Court of Appeals Cause No. 76178-1-I

No. 97272-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONTINENTAL MOTORS, INC., *Petitioner,*

v.

STACIE CAVNER, *et al.*, *Respondents.*

CONTINENTAL MOTORS, INC.'S RESPONSE TO PLAINTIFFS/APPELLANTS' PETITION FOR REVIEW

Of An Unpublished Decision Of
The Court of Appeals (Division One), No. 76178-1-I

Will S. Skinner, *Pro Hac Vice*
Erik D. Slechta, *Pro Hac Vice*
SKINNER LAW GROUP
21600 Oxnard Street, Suite 1760
Woodland Hills CA 91367
(818) 710-7708

Douglas A. Hofmann, WSBA #06393
David A. Shaw, WSBA #08788
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle WA 98101
(206) 628-6600

Laurie A. Salita, *Pro Hac Vice*
SKINNER LAW GROUP
101 Lindenwood Dr., Suite 225
Malvern PA 19355

Douglas E. Winter, *Pro Hac Vice*
BRYAN CAVE LEIGHTON PAISNER
1155 F Street, N.W.
Washington DC 20004

Attorneys for Respondent/Cross-Petitioner *Continental Motors, Inc.*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

This Court should decline to accept review of the issues presented by Plaintiffs/Appellants/Cross-Respondents' Petition for Review ("the Cavner Petition") for several reasons:

(1) The issues do not meet any of the four RAP 13.4(b) criteria for acceptance of review;

(2) The issues concern evidentiary and sanctions rulings that are committed to the sound discretion of the Trial Court, which was best positioned to assess the issues in the context of a three-month jury trial – and which may be reversed "only when no reasonable person would take the view adopted by the trial court." *Peralta v. State*, 187 Wn.2d 888, 894 (2017);

(3) The issues do not present a likelihood of error on the part of the Trial Court and the Court of Appeals;

(4) Even if an issue presented a likelihood of error, that error would be harmless; and

(5) The Petition merely confirms that this Court should hold, as requested by the Continental Motors, Inc. ("CMI") Petition for Review filed on May 30, 2019, that the jury verdict exonerating CMI and finding Mr. Cavner solely liable for this accident inherently resolved Plaintiffs' design defect claim against CMI.

ASSIGNMENTS OF ERROR

CMI's Petition for Review, filed on May 30, 2019, sets forth its Assignments of Error.

STATEMENT OF THE CASE

CMI's Petition for Review, filed on May 30, 2019, sets forth its Statement of the Case.

ARGUMENT

I. THE EVIDENTIARY ARGUMENTS DO NOT MERIT THIS COURT'S ATTENTION

The Cavner Petition for Review centers on four sets of evidentiary rulings that took place before and during the three-month jury trial: The Trial Court's allowance of certain testimony by eyewitnesses to the accident; its exclusion of evidence concerning Federal Aviation Administration regulations that were not applicable to the accident aircraft; its exclusion of some, but not all, evidence of warranty claims by requiring proof of their substantial similarity to the aircraft and the accident; and its sanctions imposed for CMI's late production of a third-party document obtained during trial.

The Court of Appeals affirmed these rulings as well within the Trial Court's discretion.

Plaintiffs offer nothing concrete to show that the decision below conflicts with a decision of this Court or a published decision of the Court of Appeals, involves a significant question of constitutional law, or involves an issue of substantial public interest that this Court should determine. For this reason alone, the Cavner Petition should be denied. *See* RAP 13.4(b).

Moreover, these challenges to mundane evidentiary and sanctions rulings do not involve supervening issues of law on which the lower courts deserve or require guidance, but matters that go simply to the sound discretion of trial courts – exercised, in this case, in the context of a three-month-long jury trial preceded by more than two years of discovery.

"The standard for review for evidentiary rulings made by the trial court is abuse of discretion." *City of Spokane v. Neff*, 152 Wn.2d 85, 91 (2004); *see Univ. of Wash. Med. Ctr. v. State Dep't of Health*, 164 Wn.2d 95, 104 (2008). That standard is imposing, and requires a determination that the Trial Court's rulings were "manifestly unreasonable or based upon untenable grounds." *State v. Stenson*, 132 Wn.2d 668, 701 (1997); *see Veit ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 99 (2011); *Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wn. App. 260, 276 (2001).

Thus, as the Court of Appeals noted below, an appellate court may reverse a trial court's evidentiary ruling "only when no

reasonable person would take the view adopted by the trial court." *Peralta*, 187 Wn.2d at 894.

Plaintiffs do not and cannot fulfill that solemn standard. And even if they could, the imagined error would be harmless in light of other evidence admitted at trial, including evidence that Plaintiffs proffered.

(A) Eyewitness Testimony

The accident occurred as Mr. Cavner piloted his Cessna U206F aircraft on takeoff from an airport in Anchorage, Alaska. Eyewitnesses to the accident who worked at the airport testified at trial through videotaped pre-trial depositions in which Plaintiffs' counsel had participated and conducted cross-examination.

Plaintiffs contend that the Court of Appeals erred by affirming the Trial Court's decision to admit this eyewitness testimony, which they try to spin into "lay opinion testimony" prohibited by ER 701 (Cavner Pet. 2, 7-10). But contrary to Plaintiffs' representations, these witnesses did not opine about the cause of the accident. They properly testified to what they personally saw and heard before and during the takeoff, and did not testify about any causal link between those conditions and the accident; for example:

- Richard Armstrong testified to what he saw: "The tires appeared to be pretty low…. The plane appeared to be very heavy to me and I saw lumber stacked inside"; "I

remember . . . a young lady was boarding the plane and – and getting in the backseat . . . the plane actually tipped down onto its tail with the nose wheel up in the air;" the plane was "struggling" on takeoff and "had quite a bit of flaps extended … but never did climb very high" (RP 8293-96).

- Scott Bloomquist described what he saw: the airplane was "too low . . . relative to the end of the runway" and "just did not seem to climb correctly…." (RP 8236, 8238).
- Erik Boltman told the jury what he heard: "[The engine] sounded fine…. [I]t sounded like a [Cessna] 206 should at flat-pitch. High RPM setting. Full throttle" (RP 7924).
- Michelle LaRose, a fuel station attendant, interacted with the Cavner family when Mr. Cavner fueled the aircraft minutes before the crash. She testified about what she saw, heard, and said – notably, that when Mr. Cavner fueled the aircraft, it became so heavy and off-balance that it fell on its tail. She then heard Mr. Cavner ask his wife to board the aircraft to try to help it right itself (RP 7663 *et seq.*).

Plaintiffs also misapprehend the 2004 amendments to Rule 701(a). The amendments did not change the Rule's authorization of lay witness testimony "in the form of opinions or inferences"

when "rationally based on the perception of the witness." ER 701(a). (Indeed, the amended Rule allows lay opinion testimony even when the witness' observations concern an issue to be decided by the trier of fact – which did not occur here. *See, e.g.*, *State v. Mercer-Drummer*, 128 Wn. App. 625 (2005).)

The 2004 amendment conformed ER 701 to the 2000 amendment to Federal Rule of Evidence 701. The Advisory Committee Notes to FRE 701 make it clear that "Limitation (a) is the familiar requirement of first-hand knowledge or observation" – and that the amendment did not affect the "prototypical example[s]" of evidence admissible under that Rule: "the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *See* FRE 701 Advisory Committee Notes, *citing Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995). And Rule 701 authorizes lay opinion testimony that arises from "the particularized knowledge that the witness has by virtue of his or her position in the business," FRE 701 Advisory Committee Notes (citing cases) – here, by the witnesses' employment at the airport and their first-hand perception of events.

Plaintiffs carve excerpts from the testimony that use aviation terms, as if semantic choices transform opinions

"rationally based on the perception of a witness" into those of non-eyewitness experts. But as Rule 701 confirms, recounting an observation or impression in specialized language – otherwise known as jargon – is quite different from rendering an expert opinion under Rule 702. Rule 701 does not prohibit eyewitness testimony that happens to use work-related or even learned terminology to describe first-hand observations. *See* FRE 701 Advisory Committee Notes. Just as a physician's eyewitness description of trauma would not be precluded simply because she said "subdural hematoma" instead of "bruise," these eyewitnesses' use of aviation terms to relate what they saw and heard when witnessing an aviation accident – for example, "attitude" (an aircraft's orientation in flight), "tail-heavy," or "full throttle" – does not magically transform them into Rule 702 experts. Those terms simply reflect their personal (and work-related) knowledge of aviation jargon.

Although Plaintiffs describe this testimony as "undisclosed opinions" (Cavner Pet. 1), it was not. Plaintiffs they took the deposition of and/or cross-examined each eyewitness, and knew the nature and scope of their videotaped testimony long before trial. The Trial Court's exercise of discretion in permitting this testimony was appropriate, and certainly not "manifestly unreasonable."

In any event, any error in admitting this testimony would be harmless given equivalent, unchallenged testimony from other witnesses. *See Mackay v. Acorn Custom Cobinetry*, 127 Wn.2d 302, 311 (1995). Although Plaintiffs argue that the Trial Court should have prevented these eyewitnesses from recounting their highly relevant observations of the aircraft's weight, load, pitch, position relative to the ground, and speed/rate of climb, the jury heard similar descriptions from others.

At trial, Mr. Cavner himself admitted that:

- The aircraft was substantially overloaded and packed full of people and cargo;
- The loaded aircraft was outside the acceptable center-of-gravity envelope;
- Eyewitnesses saw the aircraft fall on its tail after he loaded fuel just prior to takeoff; and
- On takeoff, he extended the flaps to 30 degrees, then up to 20 degrees, then back to 30 degrees (*see, e.g.*, RP 2419-20, 2451-53, 2465-66, 2473-74, 2479-82).

Plaintiffs' experts likewise conceded that the aircraft was overloaded by nearly 500 pounds (*see, e.g.*, RP 2453, 2465). And FAA aircraft controller James Buggy described the takeoff consistent with the challenged eyewitnesses: "I then saw him lift up from the runway and then come back down onto the runway, roll a little further, and then lift again. He did not appear to be

climbing well…. He leveled off and then appeared to be descending…." (RP 7408).

(B) Evidence of Inapplicable FAA Regulations

Plaintiffs also contend that the Trial Court erred by excluding evidence of inapplicable FAA regulations permitting certain Cessna aircraft to operate with loads in excess of 3,600 pounds gross. Those regulations apply only to certain qualified aircraft models, ferry flights, or charter operations.

It was undisputed that, on the day of the accident, Mr. Cavner did not operate and could not have flown the aircraft as a ferry flight or with a ferry flight certificate, as a charter flight, or under any FAA other regulation that arguably would have permitted this Cessna U206F to carry an excessive load.

As the Court of Appeals found, the Trial Court properly excluded this evidence as irrelevant, confusing, prejudicial, and/or a waste of time: "I think that the prejudicial value outweighs any probative value we have because the Cavner plane didn't fit, didn't qualify for either permit…." (RP 137). (The Trial Court did permit counsel to re-assert these issues throughout trial, and heard offers of proof and argument each time (*see, e.g.*, RP 1318-27, 2283-84, 2292-93, 2373-85, 2397-2402, 5285-93, 5523-24).)

The Trial Court properly exercised its discretion to exclude this potentially confusing, misleading, and irrelevant evidence; and

Plaintiffs cannot show that this decision was "manifestly unreasonable."

And again, even if erroneous, the exclusion of this evidence was harmless. Plaintiffs were not prohibited from presenting evidence that the Cessna U206F was "capable of flying over the FAA permitted weight because it can" (RP 139); and they had substantial latitude to present evidence to this effect. Mr. Cavner testified that he was trained to load aircraft to 115% over gross (*see, e.g.*, RP 2253-59); and several witnesses, including Kyle Walker and CMI's expert Doug Marwill, testified that a Cessna U206F aircraft can be flown in excess of 3,600 pounds gross without crashing (*see, e.g.*, 4421-33).[1/]

1/ Plaintiffs argue that prejudice resulted from the purported exclusion of "substantially similar" evidence from witnesses such as their expert Gary Graham and bush pilot Jerry Wells (Cavner Pet. 14-15 and n.11). But the Trial Court allowed Plaintiffs to present Graham to testify that Cessna U206F aircraft are capable of flying overweight (RP 2397-2402). Plaintiffs elected not to call him, perhaps because other witnesses testified that the U206F could fly overweight. And Plaintiffs conceded that Wells' testimony was unnecessary when agreeing that reckless "bush culture" piloting in Alaska would not be an issue at trial (RP 154-59). Plaintiffs, not the Trial Court, prevented the jury from hearing any testimony from Graham and Wells.

(C) Evidence of Some (But Not All) Warranty Claims

After carefully assessing "other incident" evidence in the form of warranty claims presented to CMI concerning other aircraft, engines, and incidents (*see, e.g.*, RP 171-78, 453-55, 1082-87, 1209-12, 1709-17, 2883-93), the Trial Court permitted Plaintiffs to introduce, under the "substantial similarity" test, twenty-two (22) warranty claims to attempt to show that CMI had notice of engine compression problems. The Trial Court set four reasonable admissibility criteria: (1) the claim had to relate to a CMI 520F engine on a Cessna 206 aircraft; (2) the claim had to reference a compression or lifter issue; (3) CMI must have authorized a replacement or repair; and (4) to establish "notice," the claim must have been submitted to CMI before the accident (RP 1209-10).

Plaintiffs contend that the Trial Court abused its discretion because these criteria precluded the admission of thirty-eight (38) additional warranty claims (Cavner Pet. 5, 16). But the Trial Court understood that warranty claims are often unverified and that many factors not involving design or manufacturing defects can cause product issues. Here, engine make, model, output, performance, maintenance, fuel, and operational issues were all relevant considerations, and the Trial Court properly exercised its discretion to allow Plaintiffs to proffer many "substantially

similar" warranty claims, but not to poison the jury with prejudicial, irrelevant claims that could not have put CMI on notice that this particular engine, under similar circumstances, was subject to a dangerous condition. *See* ER 401-403; *Houck v. Univ. of Wash.*, 60 Wn. App. 189, 201-202 (1991); *Hinkel v. Weyerhaeuser Co.*, 6 Wn. App. 548, 555-56 (1972).

And yet again, any error would be harmless, because there was no wholesale exclusion of warranty evidence. The jury was permitted to consider 22 "substantially similar" (and thus the most probative) warranty claims that provided repeated independent opportunities to show and argue that CMI had notice of compression problems prior to the accident.

(D) <u>Belated Production of an Eaton Design Drawing</u>

Plaintiffs' final evidentiary argument questions the level of sanctions the Trial Court imposed on CMI for the late production of a design drawing obtained during trial from a third party, Eaton Corporation (Cavner Pet. 11-13). Discovery sanctions, like evidentiary rulings, are reviewed for an abuse of discretion. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582 (2009).

Plaintiffs sought a doomsday sanction: a directed verdict on the issue of manufacturing defect. The Trial Court found that this relief was not justified, and instead gave Plaintiffs the opportunity to recall liability experts to the stand at CMI's

expense; to cross-examine CMI witnesses about the production of the drawing to ensure the jury knew that Plaintiffs were not at fault for not discussing the drawing in their case-in-chief; to vilify CMI in closing argument for its alleged withholding of the drawing; and to pursue costs and attorney fees against CMI totaling almost $50,000 (RP 6053-54; CP 13046-47).

At trial, Plaintiffs' experts conjured a manufacturing defect theory from a CMI assembly drawing for an engine part known as a lifter. The drawing contained a note to "remove all burrs." The meaning of "remove all burrs" was contested: CMI argued that it meant remove all burrs from the lifter's exterior; Plaintiffs argued that it referred to the lifter's interior components, including the check-ball housing, which allegedly failed because of a burr fragment.

The late-produced Eaton technical drawing for the lifter cage/check valve (which is contained in the check-ball housing) did not include an instruction to "remove all burrs"; thus it did not help, but harmed, Plaintiffs' theory. And despite describing the Eaton drawing as "critical" to their case, Plaintiffs' Opening Brief in the Court of Appeals (pp. 45-47) admitted that earlier disclosure would have changed nothing except the parties' ability to eliminate irrelevant testimony about the presence or absence of a "burr removal" instruction.

The Trial Court properly exercised its discretion in denying a doomsday sanction and fashioning a practical and proportionate sanction. And, as the Court of Appeals noted in affirming this ruling: "[T]he trial court was in a much better position … to evaluate the significance of the drawing and its late disclosure by CMI" (Slip Op. 36).

In any event, any error would be harmless. The jury heard all of Plaintiffs' evidence about design and manufacturing defects. Plaintiffs' experts repeated the same argument: the engine suffered from low compression, and the presence of burrs in the lifters caused a valve blockage resulting in an intermittently underpowered engine. Plaintiffs did not and cannot argue that their ultimate theory of liability would have been different if the drawing had been produced earlier. The jury correctly found that Mr. Cavner's negligence was the sole cause of the accident, and this Court should not disturb its verdict.

II. THE CAVNER PETITION CONFIRMS THAT THE JURY VERDICT INHERENTLY RESOLVED PLAINTIFFS' DESIGN DEFECT CLAIM

At the conclusion of trial, the jury found that:

- The accident engine had no manufacturing defect;
- CMI did not fail to warn about potential dangers in the engine, including design defects;

- Two third-party maintenance facilities were negligent in failing to observe CMI's instructions for identifying low engine compression, but their negligence – and thus, low engine compression – was not a cause of the accident; and
- Mr. Cavner's negligence in loading and piloting the aircraft was the sole cause of the accident (CP 12048-56).

CMI has thus argued, in its own Petition for Review filed May 30, 2019, that the Court of Appeals, after resurrecting Plaintiffs' design defect claim in light of *Estate of Becker v. Avco Corp.*, 187 Wn.2d 615, 623-24 (2017), failed to reconcile the jury's findings on manufacturing defect, failure to warn, and causation – and thus did not preserve the integrity of the jury verdict, which inherently rejected Plaintiffs' design defect theory (CMI Pet. 8-11).

The Cavner Petition, in arguing that the Trial Court abused its discretion in denying a doomsday sanction, now contends that the Court of Appeals' reinstatement of the design defect claim should somehow also revive their manufacturing defect claim. This argument defies the reality that, although Plaintiffs had three months to adduce evidence of manufacturing defect, the jury found there was no manufacturing defect – and also found that low engine compression, the supposed result of the alleged manufacturing defect *and* the alleged design defect, was not a cause of the accident. It also underscores the fact that, viewing the verdict in light of the evidence and jury instructions, the

outcome would have been the same had the design defect claim been presented to the jury. *See McDaniel v. City of Seattle*, 65 Wn. App. 360, 369 (1992).

Plaintiffs now say that "the design defect combined with the manufacturing defect to cause the crash" … "[t]he *interaction* between these two defects caused the crash" (Cavner Pet. 3, 11; emphasis original). But the jury found that there was no manufacturing defect, utterly negating this theory. In Plaintiffs' own words, absent a manufacturing defect, their "interaction" theory of the accident fails.[2/]

The Cavner Petition thus confirms that the jury verdict inherently and definitively resolved Plaintiffs' design defect theory claim.

[2/] As detailed in CMI's Petition for Review, Plaintiffs' manufacturing defect theory at trial proposed that engine parts did not comply with the "remove all burrs" design document; in other words, the jury found, consistent with CMI's evidence, that there were no burrs. On appeal, Plaintiffs contended, conversely, that a design defect existed because other design documents did not prohibit burrs; but the jury's implicit finding that there were no burrs also negates that claim. If, as Plaintiffs' theorize, CMI's design was defective because it did not "remove all burrs," then the jury's rejection of the manufacturing defect claim, which was based on the presence of burrs, rejects a design defect claim.

CONCLUSION

For these reasons, this Court should deny the Cavner Petition for Review while granting review of the issues presented by the CMI Petition for Review.

RESPECTFULLY SUBMITTED this 30th day of July, 2019.

Douglas A. Hofmann, WSBA #06393
David A. Shaw, WSBA #08788
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Phone: (206) 628-6600
Fax: (206) 628-6611
Email: dhofmann@williamskastner.com;
dshaw@williamskastner.com

Attorneys for Continental Motors, Inc.

Will S. Skinner, *Pro Hac Vice*
Erik D. Slechta, *Pro Hac Vice*
SKINNER LAW GROUP
21600 Oxnard Street, Suite 1760
Woodland Hills, CA 91367
Phone: (818) 710-7708
Fax: (818) 710-7701
Email: skinner@skinnerlawgroup.com
slechta@skinnerlawgroup.com

Laurie Alberts Salita, *Pro Hac Vice*
SKINNER LAW GROUP
101 Lindenwood Drive, Suite 225
Malvern, PA 19355
Phone: (484) 875-3159
Email: salita@skinnerlawgroup.com

Douglas E. Winter, *Pro Hac Vice*
BRYAN CAVE LEIGHTON PRAISNER
1155 F Street NW
Washington, DC 20004-1357
Phone: (202) 508-6072
Email: dewinter@bclplaw.com

Attorneys for Continental Motors, Inc.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on July 30, 2019, I caused a true and correct copy of the foregoing document, to be delivered via the court efiling system to:

Kenneth Wendell Masters
Shelby R Frost Lemmel
Masters Law Group PLLC
241 Madison Ave N
Bainbridge Island, WA 98110-1811
ken@appeal-law.com; shelby@appeal-law.com

Jason Wayne Anderson
Michael Barr King
Carney Badley Spellman PS
701 5th Ave Ste 3600
Seattle, WA 98104-7010
anderson@carneylaw.com; king@carneylaw.com

Mark Steven Northcraft
Northcraft Bigby PC
819 Virginia Street, Suite C2
Seattle, WA 98101

DATED this 30th day of July, 2019, at Seattle, Washington.

Sandra V. Brown, Legal Assistant

WILLIAMS KASTNER

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- sbrown@williamskastner.com
- shelby@appeal-law.com
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- slechta@skinnerlawgroup.com
- traci.choi@bclplaw.com

Comments:

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Sender Name: Sandra Brown - Email: sbrown@williamskastner.com
Filing on Behalf of: Douglas A. Hofmann - Email: dhofmann@williamskastner.com (Alternate Email:)

Address:
601 UNION STREET
SUITE 4100
SEATTLE, WA, 98101
Phone: (206) 233-2964

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