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SUPREME COURT OF THE STATE OF WASHINGTON

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KENNETH C. BURTON, as Personal Representative of the ESTATE OF  
ULISES DESPOSORIOS SANTIAGO, and on behalf of ERIKA  
BARAJASA VASQUEZ, VIRGINIA DESPOSORIOS BARAJAS,  
ULISES DESPOSORIOS BARAJAS, TEOFILO UVALDO  
DESPOSORIOS CABRERA, and IRENE SANTIAGO NAVA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF  
MARCELINO GONZALEZ ALCANTARA, and on behalf of ROSARIO  
FLORES ALVARADO, EDUARDO GONZALEZ FLORES, DANIEL  
GONZALEZ FLORES and CHRISTIAN NANYELI GONZALEZ  
FLORES,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF  
JUAN GALINDO HERRERA, and on behalf of REBECA ESCAMILLA  
MAGALLANES, ERICK GALINDO ESCAMILLA and LILLIAN ITZE  
GALINDO ESCAMILLA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF  
PABLO LOZADA LEGORRETA, and on behalf of MARIA DE  
LOURDES ESQUIVEL AVALOS, GERSON FABRICIO LOZADA  
ESQUIVEL, DIANA PAOLA LOZADA ESQUIVEL and PRISCILLA  
LOZADA ESQUIVEL,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF  
CESAR GABRIEL MAYA, and on behalf of STEPHANIE  
GUADALUPE MAYA TRIUJEQUE and DIEGO HANNIEL MAYA  
TRIUJEQUE,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF  
JESUS ARCINIEGA NIETO, and on behalf of ANGELICA  
MARGARITA ARIZMENDI GUADARRAMA, ESTEFANIA  
ARCINIEGA ARIZMENDI, JOSE FRANCISCO ARCINIEGA PEREZ  
and CONSUELO NIETO TAPIA, and

KENNETH C. BURTON, as Personal Representative of the ESTATE OF  
MARIANELA ELIZARDI RIOS, and on behalf of MARIANELA AIDA  
QUEZADA ELIZARDI and AIDA MAGDALENA RIOS DE  
ELIZARDI,

Respondents,

v.

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RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

TWIN COMMANDER AIRCRAFT, L.L.C., formerly known and doing  
business as TWIN COMMANDER AIRCRAFT CORPORATION,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER TWIN COMMANDER

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## I. INTRODUCTION

The trial court granted summary judgment to Petitioner Twin Commander Aircraft, L.L.C. (“Twin Commander”) on the grounds that a federal statute of repose, the General Aviation Revitalization Act of 1994 (“GARA”), 49 U.S.C. § 40101, note, protects it from suit. The Court of Appeals affirmed in part, but reversed on two issues. First, accepting a last-minute complete change in Respondent Kenneth C. Burton’s theory of the case, the Court of Appeals held that there was a fact issue regarding whether Twin Commander is even a “manufacturer” entitled to invoke GARA. Second, the Court of Appeals held that improper and impermissible expert opinions regarding corporate knowledge and intent were sufficient to create a fact issue for trial regarding whether Twin Commander had engaged in fraud and thus lost the protection of GARA.

The trial court got it right. Twin Commander was sued as a manufacturer; it defies logic and settled case law to hold now that Twin Commander is not a manufacturer. In addition, prior to the decision of the Court of Appeals, no other court in the country had allowed a case involving a GARA-protected aircraft to proceed to trial on the basis of such paltry evidence of alleged fraud. The Court of Appeals’ decision makes summary judgment virtually unavailable in GARA cases, contrary to congressional intent to alleviate even the costs of a defending a lawsuit.

This Court should interpret GARA correctly and should instruct the Court of Appeals to affirm the trial court in full.

## **II. ASSIGNMENTS OF ERROR**

1. Whether the Court of Appeals erred in holding that the holder of a type certificate issued by the Federal Aviation Administration (“FAA”) for an aircraft is not a “manufacturer” under GARA’s statute of repose when the suit is based on an action the type certificate holder took with respect to an alleged defect in the aircraft.

2. Whether the Court of Appeals erred in holding that Twin Commander is entitled to summary judgment on the fraud exception to GARA when the only evidence relied on to create a triable issue of fact is the opinions of experts who were not qualified to opine on corporate knowledge or intent; the information that Twin Commander allegedly failed to disclose is not “required information” under GARA; and there is no evidence of a causal link between the information allegedly withheld and the accident.

## **III. STATEMENT OF THE CASE**

The case is stated in Twin Commander’s prior briefs. In sum, the trial court below granted summary judgment to Twin Commander, holding that GARA’s statute of repose protects Twin Commander from suit. The Court of Appeals affirmed in part, but reversed and remanded in part.

This Court granted review on the two issues decided against Twin Commander by the Court of Appeals.

#### IV. ARGUMENT

**A. The Trial Court Correctly Concluded That Summary Judgment Was Proper for Twin Commander on Its “Manufacturer” Status Under GARA.**

Under GARA, no lawsuit seeking damages for death or injury from a general aviation aircraft accident may be brought “against the manufacturer of the aircraft” or the “manufacturer of any new component, system, subassembly, or other part of the aircraft” more than 18 years after the aircraft is first delivered or the part is installed. GARA §§ 2(a), (3)(3). In the trial court, through every pleading and every submission including summary judgment briefing (as set out in detail at pages 13 to 15 of Twin Commander’s motion for reconsideration), Burton took the position that Twin Commander was a manufacturer. Burton’s approach was not surprising, because Burton sued Twin Commander on product liability claims and thus would need to prove at trial that Twin Commander was a manufacturer or seller of the product in question. RCW 7.72.030, .040.

During oral argument in the trial court on Twin Commander’s motion for summary judgment, Burton changed course and, for the first time, advanced the notion that Twin Commander is not a “manufacturer.” This move is not a minor reshaping or refining of a legal argument. If

Twin Commander is not a manufacturer or seller, Burton has no product liability claim against it. Thus, by making this argument, Burton appears to concede its product liability claim in favor of some as yet undefined alternative claim.

Aside from the anomalous nature of a plaintiff arguing that a defendant has failed to prove an element of the plaintiff's case as an argument *against* summary judgment, Burton's argument against Twin Commander's manufacturer status is legally flawed. First, contrary to the Court of Appeals' decision, and as described in Twin Commander's motion for reconsideration at page 15, Twin Commander did *not* have the opportunity to respond to this argument in the trial court. Second, as described in Twin Commander's motion for reconsideration at pages 12 to 13, a defendant should not *lose* summary judgment for failing to present evidence on an *element of the plaintiff's affirmative case*. Third, as explained in detail in Twin Commander's motion for reconsideration and its petition for review, as a matter of both law and fact, the Court of Appeals' concerns regarding whether Twin Commander is an aviation manufacturer are misplaced. Twin Commander is the type certificate holder for this aircraft, responsible for ongoing safety issues involving the aircraft. *See* 14 C.F.R. §§ 21.3, 21.99. Twin Commander was sued as a result of its status and undertakings as the type certificate holder for this

aircraft, in particular a service bulletin issued regarding potential safety concerns for a part manufactured by the predecessor type certificate holder more than 18 years before. Twin Commander is therefore unquestionably the type of entity Congress sought to protect through GARA. For these reasons, the trial court's grant of summary judgment to Twin Commander under GARA was unremarkable and correct.

**B. The Trial Court Correctly Concluded That Summary Judgment Was Proper for Twin Commander on the Fraud Exception to GARA.**

The Court of Appeals incorrectly held that two emails from a Twin Commander manager, as interpreted by Burton's experts, "create material issues of fact about whether the misrepresentation or concealment exception under GARA applies." (Decision at 19.)<sup>1</sup> A manufacturer otherwise protected by GARA GARA's protection if it materially and knowingly misrepresents, withholds, or conceals required information from the FAA that is causally related to the accident. *See* GARA § 2(b)(1).<sup>2</sup> This exception is narrow and, under the express language of

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<sup>1</sup> Burton also argued below that, in addition to the two emails, Twin Commander engaged in fraud by failing to re-report three earlier accidents to the FAA and (allegedly) failing to perform adequate testing. The Court of Appeals correctly rejected these arguments. (Decision at 22 n.19.) Burton did not seek review of this holding and thus the issue before the Court is only whether the evidence relied on by the Court of Appeals, *not* the other evidence discussed by Burton below, is sufficient to create a triable issue of fact regarding the fraud exception to GARA.

<sup>2</sup> "Subsection (a) [the statute of repose] does not apply . . . 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

GARA, applies only when several elements—each separate and independent from the others—are met. *Id.* These elements are:

- (1) proof “with specificity”;
- (2) communications relating to a type certificate, airworthiness certificate, or obligations with respect to the continuing airworthiness of an aircraft or part;
- (3) a knowing misrepresentation, withholding, or concealment from the FAA;
- (4) of “required information”;
- (5) that is material and relevant to the performance of the aircraft; and
- (6) is causally related to the harm Burton suffered.

*Id.* Burton bears the burden of proof on each of these elements. *Id.*; *Willett v. Cessna Aircraft Co.*, 851 N.E.2d 626, 635-36 (Ill. App. Ct. 2006).

The trial court’s grant of summary judgment to Twin Commander must be affirmed if Burton’s showing was insufficient on even one of these elements. In fact, Burton’s showing fails on each and every one of

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airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the [FAA], or concealed or withheld from the [FAA], 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 . . . .” GARA § 2(b)(1).

these factors, and therefore the Court of Appeals' reversal of summary judgment was in error. In this brief, Twin Commander will focus Burton's deficient showings on the third, fourth, and sixth elements.

**1. The Emails at Issue and the Legal and Factual Context in Which They Were Written.**

The record establishes that the emails arose as follows. In 1992, a Twin Commander Model 690C aircraft accident occurred in Denver; the NTSB determined that the accident was caused by turbulence. (CP 1334-35.) On November 1, 2002, a Model 690B aircraft lost part of its rudder mid-flight. (CP 1176.) In March 2003, while the NTSB was still investigating the 2002 incident, a Model 690B aircraft had an accident. (*Id.*) The NTSB discovered that parts of the aircraft, including the rudder tip, had broke off mid-flight. (*Id.*)

As the type certificate holder for the aircraft, Twin Commander could participate in and observe the NTSB's investigations, but it could not lead or direct them. *See* 49 C.F.R. § 831.1-.14. Twin Commander, however, took other steps to gather information about the condition of the fleet and, in particular, the condition of the rudders in the field. Twin Commander sought this information to help determine whether the loss of the rudder could have been the precipitating event to the accident, or simply the consequence of another event. In other words, when an aircraft

flies too quickly for its altitude, called “flying outside the flight envelope,” the aircraft typically experiences intense vibration and parts may break away from the aircraft. (See CP 1177, 1334-35.) When an accident occurs, a central question in the investigation is whether the part breaking away—here the rudders—was the *cause* of the incident, or instead broke away during a period of vibration *resulting* from a loss of control caused by something else. (See *id.*)

Twin Commander’s purpose in gathering information on the condition of the rudders in the fleet was to determine *if* there was a problem of any variety with the rudders. If it determined there was, in fact, a problem, only then would it be necessary to determine whether it was a reportable event under 14 C.F.R. § 21.3. (See CP 1177.) As discussed in more detail *supra* Part IV.B.3, 14 C.F.R. § 21.3 creates and defines manufacturers’ reporting obligations to the FAA. It requires “the holder of a Type Certificate” to “report any failure, malfunction, or defect in any product . . . manufactured by it *that it determines*” has or could result in one of 13 occurrences, unless the event has already been reported to the FAA.<sup>3</sup> 14 C.F.R. § 21.3(a), (b), (d). Thus, a manufacturer must

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<sup>3</sup> The 13 occurrences are fires, engine exhaust system failure, accumulations of toxic gases in the cockpit, malfunctions of the propeller control system, propeller or rotorcraft hub failures, flammable fluid leakage, brake system failures, primary structural defects or failures, abnormal vibrations or buffeting, engine failures, structural or flight control system failures, complete losses of power-generating systems, and failures of more than

make a determination of cause and effect before it can determine whether it has a duty to report. To make this causal determination in this instance, Twin Commander took the extraordinary step of seeking immediate fleet-wide rudder inspections and, if necessary, rudder replacements, even though this grounded part of the fleet while Twin Commander sought a vendor to make replacement parts. (See CP 3807-14; 4374-75.)

It was during this time period that Jeff Cousins, Twin Commander's Vice President and General Manager, wrote the two emails at issue. (See Appendix.) The first was written on April 4, 2003, just eight days after the 2003 accident. (CP 4356.) Cousins sent the email to 38 people, most of them service repair stations. (*Id.*) He relayed that the investigations into these accidents were ongoing and that, until the investigation finished, "NO determination of cause is possible." (*Id.*) Cousins then informed these outside repair stations that, although Twin Commander had "no evidence to point to the cap as [sic] primary cause of the problem," Twin Commander nonetheless was recommending that all rudder caps be inspected and replaced if necessary. (*Id.*) The second email was written a short time later, on April 21, 2003, and similarly appears to have been sent to a list of external recipients. (CP 2199.) In the email, Cousins reports that the FAA had approved Twin Commander

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one attitude, airspeed, or altitude system. 14 C.F.R. § 21.3(c).

Service Bulletin 235 and discusses the results of Twin Commander's information-gathering efforts. (*Id.*)

As a policy matter, the idea that these emails—in which Twin Commander freely, voluntarily, and candidly shared information with external recipients during the early stages of an ongoing accident investigation, in an effort to determine proactively if there was a problem in the fleet—could be sufficient evidence of fraud to lose GARA protection is perverse, as such a rule would require manufacturers to choose between caution in the face of uncertainty and the loss of GARA's protections. But in addition, Burton's argument is legally flawed. Burton would have the Court conclude from these emails that Twin Commander determined that the 1992 accident had the same cause as the 2002 and 2003 incidents, that it inferred from this that each of these incidents were caused by flutter, and that it hid this inference from the FAA. For several reasons, this theory is speculative at best and nonsensical at worst, and it does not survive analysis under settled summary judgment principles.

**2. Neither the Emails Nor Any Other Evidence Creates a Triable Issue of Fact Regarding the Knowing Misrepresentation, Withholding, or Concealment Element of the Fraud Exception to GARA.**

First, the trial court's grant of summary judgment should be affirmed because there is *no* evidence of a knowing misrepresentation,

withholding, or concealment. On their face, the emails themselves disprove the notion that, as Burton argues, Twin Commander had determined that the rudder caps were defective or, more specifically, that Twin Commander had determined that there was a material relationship between the 1992 incident and the two more recent ones.

For example, in the April 4 email Cousins describes both similarities and differences between the rudders recovered from the various incidents, states that the investigation into the most recent one was ongoing, and emphasizes that “NO determination of cause is possible” until more information is gathered. (CP 4356.) The April 21 email is even less helpful to Burton. The Court of Appeals relied on this email for the conclusion that, “Twin Commander did not advise the FAA that its Service Center were reporting numerous cracked lower horizontal stabil[izer] . . . ribs.” (Decision at 21.) Notably, the actual word in the email is “stabilator,” not “stabilizer.” (CP 2199.) A stabilator is a *non-rudder part* of the control surface on the aircraft’s tail; it is in no way related to Burton’s claims in this case. *See* U.S. Dep’t of Transportation, FAA, *Pilot’s Handbook of Aeronautical Knowledge*, FAA-H-8083, at 5-2 (2008).<sup>4</sup> One of Burton’s experts wrongly assumed the email meant “stabilizer” (CP 1137), and the Court of Appeals indulged this assumption

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<sup>4</sup> Available at [http://www.faa.gov/Library/manuals/aviation/pilot\\_handbook](http://www.faa.gov/Library/manuals/aviation/pilot_handbook).

by citing the expert's altered version of the email, rather than the email itself.

Further, there is *no evidence* that Twin Commander withheld or concealed the ideas and thoughts contained in the April 4 and April 21 emails from the FAA. The Court of Appeals focuses solely on what information Twin Commander included in the "Reason for Publication" provided to the FAA with Service Bulletin 235 (Decision at 18-19), apparently willing to assume, without proof, that no other relevant communications occurred regarding the 2002 and 2003 incidents. The record belies that fact. First, the April 4 email was sent to 38 recipients, most of them service repair stations. These repair stations have their own obligations to report information to the FAA if, as a result of the inspections, they discovered a problem with the rudder. 14 C.F.R. § 145.221. One does not send to those who must report to the federal government information one is attempting to conceal from the federal government.

Second, all evidence in the record suggests that Twin Commander openly shared its ideas and information regarding the incidents with the FAA. Between 2002 and 2004, Pierre Debruge, Twin Commander's Engineering Manager, logged over 230 correspondences with the FAA. (CP 3756-58, 3761-64, 3766-69.) Debruge "worked closely with the

FAA, including by sharing and discussing the information known by Twin Commander about the rudders, rudder tips, and the results of the rudder inspections, and discussing and deciding what actions to take going forward.” (CP 1178.) Debruge’s declarations indicate no misrepresentation or concealment; instead they demonstrate the open nature of communications between Twin Commander and the FAA on these topics, and Burton has no contrary evidence. The latter is, of course, the most relevant, as it was Burton’s obligation to defeat summary judgment by coming forward with evidence of withholding or misrepresentations. Burton has none.

Notably, and perhaps for these reasons, the Court of Appeals did not rely on the emails themselves as proof of a knowing misrepresentation, withholding, or concealment, but relied on the *opinions of Burton’s experts* regarding the emails as sufficient evidence to create a triable issue of fact. As discussed in detail in Twin Commander’s motion for reconsideration of the Court of Appeals’ decision and subsequent petition for review to this Court, such reliance on expert opinion was misplaced because (1) the trial court correctly excluded expert opinions on the law; (2) corporate knowledge and intent are not proper subjects of expert testimony; and (3) the experts had no foundation to offer the opinions on which the Court of Appeals relied. Once the incorrect reliance on

improper expert opinions is set aside, there is no evidence to support the Court of Appeals' reversal of the trial court's grant of summary judgment.

**3. Neither the Emails Nor Any Other Evidence Creates a Triable Issue of Fact Regarding the "Required Information" Element of the Fraud Exception to GARA.**

Second, and independently, the trial court's grant of summary judgment should be affirmed because *regardless of how the emails are construed*, there is *no* evidence of a reportable event triggering Twin Commander's reporting duties under 14 C.F.R. § 21.3, and thus the threshold for consideration of the fraud exception to GARA is not met.

The fraud exception to GARA is not a free-floating exception relating to any and all communications between an aviation manufacturer and the FAA. As is clear from the evidence in the record, aviation manufacturers communicate frequently with the FAA on a wide variety of topics. (*E.g.*, CP 3756-58, 3761-64, 3766-69.) Instead, the fraud exception to GARA only applies to knowing misrepresentations, withholdings, or concealments that occur in specific types of communications, as stated in the statute. *See* GARA § 2(b)(1). The communication must be "with respect to a type certificate, or airworthiness certificate for, or obligations with respect to continuing airworthiness of" an aircraft or part. *Id.* And, the information that is

allegedly knowingly misrepresented, withheld, or concealed must be “required information.” *Id.*; *Wright v. Bond-Air Ltd.*, 930 F. Supp. 300, 303 (E.D. Mich. 1996). Information is only “required” if (1) a statute, regulation, or case requires the manufacturer to report it, (2) the FAA directly inquires about the information, or (3) it is necessary to correct information “previously supplied directly by the defendant to the FAA.” *Butler v. Bell Helicopter Textron, Inc.*, 109 Cal. App. 4th 1073, 1084 n.17, 135 Cal. Rptr. 2d 762 (2003).

Without setting forth any analysis of the point, the Court of Appeals appeared to be under the impression that Twin Commander’s submissions to the FAA in connection with obtaining approval of Service Bulletin 235 were “required information.” (Decision at 17.) This is not correct. Manufacturers do not have to obtain FAA approval in order to issue a service bulletin. *See* FAA Advisory Circular 20-114, § 3.c, at 2 (Oct. 22, 1981) (“Manufacturers are not required by FAR either to coordinate service documents with the FAA or to gain FAA approval . . .”).<sup>5</sup> That Twin Commander may have voluntarily coordinated issuance of Service Bulletin 235 with the FAA does not alter the fact that it was under no legal obligation to do so.

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<sup>5</sup> Available at [http://rgl.faa.gov/Regulatory\\_and\\_Guidance\\_Library/rgAdvisoryCircular.nsf/0/a68778212c02b5b586256e8b0070d106/\\$FILE/AC20-114.pdf](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/a68778212c02b5b586256e8b0070d106/$FILE/AC20-114.pdf).

Burton argues that the emails evidence a knowing misrepresentation, withholding, or concealment in connection with Twin Commander's reporting obligations under 14 C.F.R. § 21.3. (Br. of Appellants at 26.) As noted above, this regulation requires a type certificate holder to report an event to the FAA only if (1) there has been a failure, malfunction, or defect; (2) in a product manufactured *by the type certificate holder*; and (3) the type certificate holder determines (4) that the failure, malfunction, or defect has or could result in one of the 13 occurrences. As is clear from this regulation, there is no obligation for a manufacturer to report each and every fact, tentative hypothesis, or possibility that could conceivably bear on aircraft safety. Acting pursuant to its congressionally delegated authority, the FAA weighed competing concerns and specified exactly when an event would be reportable to it. This limitation prevents the FAA from being inundated with so much information of such little value that it cannot carry out its mandated duties relating to aircraft safety. Without the carefully balanced limits of § 21.3, manufacturers "would spend most of their time reporting to the FAA and the FAA would be buried in reports noting differences of opinion concerning aircraft design and aircraft failure." *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 929 F. Supp. 380, 384 (D. Wyo. 1996) ("*Rickert II*").

This outcome would be *detrimental* to safety, as the FAA could not focus its attention on legitimate safety concerns.

Here, there is absolutely no evidence that Twin Commander “determined” either that there was a failure, malfunction, or defect in a part manufactured by it, or that such failure, malfunction, or defect had or could cause one of the 13 occurrences listed in the regulation. It is clear on the face of the emails at issue that the author *did not yet know* whether there was a failure, malfunction, or defect and most assuredly did not yet know the cause of the accidents under investigation. Burton, of course, disagrees with Twin Commander’s eventual conclusion regarding the rudders, but the question here presented is not whether Twin Commander was *correct* at any given time in its assessments of the rudders, but whether it in fact *determined* the rudders to be defective and misrepresented, withheld, or concealed that determination from the FAA. Compare *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 923 F. Supp. 1453, 1457-62 (D. Wyo. 1996) (“*Rickert I*”) (fraud exception to GARA not met by claims of negligence, or by disagreements over the cause of accidents), *reversed on other grounds by Rickert II*, 929 F. Supp. 380, with *Butler*, 109 Cal. App. 4th at 1084 (exception met when a manufacturer itself determined that accidents were caused by yoke failure and hid this

determination from the FAA). The emails most assuredly are not evidence of such a determination.

**4. Neither the Emails Nor Any Other Evidence Creates a Triable Issue of Fact Regarding the Causation Element of the Fraud Exception to GARA.**

Third, and again independently, the trial court's grant of summary judgment should be affirmed because there is *no* evidence that the information allegedly misrepresented, withheld, or concealed was "causally related" to Burton's harm. GARA § 2(b)(1).

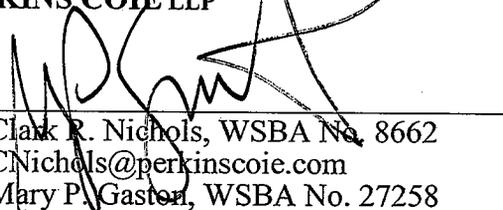
Burton posits a chain of unsupported assumptions. To hold for Burton, the Court must agree that a reasonable jury could conclude: (1) notwithstanding the wide net of recipients to the April 4 email and Dubruge's ongoing communications with the FAA, Twin Commander ensured that no representative of the FAA ever learned the information contained in the emails; (2) if the FAA had known that information, it would have decided that, contrary to the conclusions of the NTSB after thorough investigations, that the incidents were caused by defects in the rudders of the aircraft; and (3) prior to May 2004, when the subject accident occurred, the FAA would have taken some action that would have prevented the accident. Burton has provided no declaration from anyone at the FAA, or any other evidence, that could possibly support such speculation, and summary judgment therefore is required.

**V. CONCLUSION**

For the foregoing reasons, on the issues on which review was granted, this Court should reverse the Court of Appeals. The Court should remand with instructions for the Court of Appeals to affirm the trial court in full.

DATED: November 2, 2009

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# **APPENDIX**

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**Coyle, Richard C.-SEA**

**From:** Jeff Cousins [jcousins@twincommander.com]

**Sent:** Friday, April 04, 2003 2:59 PM

**To:** Steven Nott (stevenott@gamgroup.net); Alan Peralta (alanp@flycfm.com); Alberto Benatar (info@aerocentro.com); Allen Howell (ahowell@flycfm.com); David A Lipski (dlipski@eagle-aviation.com); Gordon Johnson (info@exec-air.com); Jim Clifford (jimclifford@nationalflight.com); Keith Addington (kaddington@eagle-creek.com); Kerry Lelfeld (klelfeld@byerlyaviation.com); Mark Goodwin (markg@northeastairmotive.com); Tom Wiles; Bruce Byerly (E-mail); Dale McDonald; Dave Augustine (E-mail); Dave Hobza @ The ServiCenter (E-mail); Don Campion (E-mail); Doug Jacob (E-mail); Ernesto Torrent; Gary Buchanan (E-mail); Gary Riggs (E-mail); Henry Laughlin (E-mail); Jerry Hill (E-mail); Jerry Torrance (E-mail); Ken Molczan (E-mail); Kevin McCullough (E-mail); Larry Byerly (E-mail); Matt Hagans (E-mail); Miguel Benatar; Mike Okeeffe (E-mail); Norm Rakston (E-mail); Peter Van Dolzer; Randy Ames; Rick Hale (E-mail); Sid Watson

**Cc:** Pierre DeBruge; Geoffrey Pence; Jim Matheson (jmatheson@prec-aero.com); Coyle, Richard C.-SEA

**Subject:** Rudder Inspections

In response to calls from some of you and in the interest of keeping everyone informed I would like to discuss two incidents we have had with Twin Commanders in the past four months.

Late last year a 690A inbound to Corpus Christi, TX reported that he lost temporary control of the aircraft resulting in a partial roll before recovering. The aircraft successfully landed in Corpus with damage to the rear empennage structure and skins and with the rudder cap and upper rudder rib missing. The investigation involving NTSB, FAA, and TCAC has been unable to ascertain quite a few facts concerning this incident. The rudder cap has not been recovered.

Last week a 690B came apart in flight over southern Georgia with a crew of two pilots on board. The investigation by the NTSB is still at a very early stage and quite a bit of information is still being gathered. What is known is that there was turbulence reported in the area at the affected altitudes and again the rudder cap departed the aircraft and has not been recovered.

Geoffrey has been investigating all the breakups we have records of and the 1992 accident of the Casper Air Service 840 (metal rudder cap) going into Denver has tearing of the rudder identical to the two recent incidents. BUT the cap for that aircraft WAS recovered and is in one piece. The failure was below the cap and rib. The vertical spar failed in a twisting force 2 inches above the upper rudder hinge. The significance of this is that the rudder has the same appearance of the two current ones. The other significant fact is that extensive analysis was done on the Casper rudder and it failed well above design load.

Since Monday of this week in cooperation with several Service Centers 7 aircraft have been inspected and no serious airworthiness problems have been discovered with the caps.

Currently an analysis is being done by the NTSB on the two current incident rudders to determine if there is fatigue in the area of separation but we do not have any information yet to determine cause. We also are waiting for records, final radar tracks (altitude, airspeed, last clearance, etc on the Georgia aircraft). Until that is in NO determination of cause is possible. The initial radar info indicates that a normal descent might have been started before control was lost.

With the info we have from inspecting the aircraft and a rudder that TCAC has obtained we have no evidence to point to the cap as primary cause of the problem.

TCAC does feel the circumstances justify the following:

We are finishing up a draft Service Bulletin 235 to inspect the upper rudder assembly including the cap to be accomplished within the next 25 flight hours or 90 days and are not sure of the FAA reaction to even going that far without more information. We are doing so to be prudent and to obtain more data concerning the condition of the fiberglass caps installed on 685, 690, 690A, and 690B aircraft with rudder horns. The later jetprop models are equipped with aluminum caps and nothing to date points to a problem with those caps.

We will submit the draft SB to the FAA by Monday and I will forward each of you a copy.

04/07/2003

In the meantime I hope this will provide you with enough information to discuss the incident with your customers.

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04/07/2003

**From:** Kevin McCullough <KMcCullough@AeroAir.com>  
**Sent:** Tuesday, April 22, 2003 5:12 PM (GMT)  
**To:** Jeff Cousins <jcousins@twin.com>  
**Subject:** RE: SB 235 Is Released

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Jeff

Many of our customers are asking when an AD will be released, what is you gut on this?

Kevin

—Original Message—

**From:** Jeff Cousins [mailto:jcousins@twincommander.com]  
**Sent:** Monday, April 21, 2003 7:17 AM  
**To:** Jeff Cousins  
**Subject:** SB 235 Is Released

Enclosed is the release copy of SB 235. Pierre has FAA approval of this version and it will be mailed to owners this week. We have every indication that the FAA is considering this for an Airworthiness Directive in the near future.

Last week was enlightening for us all as reports came in from Service Centers We not only have 22 rubber horn caps on order, we have numerous reports of defective heating elements, cracked lower horizontal stabilator ribs, cracked upper rudder ribs, and a defective forward rudder spar. It has become apparent that this part of the aircraft deserves more attention during inspections and ongoing maintenance.

Please discuss this with your technical personnel to insure that they are aware of these items while conducting this inspection. Also please fax back to us the compliance cards with any comments you have as soon as possible.

At the moment our first article rudder tip is due at the end of next week with first deliveries following a few days later.

TCAC will try to do everything in our power to keep you informed of any new information on SB 235.

Thank you,

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TC 007739

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**CERTIFICATE OF SERVICE**

I certify that on the 2nd of November 2009, I caused a true and correct copy of this Supplemental Brief of Petitioner Twin Commander to be served on the following counsel of record in the manner indicated below:

Via Hand Delivery

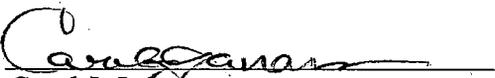
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DATED: November 2, 2009

**PERKINS COIE LLP**

By:   
Carol J. Janam