested in it by the FAA and the exact regulations which were promulgated to prevent an accident like Daniel Hart's were never fulfilled.

B. HBC's Second Misrepresentation

The very incident that prompted the FAA to mandate flight testing involved a *right-side* extended split flap condition: the same side that failed in the present accident. Therefore, a right-side extended split flap was a foreseeable flight configuration for HBC to flight test. HBC prepared a protocol requiring the right split flap failure to be analyzed. The ensuing flight test, however, switched the protocol to a *left-side* extended split flap. This bait and switch was an aerodynamically significant and calculated move because HBC knew the Duke could not pass the originally planned test with the right flap fully extended and left flap retracted.

The difference between a right-sided and left-sided split flap is overwhelmingly important. Because the propeller and engine rotating systems of the Duke spin counter-clockwise, the aircraft rolls to the left (called P-factor and torque) without any pilot input. An aircraft suffering a split flap will roll in the direction of the retracted flap because the extended flap creates more lift. The flap system is supposed to be interconnected according to the Federal Aviation Regulations, so it works symmetrically. However, a split flap with an extended right flap will cause the aircraft to roll to the left and this force will combine with the P-factor and torque to exacerbate the malfunction. On the other hand, a split flap with a left-side extended flap will cause the aircraft to roll to the right which will be tempered by the left roll forces caused by P-factor and torque. HBC testified under oath that the foregoing was true and that it had knowledge of this aerodynamic feature. HBC also testified that the heavier the aircraft, the more controllable it is in a split flap configuration.

Despite the FAA's demand that HBC assure that the Duke was safely controllable in all foreseeable flight configurations, HBC performed the test with the left flap extended and at maximum gross weight. HBC concealed the fact that its results were skewed by the aircraft weight, P-factor and torque effect. Knowing that the test was rigged to test only the most favorable conditions, HBC falsely represented "[w]ith one flap fully extended and the other fully retracted, the aircraft is still controllable and

maneuverable during all normal flight regimes". (App. 20-21). HBC misrepresented to the FAA that while the right flap extended (left flap retracted) position was not tested, "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". (App. 20). HBC further misrepresented that the aircraft demonstrated safe flight characteristics, even though no testing was performed to demonstrate that the Duke was controllable in the foreseeable and more dangerous configuration of a right-sided split flap.

Based on these tests, the HBC flight test pilots admitted that the correct reaction was counterintuitive to the ordinary pilot. Therefore, exceptional piloting skill, alertness, and strength was required to handle a split flap failure which is a violation of 14 C.F.R. § 23.143. Furthermore, to this day, there is no mention of how to handle asymmetric flaps in the Duke's Airplane Flight Manual, even though federal regulations require the manufacturer to publish such information. 14 C.F.R. § 23.1585.

C. HBC's Third Misrepresentation

The P-94 incident also prompted the FAA to inquire why there was no emergency shutdown switch in the Duke, like ones used in other HBC aircraft, which would deactivate flap movement in the event flap asymmetry was detected. In response, HBC represented to the FAA that an emergency shutdown

switch was unnecessary because the flap system's flap limit switch and flap circuit breaker would deactivate the system, making a flap cut-out switch unnecessary.

However, this statement misrepresented the design of the Duke's flap system because the limit switch is only on the *left* wing and will only trigger failure from the *left* side. Thus, like the P-94 incident, the *right* side flap failure of the Daniel Hart aircraft left the pilot unprotected by this purported safety mechanism. There was no emergency shutdown switch on the *right* wing to prevent either the P-94 incident or Daniel Hart's accident.

D. The Causative Effect of HBC's Misrepresentations on Daniel Hart's Accident

The responsibility of HBC did not terminate at certification or post-P-94 incident flight testing. As the holder of the type certificate, HBC maintains non-delegable duties under the Federal Aviation Regulations to assure the continuing airworthiness of the Duke. Herein lies the significant federal concern presented in this case: a state court's interpretation of a statute which fosters a decay in aviation safety in existing aircraft in favor of fostering economic stimulus of new industry.

The Federal Aviation Regulations also require HBC to issue a Flight Manual which provided pilots with "[p]rocedures for the safe operation of the airplane's system and equipment, both in normal use

and in the event of malfunction". 14 C.F.R. § 23.1585. However, no Beech Duke Flight Manual ever provided any information about how to recognize a split flap or how to deal with it.

Rather than correct the lack of interconnectedness of the flap system, HBC only took measures to perpetuate the originally self-certified design. HBC reversed the direction of the flap motor and increased the robustness of the 90 degree drive that operated the flap actuators. The wholesale change to the 90 degree drive was never told to the FAA. HBC never notified the public of the more robust design by making it available to all models of the Duke as a part improvement. No maintenance facility was ever informed of the change, so Daniel Hart's aircraft could never be retro-fitted with it. It was not a case of the aircraft not doing the modification; no one but HBC knew about it. As fate would have it, Daniel Hart's swage key of the 90 degree drive broke before or during his takeoff.

Even today, the real problem remains an insufficient flap system vulnerable to an unannunciated single point failure – just as occurred in this accident. HBC has failed to report the defective condition of the flap system to the FAA as required under 14 C.F.R. § 21.3.

E. Flap System Replacement

Petitioners established the available logbooks show that the flap system components were replaced

less than eighteen-years before the accident. The HBC recommended 2,000 hour replacement period would have been between 1995 and the date of the accident in 2008 (13 years). The mechanic primarily responsible for subject aircraft testified that the system had been replaced in accordance with the manufacturer's recommendations. HBC manufactured these parts, as it is the only one who could have caused these parts to be made through vendors contracted by HBC and in accordance with HBC's proprietary drawings.

F. Written Warranty

Finally, HBC possesses a delegation from the FAA allowing it to delegate employees to stand in the shoes of the FAA. HBC applied for an airworthiness certificate for the subject aircraft and one of its employees, as an FAA designee, approved the application. The airworthiness certificate represents that the aircraft met all applicable regulations and was airworthy at the time of manufacture. The facts explained above documenting HBC's misrepresentations establish that the aircraft was not airworthy and did not meet all regulations.

G. Relevant Procedural Facts

After discovery, HBC filed a motion for summary judgment under GARA alleging that all of Petitioners' claims were time barred. In response, Petitioners presented record evidence supporting the facts

expressed above and argued that GARA's Misrepresentation Exception applied to completely strip HBC of any GARA protection. Petitioners further argued that GARA's eighteen-year limitation period had not expired under the Rolling Provision because the flap system components had been replaced within the limitations period. Petitioners further argued that the airworthiness certificate constituted a written warranty subject to GARA's Warranty Exception. On December 15, 2011, the trial court granted summary judgment. (App. 3-32).

The trial court's analysis of the Misrepresentation Exception misinterprets the plain language of the Statute. Rather than focusing on whether HBC's actions constituted knowing misrepresentations or concealments, which is what Congress demanded, the state court placed itself in the shoes of the FAA and queried whether it (sitting as the FAA) would have been misled under the circumstances. The court did not consider HBC's knowledge, but rather focused on what it believed the FAA knew or accepted to be true. By blocking out all evidence of HBC's misconduct, the court simply determined that the correspondence between the FAA and HBC was an "ongoing and open dialogue". (App. 22). The court never determined whether the statements made by HBC in this "ongoing and open dialogue" were true, false, misleading, or otherwise knowingly inaccurate. (App. 22).

The state court's approach assumes that a judge can supplant a complicated regulatory discourse between an aviation manufacturer and a federal agency

with its understanding of the facts. This approach contradicts the nature of the relationship between aviation manufacturers and the FAA, which this Court described at length in *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 815 (1984). ("[T]he basic responsibility for satisfying FAA air safety standards rests with the manufacturer, not with the FAA. The role of the FAA, the Government says, is merely to police the conduct of private individuals by monitoring their compliance with FAA regulations".). In the context of the GARA statute of repose, the state court's result immunizes HBC for conduct that Congress specifically preserved for the scrutiny of the American tort system and leaves the victim with no remedy.

The court also erred in granting summary judgment under Section 2(a), which the trial court improperly treated as a "New Parts Exception", which runs contrary to the plain language of the statute. (App. 25-26). The Petitioners established that the parts of the flap system were replaced and that HBC had no proof that the flap system was subject to GARA protection.

Finally, the court refused to apply GARA's Warranty Exception based on warranties arising from an airworthiness certificate because it reasoned, "[i]f the Court adopted Plaintiffs' interpretation of the warranty exception, GARA's statute of repose would never apply". (App. 31). Other than that blanket statement, the court performed no statutory construction that this warranty did not apply other than the

court's belief that GARA weighed in favor of the manufacturer at the demise of accident victims as a matter of policy.

Without any written opinion, a panel of the Supreme Court of Delaware affirmed the lower court's opinion wholesale on September 5, 2013. (App. 1-2).

REASONS FOR GRANTING THE PETITION

This case presents questions of national importance because a limited federal tort reform-inspired statute of repose is perpetuating objectively verified and concededly dangerous design defects in aircraft. A number of state and federal courts, including the state court below, have judicially nullified the statutory provisions which Congress intended as the safety mechanism to prevent apathy in general aviation manufacturers. The jurisprudence on GARA has developed significantly in the past nineteen years without any guidance from this Honorable Court. As a result, there is no uniform application of this federal act; but rather, a stark split exists among the lower courts on how to apply the statute. The split concerns those courts on one hand which apply the plain language of the statute versus those courts which use GARA as a vehicle to foster a perceived tort-immunization policy without regard to statutory language. The latter view, held by the state court below, undermines the regulatory scheme in the aviation industry set forth in the Federal Aviation

Act. The misguided analyses of the courts that adhere to a perceived (and non-existent) policy to immunize defendant manufacturers threatens to obliterate any safeguards afforded by the very tort law system that provides critical protections to citizens of this nation. As long as general aviation manufacturers enjoy judicially legislated immunity from tort claims, lives are at risk.

The Consequence of Judicial Nullification of Statutory Safeguards That Congress Included to Assure Constitutionality in the First Instance is a Paramount National Concern Deserving This Court's Attention.

If the statutory exceptions to GARA immunity are nullified, what is left is a federally imposed statute of repose that fails to provide an accident victim with an alternative right or remedy before the aircraft reaches its average age and locks courtroom doors; and therefore, is subject to a Due Process analysis. In addition, because GARA, as interpreted by the state court and several other lower courts, eliminates the state remedy for torts, the statute violates the Tenth Amendment of the United States Constitution.

The American Tort System and the Federal Aviation Act coexist through a savings clause which preserves all remedies an aggrieved party may pursue. 49 U.S.C. § 40120(c) ("A remedy under this part is in addition to any other remedies provided by law".). The savings clause, enacted in 1958, was

modified in 1994 through the passage of the GARA amendment. The limited rollback of the savings clause through the GARA amendment did not negate remedies existing at common-law for aged products, but rather it placed a different barrier of proof. After 1994, remedies for harm caused by general aviation manufacturers for eighteen-year-old products could not be proved by simple negligence, or strict liability. Rather, remedies could only be procured through proving that the manufacturer knowingly misstated facts, concealed information from the FAA, or provided a written warranty. Therefore, Congress did not take away remedies preserved by the Federal Aviation Act's Savings Clause or remedies reserved to state law tort systems; it simply demanded evidence of knowing misconduct rather than negligent misconduct.

Congress did not intend to pass an unconstitutional statute which eliminated the same remedies the savings clause preserved. The wholesale elimination of redress and the consequential extinguishment of a common-law cause of action would violate Due Process protections if the Congressional action does not provide a satisfactory quid pro quo for the common-law rights of recovery. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 86 (1978). In order to balance the competing concepts of accident victim's rights and aviation safety of existing aircraft against the perceived need to stimulate economic growth, Congress passed GARA's Misrepresentation Exception, Rolling Provision, and Warranty Exception.

The enactment of these statutory checks against the wholesale vindication of the interests of big business was an important step in preserving the Due Process rights of American citizens. "'Due process applies to any adjudication of important rights.'" *In re Brock*, 499 N.W.2d 752 (Mich. 1993). This Court has recognized that a claim or cause of action can be a "property interest" implicating the Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-34 (1982) (Fourteenth Amendment). "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. . .". *Id.* at 434. The savings clause of the Federal Aviation Act evidences the importance of preserving redress for wrongs. The right to redress is a core common-law right afforded to aviation accident victims and rightly so, since any aviation accident is highly likely to result in serious or life ending consequences.

The importance of preserving core common-law rights has been a consistent theme in the jurisprudence of this Honorable Court. In *New York Central R.R. v. White*, 243 U.S. 188, 201 (1917), this Court explained that "[i]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead". As explained by Justice Marshall in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 94 (1980) (Marshall, J., concurring), a reasonable alternative remedy must be provided

when "core" common-law rights are abolished. *See also Brickerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930). As noted above, the maintenance of state judicial systems for the decision of legal controversies is a "core" sovereign function of the States. *Atl. Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970); *see also Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring); *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997). After all, statutes of repose affect substantive rights as opposed to statutes of limitations which affect only procedural rights. *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

Further, state tort claims are a valuable source of information and are part of the regulatory process. *Wyeth v. Levine*, 555 U.S. 555, 579 (2009). As this Court emphasized in *Levine*, "[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information". *Id.*

Therefore, those powers reserved to the states to enact laws that would permit their citizens to seek redress for torts is a matter that Congress cannot abridge through the grant of absolute immunity to a particular class of defendants. When a federal statute impermissibly expands federal power, courts have refused to apply the statute as unconstitutional.

Nat'l League of Cities v. Usery, 426 U.S. 833, 845 (1976) (invalidating requirements of the Fair Labor Standards act that extended minimum wage and maximum hour provisions to state employees because it impermissibly regulated not private citizens, but "States as States"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (explaining that whenever a federal law regulates "States as States" and is destructive of State sovereignty, there will be a Tenth Amendment violation); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (refusing to apply the federal Age Discrimination Employment Act to state judges because such an application would upset the usual constitutional balance between federal and state powers); *United States v. Lopez*, 514 U.S. 549, 556-57 (1995) (striking down federal statute which prohibits individuals from knowingly possessing a firearm in a school zone because "even our modern-era precedents which have expanded congressional power under the Commerce Clause confirm this power is subject to outer limits"); *Printz v. United States*, 521 U.S. 898 (1997) (striking down statute which compelled state sheriff to conduct background checks prior to gun purchase by State citizens); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down a provision of the Violence Against Women Act which authorized suit by rape victims against their attackers, as an impermissible intrusion under the Commerce Clause into an area of traditional State police power regulation).

Similarly, the lower courts' nullification of GARA's Misrepresentation Exception, Rolling Provision, and Warranty Exception violates the Tenth Amendment. The nullification of these provisions takes away constitutionally guaranteed rights, remedies and claims before they arise without providing anything in their stead, such as added rights or safety. GARA was and is the first and only statute in the history of the United States which comes into an area of traditional State regulation – public health, safety and welfare – and only takes away claims, rights and safety. States have a significant interest in assuring that their citizens are adequately compensated for their injuries and deaths caused by defective products injected into their stream of commerce, so that they do not become wards of the State. *See generally In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979,* 644 F.2d 594, 613 (7th Cir. 1981). GARA unconstitutionally disregards that interest.

The blanket immunity given to aviation defendants under GARA, strips the states of their sovereignty in violation of the Tenth Amendment of the United States Constitution. GARA's eighteen-year repose statute is an unconstitutional infringement on the states' ability to function in our system of dual sovereignty, preventing the state from effectively providing for the health, safety and welfare of its citizens killed by defective airplanes averaging thirty-years old injected into their stream of commerce and forcing the states to take the blame.

This legal framework serves an important foundational starting point in the art of Congressional law-making. Under GARA, where Congress had taken away remedies for simple negligence and strict liability, it preserved the same remedy under a more stringent burden of proof. Because the balance of constitutionality was struck by the Misrepresentation Exception, Rolling Provision, and Warranty Exception, judicial adherence to the plain language of these statutory provisions are imperative. Unfortunately, the misguided belief that any denial of GARA protections eviscerates an uncodified legislative policy, the statute has been judicially nullified at its most important provisions.

A. Judicial nullification of GARA's Misrepresentation Exception is antithetical to the constitutional notion of preserving core common-law rights and the goal of the Federal Aviation Act to foster safety in aviation.

The consensus among the lower courts is that GARA's Misrepresentation Exception applies when the manufacturer (1) knowingly misrepresents, conceals, or withholds, (2) required information from the Federal Aviation Administration, that is (3) causally related to the accident. GARA § 2(b)(1); *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 923 F. Supp. 1453, 1456 (D. Wyo. 1996); *Robinson v. Hartzell Propeller, Inc.*, 326 F. Supp. 2d 631, 647 (E.D. Pa. 2004); *Moyer v. Teledyne Cont'l Motors, Inc.*, 979 A.2d 336, 345-46

(Pa. Super. 2009). However, the intellectual discord among the lower courts concerns the appropriate assessment of how a misrepresentation or concealment can be identified in this regulated field.

The standard appears simple enough: (1) establish that a manufacturer knew of a fact and made a statement to the FAA inconsistent with its knowledge; (2) establish that a manufacturer possessed, but did not disclose knowledge of information it was required to provide to the FAA; or (3) establish that the manufacturer refused to turn over information the FAA requested it to turn over. That is knowing misrepresentation, concealment, or withholding in its simplest terms. However, either in the simplest of scenarios or the most complex, the Congressional direction to courts is to focus on the conduct of the manufacturer – not to judge the subjective scienter and mind frame of the FAA.

For example, in *Robinson v. Hartzell Propeller, Inc.*, 326 F. Supp. 2d 631, 647 (E.D. Pa. 2004), the plaintiff claimed that the manufacturer's propeller vibration testing showed stresses beyond the allowable FAA limits, but the manufacturer claimed the testing was within the limits. *Robinson*, 326 F. Supp. 2d at 640-41. The court rejected defendant's argument that the Misrepresentation Exception did not apply because the graph showing the excessive stresses was included in the certification submission, "so the FAA would have been able to make this determination itself". *Id.* at 649. The court reasoned that the existence of the graphs supported whether

the defendant knowingly made the misrepresentation that the stresses were within allowable limits, and did "not correct the misstatement as a matter of law". *Id.* at 650.

Similarly, in *Hinkle v. Cessna Aircraft Co.*, No. 247099, 2004 WL 2413768 (Mich. App. Oct. 28, 2004), the defendant represented to the FAA that the 421 twin engine aircraft met the single engine handling requirements under the Federal Aviation Regulations. The court determined, however, that evidence of misrepresentation existed because the Cessna 421 aircraft was certified based on engines powered at 375 hp, and Cessna's single engine testing was performed with power above 400 hp even though the underlying data was provided to the FAA. 2004 WL 2413768, at *11-12.

Also, in *Butler v. Bell Helicopter Textron*, 109 Cal.App.4th 1073 (2003), the defendant failed to disclose to the FAA the existence of military accidents involving a helicopter that had a civilian counterpart. *Id.* at 1087. The defendant claimed it had no duty to disclose military accidents and the courts rejected the defense:

> The argument has no merit. If the FAA had been aware of five catastrophic yoke failures in 1989, when Bell increased the retirement life of the yoke to 5,000 hours, the FAA may have been inclined to question the increase, or require further evaluation, or require X-ray defraction testing (the last of which the FAA did require after this accident). We

> cannot conclude, on this record, what the FAA would have done, and we certainly cannot conclude as a matter of law there was no relationship between the withheld information and the accident. "[T]he FAA cannot ask for more extensive examinations of a problem that it does not know exists because a manufacturer withheld or concealed the required information. . . . In short, causation issues on which Bell presented no evidence in its summary judgment motion are matters for resolution by the trier of fact.

Id. at 1087-88 (citations omitted).

The reasoning of the *Robinson, Hinkle* and *Butler* cases is that the foundation of the regulatory process relies upon full and complete disclosure from the manufacturers. The regulatory relationship between manufacturers and the FAA was described by this Court in *Varig Airlines*, 467 U.S. at 804-05, the United States Supreme Court described the aviation certification process in great detail and held that manufacturers and not the FAA are ultimately responsible for the safety of the product:

> The FAA certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance. Thus, the manufacturer is required to develop the plans and specifications and perform the inspections and tests necessary to establish

> that an aircraft design comports with the applicable regulations; the FAA then reviews the data for conformity proposes by conduction a "spot check" of the manufacturer's work.

Id., 467 U.S. at 816-17.

The competing line of cases, however, does not focus on whether the manufacturer made a knowing misrepresentation, but rather on whether the FAA was defrauded. For example, in *Tillman v. Raytheon Co.*, 2013 Ark. 474, ___ S.W.3d ___, 2013 WL 6122298 (Ark. Nov. 21, 2013), the state court characterized communications between the defendant and the FAA concerning *product failures* as being open and candid. *Id.* at *16. However, not once did the court determine whether HBC had misrepresented a fact about a *product defect*. The court's focus was solely on whether it believed the FAA had been misled, and this determination could not be made without first assessing the accuracy of the representations HBC made.

Likewise, in *Sheesley v. Cessna Aircraft Co.*, Nos. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006), the court acknowledged that the defendants' documentation confirmed that the problem with exhaust system failures was due to a design issue. *Id.* at *8. However, the court viewed the ensuing discourse between the FAA and defendant as proof that both agreed the appropriate course of action was to issue maintenance instructions. *Id.* at *8. By focusing on what the court thought the FAA

believed, the court failed to address whether the defendant's knowledge was inconsistent with the representations it made to the FAA.

In *Burton v. Twin Commander Aircraft, LLC*, 254 P.3d 778 (Wash. 2011), the court also weighed the evidence of the manufacturer's knowledge of a defective condition in an aircraft and reached a conclusion that the discussions addressing product failures (not product defects) with the FAA were "open and ongoing". However, the court never addressed whether the factual record supported a finding that the manufacturer knew of a product defect.

In the case below, the state court also characterized manufacturer communications with the FAA about a product failure as open and continuous. However, like *Burton*, *Sheesley*, and *Tillman*, the court never addressed whether the manufacturer said something inconsistent with its knowledge. The important federal concern is that nullification of the GARA statutory requirement to assess the accuracy of the manufacturer's representations fosters the perpetuation of defective aircraft. Here, the split flap defect in the Duke still exists because there is no incentive on the part of HBC to correct it now that it enjoys tort immunity. Likewise, the manufacturers in *Burton*, *Sheesley* and *Tillman* enjoy the same immunity; not because they earned it, but because a trial court believed the FAA was not misled.

Nullification of GARA's Misrepresentation Exception, however, renders the statute unconstitutional as

it leaves no remedy for wrongs. The Federal Aviation Act specifically preserves remedies and Due Process requires them to remain in place. Therefore, this Honorable Court is requested to assure the Constitutionality of a statute that has been misapplied by a number of lower courts by ignoring manufacturer knowledge. Only by requiring all courts in this nation to apply the clear language of GARA's Misrepresentation Exception will the Constitutionality of the statute be preserved. Otherwise, blanket immunity will be the rule in an industry where product improvement is already frozen in place due to federal certification of products under standards applicable in the 1950's. The tort system was the only check to assure that aviation manufacturers would correct design defects.

B. Judicial nullification of GARA's Rolling Provision by treating it as an exception rather than a separate repose period as provided in the plain language of the statute is unconstitutional.

GARA sets forth two separate and distinct eigteen-year periods of repose, only one of which can apply to a plaintiff's claim. GARA §§ 2(a)(1), 2(a)(2). The issues presented here concern who has the burden of proof in establishing which limitation period applies, and to whom the second limitation period can apply.

The first limitation period, addressing original equipment, is set forth under Section 2(a) and begins to run from the date of the original sale of the aircraft. The other provision, concerning replacement parts, is the Rolling Provision at Section 2(a)(2) and applies from the date of the installation of a replacement or component part or system.

A plaintiff who proves GARA's Rolling Provision may proceed to trial on a claim arising from the failure of that part. *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1157 (9th Cir. 2000) (addressing limitation period for replacement flight manual under GARA's Rolling Provision); *Flores v. RAM Aircraft Corp.*, No. 96-1507, 2000 WL 34017118 (S.D. Fla. Aug. 31, 2000) (holding "the limitations clock was restarted for the component seal upon its installation during the Ram overhaul".); *Carson v. Heli-Tech, Inc.*, No. 2:01-cv-643-FtM-29SPC, 2003 WL 22469919 (M.D. Fla. Sept. 25, 2003) (new sleeve installed pursuant to a service bulletin triggered GARA's Rolling Provision); *Sheesley v. Cessna Aircraft Co.*, Nos. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006) (replacement of exhaust component during overhaul triggered Rolling Provision). However, there is a lack of uniformity among the courts on how the Rolling Provision works.

First, some courts apply the Rolling Provision as an exception or tolling provision of the statute which places the burden of proof upon the plaintiff. *Willett v. Cessna Aircraft Co.*, 851 N.E.2d 626, 636 (Ill. App. 2006); *Agape Flights, Inc. v. Covington Aircraft*

Engines, Inc., No. Civ. 09-492 FHS, 2011 WL 2560281 *5 (E.D. Okla. June 28, 2011); *Southside Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.,* 927 N.E.2d 179, 195 (Ill. App. Ct. 2010). Other courts treat the Rolling Provision as a completely separate limitations period under which a defendant has the burden of proof. *Glover v. Am. Res. Corp.*, No. 163672, 1996 WL 33484136, *3 (Cal. App. Sept. 13, 1996).

In *Glover*, the California Court of Appeal recognized this feature of GARA without any question from the defendant and ruled:

> The reason I conclude that General Electric did not meet its burden here, as opposed to determining as in *Hinds* whether plaintiffs succeeded in raising a triable issue regarding defective replacement parts, is that the present statute specifically addresses the issue of defective replacement parts. Thus, General Electric needed to show that the defective replacement provision did not apply in order to meet its burden of showing the action is barred by the Act.

Id. at *3.

Therefore, unlike *Willett*, *Southside Trust*, and *Agape Flights*, the *Glover* court correctly understood the Rolling Provision was not an exception or tolling provision. Since it is a separate exception, the moving defendant bears the burden of proving that a particular claim falls outside of the limitation period for the

Rolling Provision. Here, that burden of proof should have been placed on HBC who was faced with a record establishing that the flap system had been replaced within the limitations period. If HBC contended that facts, such as whether the replacement parts were new or reconditioned parts, justified application of the original limitations period under Section 2(a), then it bore the burden of proving the original limitations period applied.

Second, some courts have limited application of the Rolling Provision to apply only to the entity that manufactured or sold the replacement part. *Campbell v. Parker Hannifin Corp.*, 82 Cal.Rptr.2d 202 (Cal. App. 1 Dist. 1999); *Sheesley*, 2006 WL 1084103 at *6; *Pridgen v. Parker Hannifin Corp. (Pridgen I),* 905 A.2d 422, 437 (Pa. 2006). Other courts have found that the Rolling Provision applies to the entity bearing liability to the part regardless of the source of make and distribution. *Avco Corp. v. Neff*, 30 So.3d 597, 601 (Fla. App. 2011) (discussing trial court's finding that defendant "caused" replacement parts to be manufactured).

The plain language of GARA's Rolling Provision is silent as to whom it does and does not apply and that silence means it applies to anyone bearing liability for the replacement part. GARA § 2(a)(2). However, some courts have merely identified a nonexistent Congressional intent to protect manufacturers at all costs and craft a rule to meet that end, but instead, should perform a statutory construction of

the Rolling Provision and apply it according to its terms.

GARA is an amendment to the Federal Aviation Act and it should be interpreted in accordance with the "design of the statute as a whole and to its object and policy". *Crandon v. United States*, 494 U.S. 152, 158 (1990). The FAA's definition of "manufacturer" does not focus on who physically builds or supplies the particular item. Instead, the FAA focuses on the entity causing the part to be produced. FAA Order 8130.2F establishes the procedures for original and recurrent airworthiness certification of aircraft and related products and defines the term "manufacturer" as "[a] person who causes a product or part thereof to be produced".

The *Pridgen* line of cases all engrafted the requirement that the defendant physically manufacture or supply the replacement part without resort to the language of the Rolling Provision. In fact, the Pennsylvania Supreme Court expressly disavowed the language of the Rolling Provision and reached into Congressional history to support its ruling without identifying any ambiguity in the Rolling Provision. The Court held:

> Because we believe that the status of type certificate holder and/or designer fall under the umbrella of manufacturer conduct for purposes of GARA, it would wholly undermine the general period of repose if original manufacturers were excepted from claims

> relief for replacement parts under the rolling provision by virtue of that status alone.

Pridgen I, 905 A.2d at 436. On reargument, the Court again disavowed the language of the statute and relied upon policy:

> Certainly, we agree with Appellees' observation that Appellants "sit at the top of the aviation food chain with respect to all components comprising the type certificated engine". Thus, in the absence of GARA repose, Appellants might indeed be liable for design defects in replacement parts and/or the aircraft systems within which such components function. Again, however, consistent with the approach of a number of other jurisdictions as referenced in our original opinion and above, we believe that it would undermine Congress's purposes to hold that GARA's rolling provision is triggered by the status of original aircraft manufacturer, type-certificate holder, and/or original designer alone.

Pridgen v. Parker Hannifin Corp. (Pridgen II), 916 A.2d 619, 623 (Pa. 2007).

However, the *Pridgen* line of cases imposes a hardship upon accident victims that Congress did not intend because aircraft manufacturers generally physically construct nothing. They assemble prefabricated parts made by vendors into a final unit. To write "manufacturer" into GARA's Rolling Provision will eviscerate the protections Congress provided for accident victims and give blanket immunity to

companies who outsource manufacturing. GARA does not provide blanket immunity for liability that was not long tail or subject to a statutory exception. Instead, it specifically provides protection from liability for parts or components more than eighteen-years old that are alleged to have caused an accident. The Rolling Provision applies to parts not a particular class of defendants.

C. Judicial nullification of GARA's Warranty Exception for the benefit of the manufacturers at the expense of accident victims and stripping the states of their ability to protect their citizens is unconstitutional.

GARA's Warranty Exception provides: Subsection (a) does not apply . . . to an action brought under a written warranty enforceable under law but for the operation of this Act. GARA § 2(b)(4). Therefore, the clear language of the statute requires a showing of a (1) written warranty that is (2) enforceable under the applicable law. Under a clear application of this standard, Petitioners' warranty claims are not preempted by GARA.

Delaware law, and any other state that applies the Uniform Commercial Code, preserves a remedy for a warranty based upon an aviation manufacturer's representation of airworthiness. Under the UCC, citing the Delaware statute, an express warranty is created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods

and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise". 6 Del. C. § 2-313(1)(a). Such a warranty may also be created by, "[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description". § 2-313(1)(b).

The delivery of an airworthiness certificate to an aircraft purchaser constitutes an express warranty made in addition to or in connection with the terms of a purchase agreement. *Limited Flying Club Inc. v. Wood*, 632 F.2d 51 (8th Cir. 1980). An airworthiness certificate provided by the manufacturer in this instance provides, "the aircraft to which issued has been inspected and found to conform to the type certificate therefore, to be in condition for safe operation. . .".

Since a written warranty exists, it is not subject to GARA and courts should not disavow the warranty based on the improper notion that it would eviscerate GARA. *See Bianco v. Rivera*, No. CA-CV-03-0647, 2004 WL 3185847 (Ariz. App. Oct. 19, 2004) (finding that recognition of an airworthiness certificate as a written warranty under GARA would eviscerate the statute). However, by GARA's clear terms the efficacy of a warranty depends on whether it would be cognizable under state law and not some non-existent federal policy to champion the rights of manufacturers over victims. Here, the state court did not assess whether a written warranty is actionable under existing state law. Rather, it simply said that had it

found one, GARA's protection to manufacturers would be eviscerated. However, that is exactly what Congress intended by passing an exception to GARA's protections which leave in place a cause of action on a written warranty.

CONCLUSION

Petitioners are asking this Court to provide guidance and redirection to the lower courts who have either failed to follow the plain language of the statute or who have attempted to rewrite it in a way that would unconstitutionally deprive claimants of a remedy when Congress explicitly preserved one for them. Without resolution of the inconsistent interpretations, and this Court's caveat that courts are not to reverse engineer the statute by changing the burden of proof or the legal effect of its exceptions, the federal scheme of providing a single expectation of the application of this statute, designed to impose a single standard of liability for aircraft or components more than eighteen-years post delivery has no meaning and Congressional purpose for enacting the statute is thwarted.

It is respectfully submitted that review of this appeal should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF
THE STATE OF DELAWARE

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, Plaintiffs Below, Appellants, v. HAWKER BEECHCRAFT CORPORATION, Defendant Below, Appellee.	§ § § § § § § § § § § § § § § § § §	No. 13, 2012 Court Below – Superior Court of the State of Delaware, in and for New Castle County C.A. No. N09C-12-010

Submitted: September 4, 2013
Decided: September 5, 2013

Before **HOLLAND**, **JACOBS** and **RIDGELY,** Justices.

ORDER

This 5th day of September 2013, the Court having considered this matter after oral argument and on the briefs filed by the parties has determined that the final judgment of the Superior Court should be affirmed on the basis of and for the reasons assigned

by the Superior Court in its opinion dated December 15, 2011.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Mandy J. Holland
Justice

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, Plaintiffs, v. HAWKER BEECHCRAFT CORPORATION, Defendant.	)	C.A. No. N09C-12-010 MMJ

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]

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[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).

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 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.

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[6] Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C. § 40101 note) (hereinafter "GARA").

[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.

(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

(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.

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

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[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)).

> 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 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

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[12] GARA § 2(b)(1) (emphasis added).

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 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

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[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.

[17] *South Side Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Indus., Ltd.*, 927 N.E.2d 179, 193 (Ill. App. Ct. 2010);

(Continued on following page)

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]

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

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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.

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 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

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[23] *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805 (1984).

[24] 49 U.S.C. § 44701(a)(1).

[25] 49 U.S.C. § 44704(a)(1).

[26] 14 C.F.R. §§ 21.17(a)(1), 21.21(b).

[27] 14 C.F.R. §§ 23.1, 23.141.

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]

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

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[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).

[34] 49 U.S.C. § 44702(d).

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 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.

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[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.

Plaintiffs are unable to identity [sic] 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 [sic] 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 the other fully retracted, the aircraft [wa]s still controllable

[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.

and maneuverable during all normal flight regimes." The report did indicate, however, that considerable more pilot technique was required. Nonetheless, the report concluded that the Beech Duke complied with Section 23.701.

As part of an FAA DOA audit, the FAA reviewed the flight test report provided by HBC and found it to be satisfactory. The FAA concluded that Beech Duke exhibited safe flight characteristics with an asymmetric flap condition, and thus complied with Section 23.701.

Notwithstanding the FAA's approval of the flight test report, Plaintiffs contend that HBC "manipulated" the flight tests in order to conceal alleged "inadequacies" in the controllability of the Beech Duke in extreme asymmetric flap deployment scenarios. In support of this contention, Plaintiffs identify several procedures employed by HBC during flight testing that it claims were intended to achieve favorable results. Such procedures include: loading the aircraft to nearly maximum gross weight; deviating from the flap configuration specified in the flight test plan; and conducting the flight test in a steady state condition. By employing such procedures, Plaintiffs argue that HBC knowingly misrepresented that the Beech Duke was controllable in an asymmetric flap configuration.

The Court finds that Plaintiffs' "misrepresentation claim" is nothing more than criticism of the testing procedures employed by HBC during its flight testing. The fact that Plaintiffs would have conducted

additional or different testing is irrelevant for purposes of a misrepresentation claim. "[D]isagreements over what tests should have been performed or what caused crashes do not establish knowing misrepresentation."[39]

The Court finds no evidence of misrepresentation in HBC's communications with the FAA. To the contrary, the record establishes that HBC engaged in an ongoing and open dialogue with the FAA prior to commencing flight testing. The extensive communication between the FAA and HBC detail requests from the FAA to conduct flight testing, and HBC's responses. Plaintiffs' experts have failed to identify any information that HBC misrepresented to the FAA during this series of correspondence.

Further, the Court finds no evidence that HBC knowingly misrepresented, concealed or withheld required information from the FAA concerning the flight testing. The record establishes that once testing commenced, HBC provided the FAA with a detailed plan outlining how the flight test would be conducted. Although the flight plan subsequently was altered, this change clearly was indicated in the flight report provided to the FAA – a report which the FAA deemed "satisfactory." Therefore, Plaintiffs' claim that HBC misrepresented information regarding how the actual flight test was conducted is without merit.

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[39] *Burton*, 254 P.3d at 787 n.9. *See also Rickert v. Mitsubishi Heavy Indus., Ltd.*, 923 F.Supp. 1453, 1458 (D. Wyo. 1996).

In accepting the results of HBC's flight testing, the FAA implicitly acknowledged that it found the testing procedures employed appropriate. Had the FAA believed that the nature and extent of testing were insufficient, it could have required additional or different testing – but it did not. Even Plaintiffs' experts concede that it was the "FAA's call" as to whether the testing procedures employed by HBC were sufficient. The FAA reviewed the flight test report, which identified the testing procedures, and deemed it satisfactory.

HBC Demonstrated Compliance with 14 C.F.R[.] § 21.3

Pursuant to Section 21.3, a TC holder – here, HBC – has a continuing obligation to report any failures, malfunctions, or defects in any product manufactured by it that it determines could result in specified safety risks.[40] Specifically, a TC holder is required to report "[a]ny structural or flight control system malfunction, defect, or failure which causes an interference with normal control of the aircraft or which derogates the flying qualities."[41] A TC holder, however, is exempt from reporting failures, malfunctions, or defects that previously have been reported to the FAA.[42]

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[40] 14 C.F.R. § 21.3.

[41] 14 C.F.R. § 21.3(c).

[42] 14 C.F.R. §§ 21.3(d)(1)(ii), (iii).

The FAA established the Service Difficulty Program in an effort to provide assistance to owners, operators, manufacturers, and the FAA in identifying problems encountered during aircraft service.[43] Under this program, the FAA receives relevant information from a variety of sources, including FAA inspectors, owners, operators and certified repair stations.[44] The information collected is then published by the FAA in the form of SDRs.[45]

The undisputed record in this case establishes that the FAA received over 100 reports, via the FAA's Service Difficulty Program, concerning problems with the Beech Duke's flap system. Additionally, as the Court previously has noted, HBC and the FAA engaged in extensive communications regarding the occurrence of an asymmetric flap condition in the Beech Duke. The regulations do not require HBC to re-report such a condition to the FAA each time it occurs. Moreover, "multiple reportings can cause serious problems for the FAA, which has a limited number of employees to handle them."[46]

The Court finds that because the FAA was aware of issues with the Beech Duke's flap system, HBC was under no obligation to re-report each subsequent

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[43] *Aerospace, Inc. v. Slater*, 142 F.3d 572, 574 (3d Cir. 1998).

[44] *Id.*

[45] *Id.* at 575.

[46] *Burton v. Twin Commander Aircraft LLC*, 254 P.3d 778, 790 (Wash. 2011).

issue that arose with respect to the asymmetric flap condition. A manufacturer is not required to provide the FAA with information the manufacturer knows the FAA has received from another source.[47]

New Parts Exception

Plaintiffs next seek respite under GARA's new parts exception. Pursuant to Section 2(a)(2) of GARA, the 18-year repose period can restart when a new part or component is installed in a general aviation aircraft. In order to trigger Section 2(a)(2)'s rolling provision, Plaintiffs must: (1) identify the new part; (2) demonstrate that the part was placed on the Subject Aircraft within 18 years of the accident; (3) establish that the replacement part was defective and caused Plaintiffs' injuries; and (4) establish that HBC manufactured the new part.[48]

HBC, as the movant, has the burden to show that GARA's statute of repose is applicable.[49] If HBC satisfies its burden, the burden shifts to Plaintiffs to show facts that operate to restart the limitation

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[47] *See* 14 C.F.R. §§ 21.3(d)(1)(ii).

[48] *See South Side Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Indus., Ltd.*, 927 N.E.2d 179, 192-93 (Ill. App. Ct. 2010).

[49] *Id.* at 193; *Willett v. Cessna Aircraft Co.*, 851 N.E.2d 626, 635 (Ill. App. Ct. 2006).

period.[50] In other words, this rolling provision applies if Plaintiffs "can show that a new item replaced an item either originally in the aircraft or added to the aircraft and the new item was also a cause of the claimed damages."[51]

Plaintiffs' Contentions

Plaintiffs argue that at some point between 1995 and 2001, HBC replaced the Subject Aircraft's 90° drive for the right-hand flap ("90° drive") in accordance with the manufacturers' recommendations. This "new" part, Plaintiffs claim, failed during Hart's flight, causing the plane to become uncontrollable and crash. Because this new part was allegedly placed in the Subject Aircraft within 18 years of the accident, Plaintiffs seek to hold HBC liable under GARA's rolling provision.

Overhauled Part Insufficient to Trigger GARA

In order to invoke GARA's rolling provision, Plaintiffs must prove, *inter alia*, that a "new" part

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[50] *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, 2011 WL 2560281, at *5 (E.D. Okla. 2011); *Willett*, 851 N.E.2d at 636.

[51] *South Side Trust*, 927 N.E.2d at 193 (citing *Hiser v. Bell Helicopter Textron Inc.*, 111 Cal.App.4th 640, 650 (2003)).

replaced an old part on the Subject Aircraft.[52] Contrary to Plaintiffs' contention, an overhauled part does not constitute a "new" part.[53] As the court in *Butchkosky* observed:

> A holding that would toll the statute of repose on a product on account of an overhaul of a critical component of that product would effectively eviscerate the statute of repose as it applied to many types of products. For example, aircraft are required by statute to be routinely overhauled, and certain critical parts must be repaired or replaced on a regular basis. If every time a critical component was overhauled, or even replaced, the statute of repose began anew thus permitting an individual to sue for a design flaw, then the manufacturer of the aircraft would never be afforded the protection of the statute of repose. . . .[54]

Here, Plaintiffs have failed to present *any* evidence demonstrating that the 90° drive on the Subject Aircraft's right flap's [sic] was ever replaced with a "new" part. Plaintiffs were unable to produce all of

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[52] *Crouch v. Teledyne Continental Motors, Inc.*, 2011 WL 2517221, at *4 (S.D. Ala.); *Hinkle v. Cessna Aircraft Co.*, 2004 WL 2413768, at *9 (Mich. Ct. App.).

[53] *Hiser*, 111 Cal.App.4th at 651; *Butchkosky v. Enstrom Helicopter Corp.*, 855 F.Supp. 1251, 1255 (S.D. Fla. 1993); *Willett*, 851 N.E.2d at 635; *Hinkle*, 2004 WL 2413768, at *8; *Robinson v. Hartzell Propeller Inc.*, 326 F.Supp.2d 631, 663 (E.D. Pa. 2004).

[54] *Butchkosky*, 855 F.Supp. at 1255.

the Subject Aircraft's maintenance log books – which would have detailed any work performed on the flap system – for the relevant 18-year period. Plaintiffs only produced log books for the first 6 years of the relevant time period, none of which indicated that the 90° drive had been replaced. Plaintiffs did not produce any other records, documents, or invoices from the relevant time period to demonstrate that the 90° drive had been replaced.

Plaintiffs, instead, rely solely on the testimony of Robert Pinto, the Subject Aircraft's principal maintenance provider, to prove that the 90° drive was replaced. At his deposition, Pinto testified that the flap systems had either been "overhauled or replaced." After this general statement, Pinto then identified the specific parts of the flap system that had been overhauled or replaced: the actuators, cables and flap motor. Notably, Pinto did not identify the 90° drives as parts that had been replaced.

Moreover, Pinto was unable to discern whether the 90° drive, which he claimed had been replaced, was an overhauled part or a new part. As the Court already has noted, the overhaul of an allegedly defective part does not trigger GARA's new parts exception. As such, the Court finds that Plaintiffs have failed to present sufficient evidence demonstrating that the 90° drive was replaced with a "new" part.

Only Manufacturer of Replacement Part Liable

Plaintiffs have failed to establish a *prima facie* case that HBC manufactured or sold the 90° drive that allegedly was replaced. It is well-settled that only the *actual* manufacturer or seller of the replacement part can be held liable under GARA's new parts exception.[55] Therefore, the manufacturer of the aircraft cannot be held liable under this exception unless it also manufactured the relevant replacement part.

Plaintiffs have presented no evidence that HBC manufactured, installed, or sold the allegedly replaced 90° drive. It is undisputed that HBC had not dealt with the Subject Aircraft in 37 years. Rather, Plaintiffs seek to hold HBC liable by virtue of the fact that HBC, as the TC holder, manufactured the Subject Aircraft. According to Plaintiffs: "The FAA's definition of 'manufacturer' does not focus on who physically builds or supplies the particular item. Instead, the FAA focuses on the entity causing the product to be produced."

Plaintiffs' attempt to broaden the scope of the term "manufacturer" to include TC holders thwarts the legislative intent behind GARA to limit the tail of liability applicable to the manufacturers of general

[55] *Sheesley v. The Cessna Aircraft Co.*, 2006 WL 1084103, at *4 (D.S.D. 2006); *Burroughs v. Precision Airmotive Corp.*, 78 Cal.App.4th 681, 691 (2000); *Campbell v. Parker-Hannifin Corp.*, 69 Cal.App.4th 1534, 1545-46 (1999); *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 426-27 (Pa. 2006); *Stewart v. Precision Airmotive, LLC*, 7 A.3d 266, 275 (Pa. Super. Ct. 2010).

aviation aircraft.[56] As the *Sheesley* Court observed: "Congress meant what it said – the provision rolls the repose period for a claim against the manufacturer of a defective part."[57] Because Plaintiffs have failed to establish a *prima facie* case that HBC manufactured or sold the 90° drive that was allegedly replaced, the Court finds GARA's "new parts" exception inapplicable.

<u>Warranty Exception</u>

Plaintiffs' Contentions

Plaintiffs seek to impose liability upon HBC under GARA's "warranty exception." Specifically, Plaintiffs contend that HBC's delivery of the airworthiness certificate to the first purchaser constituted an express warranty, not preempted by GARA. This warranty, Plaintiffs claim, provided that the aircraft "ha[d] been inspected and found to conform to the type certificate . . . to be in condition for safe operation. . . ."

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[56] *Sheesley*, 2006 WL 1084103, at *6. *See also Pridgen*, 905 A.2d at 427 ("Because we believe that the status of type certificate holder and/or designer fall under the umbrella of manufacturer conduct for purposes of GARA, it would wholly undermine the general period of repose if original manufacturers were excepted from claims relief for replacement parts under the rolling provision by virtue of that status alone.")

[57] 2006 WL 1084104, at *6.

No Express Written Warranty Created

Pursuant to GARA Section (2)(b)(4), GARA's statute of repose does not apply "to an action brought under a written warranty enforceable under law." Contrary to Plaintiffs contention, however, the airworthiness certificate does not constitute a written warranty under GARA.[58] If the Court adopted Plaintiffs' interpretation of the warranty exception, GARA's statute of repose would never apply. Such a result clearly was not contemplated by Congress in enacting GARA.

CONCLUSION

The application of the GARA statute of repose, and any exception to GARA's limitation bar, are matters of law.[59]

The Court finds that HBC has met its initial burden of demonstrating that the GARA 18-year statute of repose is implicated. Viewing all facts and inferences in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have failed to establish a *prima facie* case that either GARA's knowing misrepresentation exception or new parts exception applies. The Court further rules that there is no

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[58] *See Bianco v. Cessna Aircraft Co.*, 2004 WL 3185847, at *8 (Ariz. Ct. App. 2004).

[59] *See Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 553 (Iowa 2002).

express warranty created by the airworthiness certificate.

THEREFORE, Defendant Hawker Beechcraft Corporation's Motion for Summary Judgment is hereby **GRANTED**. The General Aviation Revitalization Act statute of repose bars this action.

Plaintiff's Motion for Judgment on the Pleadings is hereby **DENIED AS MOOT.**

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary J. Johnston