

No. 70756-6  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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AVCO CORPORATION,

Appellant,

vs.

PAUL THOMAS CREWS, as Personal Representative of the  
ESTATE OF BRENDA HOUSTON, and as Personal Representative  
of ELIZABETH CREWS, and in his individual capacity,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE MONICA BENTON

FILED  
JAN 11 2011  
CLERK OF COURT  
KING COUNTY

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

While respondents Houston/Crews claim that the trial court's unprecedented dispositive sanctions order was based on a hidden arsenal of smoking guns, the response brief reveals their case against appellant AVCO to be nothing but smoke and mirrors. That Houston/Crews must resort to recasting the facts in a light most favorable to plaintiffs, contrary to the proper standard of review, only proves how AVCO was prejudiced by the trial court's default judgment summarily establishing its liability for compensatory and punitive damages as a matter of law. Houston/Crews mischaracterize the content, result, and consequences of the discovery disputes addressed by the decision-makers who actually presided over them, most notably Discovery Master Kallas, to whom the trial court had ordered the parties to direct *all* discovery disputes (CP 806), and who confirmed AVCO's compliance with its discovery obligations many months before the trial court entered its dispositive sanctions order on the first day of trial. (CP 961-64, 2718)

The trial court's error in summarily establishing AVCO's liability for compensatory and punitive damages must be reversed because no previous discovery or contempt order, nor the

dispositive sanctions order itself, gave AVCO any notice what litigation conduct could justify loss of all of its substantive defenses to sole and absolute liability for pilot Houston's plane crash. Moreover, the response brief makes clear that plaintiffs were not prejudiced by any claimed discovery violations. The trial court's assignment of sole and absolute liability to AVCO is an error of law because plaintiffs had no cause of action in the first instance for the claimed failure of an aftermarket carburetor AVCO neither designed nor manufactured, installed in an aircraft engine 23 years after it left AVCO's control. This Court should reverse and dismiss, or at a minimum remand for trial on the merits.

## II. REPLY ARGUMENT

### A. **Applying the proper standard of review establishes the undue harm and prejudice the dispositive sanctions order caused AVCO.**

The respondents' restatement of facts and argument are improperly premised on this Court taking "all facts and reasonable inferences in the Crews' favor." (Resp. Br. 5, citing *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 565, 311 P.3d 1 (2013).) But as *Stewart Title* recognizes, it is the party resisting judgment as a matter of law – in this instance, appellant AVCO – that on appeal is entitled to all inferences from the pleadings. On

the day trial was scheduled to begin, the trial court sanctioned AVCO and prevented it from putting on any evidence to contest its sole and absolute liability for compensatory and punitive damages. As a result, AVCO on appeal has relied upon the summary judgment record and its offer of proof in setting out the underlying facts.

Houston/Crews do not identify a single instance in which AVCO's statement of the *disputed* facts is not supported by the opening brief's record citations. The same cannot be said of the "facts" recited in the response brief. Houston/Crews go even further, not just relying on an evidentiary presumption that is the opposite of the standard for review of judgment as a matter of law, but then telling this Court that it must draw inferences favorable to plaintiffs from facts taken, not just from a summary judgment record, but from non-evidentiary briefing and motions, witness disclosures, one-sided testimony from the punitive damages "trial," and affidavits submitted on the very motions in which appellant AVCO – not respondents Houston/Crews – is entitled to all inferences. Houston/Crews in some instances then go far beyond this hodge-podge of assertions taken in a light most favorable to them and state as "fact" allegations for which there is no evidence whatsoever.

For instance, the parties sharply disputed whether the aircraft's engine was "under power" when it crashed – a question taken from the jury, but that Houston/Crews now assert as "fact" in order to justify the default judgment. (Resp. Br. 12-13) However, AVCO was prevented from establishing that pilot Houston's "maneuvering to maintain VFR conditions" (Resp. Br. 6) was the only reason she crashed into the Cascades. (See Opening Br. 10-14; CP 38, 97-99, 105, 115, 140-41, 163-64, 219-25, 244, 254, 301-03)

Houston/Crews further imply that the plaintiffs' expert actually tested the very aftermarket carburetor they claim caused the accident, which was installed in 2001, 23 years after the engine left AVCO's control in 1978. (Resp. Br. 11) That is not true. (CP 7708: "exemplar" testing) And at 3/19 RP 109, the citation (from the punitive damages "trial") for Houston/Crews' claim on appeal that fluid in the carburetor float "inexorably" would lead to engine failure (Resp. Br. 11), plaintiffs' expert admitted that the carburetor may not fail. Like those noted above, this "fact" was disputed, and had AVCO been allowed to put on a defense, its experts would have demonstrated that a carburetor with fluid in the float continues to operate. (CP 199-200, 341-42)

This presumes, of course, that AVCO could have any liability for an aftermarket carburetor installed 23 years after an aircraft engine left AVCO's control. Plaintiffs hired each of the "multiple experts" Houston/Crews claim "agreed that AVCO is responsible for the entire engine, including the defective Delrin<sup>®</sup> float" (Resp. Br. 14), but the contention of plaintiffs' "experts" that AVCO was "responsible" for or "controlled" the carburetor was nothing more than "opinion" on an issue of law. (3/11 RP 127-29, 3/19 RP 69, cited in Resp. Br. 14) Had it been allowed to defend, AVCO would have disputed Houston/Crews' contentions and been entitled to judgment as a matter of law. (§ E.1, *infra*)

Houston/Crews' claim that AVCO, rather than Precision, somehow took the lead on obtaining approval of the Delrin<sup>®</sup> float is not supported by the cited record and is in fact belied by their concession that "*Precision proposed to AVCO a product 'improvement' involving a float material change – the Delrin<sup>®</sup> float.*" (Resp. Br. 15 (emphasis added) citing CP 2100 (AVCO employee's deposition testimony that Precision "notified [AVCO] that they had an improved material or a product improvement that involved a float material change"); *see also* Resp. Br. 16 citing CP 7678 ("Precision claims to have received FAA approval for use of

the Delrin<sup>®</sup> floats.”), and 3/13 RP 138-39 (discussion of Precision’s “designated engineering representative” who would “approv[e] products . . . as a representative of the FAA”); CP 5758 (“Precision ultimately developed a float made from a material called Delrin<sup>®</sup>”) Houston/Crews’ claims that AVCO issued an “engineering change notice” giving Precision “express permission to use the Delrin<sup>®</sup> float,” that AVCO later withdrew (Resp. Br. 16-17), ignores that AVCO issued that notice in 1998 only *after* Precision had already issued its own notice in 1997 approving use of the Delrin<sup>®</sup> floats. (Compare CP 2158, 16984 with CP 16975-78) (*See* § E.1, *infra*) As explained in the discussion of AVCO’s substantive defenses in Argument § E, *infra* (which it was prohibited from presenting below), the evidence, in the supposed “smoking gun” e-mails, was that the aftermarket carburetor manufacturer *Precision*, not AVCO, was responsible for and had undertaken any notification of claimed problems with the Delrin<sup>®</sup> floats. (CP 464-68)

Houston/Crews must rely on a version of the disputed facts (often unsupported by the record) that is most favorable to plaintiffs, contrary to the correct standard of review, because they cannot otherwise deny the undue harm and prejudice to AVCO caused by the dispositive sanctions order. Houston/Crews’

insistence that this Court ignore the substantial evidence that both exonerates AVCO from liability for an aftermarket carburetor and shows that pilot error, rather than any product defect, caused the crash does nothing but prove the substantial prejudice to AVCO in having its defenses taken from it.

**B. This Court should review de novo the dispositive sanctions orders, and give no deference to a default judgment imposed by a judge who had not supervised discovery.**

This Court is in as good a position as Judge Benton to decide whether AVCO's claimed lack of compliance with its discovery obligations justified entry of a dispositive sanctions order imposing sole and absolute liability for compensatory and punitive damages as a matter of law. Plaintiffs relied on discovery orders entered without any evidentiary hearings, and in most instances without even oral argument, as the basis for the dispositive sanction of default judgment, which relieved them of the responsibility to prove their case for liability and compensatory and punitive damages. The appellate courts consider discovery disputes based on a wholly documentary record de novo. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869 (1998).

An appellate court may defer to a trial court's discovery decisions where a lower court that has supervised discovery is in a better position to evaluate the compliance and consequence of noncompliance with its own orders. *See Magana v. Hyundai Motor America*, 167 Wn.2d 570, 583, 220 P.2d 191 (2009) (considering sanctions imposed after evidentiary hearing) (Resp. Br. 41). But those policies are inapplicable in this case, where Judge Benton had nothing to do with the discovery disputes before basing a default judgment against AVCO on orders Judge Spector had entered over a year earlier, failing to consider the subsequent rulings of Master Kallas, who by court order supervised discovery in the 18 months before trial. Judge Benton's orders, all entered on a documentary record, should be reviewed de novo, and there is no reason for this Court to give the dispositive sanctions order any deference at all.

**C. No previous court order gave AVCO notice that it faced the loss of all of its substantive defenses and absolute liability for compensatory and punitive damages for claimed discovery violations.**

If the plaintiffs' claims could have survived to jury trial at all (*see* § E.1, *infra*), entry of a default judgment against AVCO on the morning trial was to begin, by a judge who had had nothing to do

with discovery, unconstitutionally took the determination of liability for both compensatory and punitive damages from the jury. The dispositive sanctions order was inconsistent with earlier orders leading AVCO to reasonably believe the court was satisfied that it had fully complied with its ongoing discovery obligations.

Houston/Crews do not cite, much less distinguish, *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 638 P.2d 1201 (1982) (Opening Br. 43-44). *Johnston* and the due process principles on which it relies mandate reversal of the February 5 dispositive sanctions order that stripped AVCO of all its substantive defenses and imposed judgment as a matter of law on the basis of supposed discovery violations that had been fully resolved months earlier by the decision-makers who actually supervised discovery.

Only a complete rewriting of the procedural history of this litigation emboldens Houston/Crews to disavow the resolution of discovery disputes in which they fully participated, and from which they fully benefited, as confirmed by the case plaintiffs presented to both the compensatory and punitive damages juries. This rewriting begins with the denial of the fact that plaintiffs' first contempt motion was filed on August 31, 2011, two weeks *after* the

appointment of a special discovery master.<sup>1</sup> (Resp Br. 18) Houston/Crews then attempt to minimize Master Kallas' authority, claiming her role was confined to resolving a dispute over "physical evidence." (Resp. Br. 19) But neither the orders appointing a discovery master, nor AVCO's request for a discovery master (CP 540), were ever that limited: "[T]he Court instructs the parties that all future discovery motions shall be directed to the Special Discovery Master." (CP 750) Eight months later, Judge Benton once again unequivocally ordered that "[a]ll future discovery motions must be noted before Judge Kallas." (CP 806) (emphasis in original)

The record also refutes Houston/Crews' unsupported assertion that "the parties actively litigated the sanctions motion" between June 2012 and trial in a manner that gave AVCO notice either of any deficiencies in its discovery, or that its defenses could be summarily nullified on the first day of trial. (Resp. Br. 45-46) As set out in Appendix B to the opening brief, AVCO supplemented its discovery, after Judge Spector entered the orders Judge Benton

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<sup>1</sup> Retired Superior Court Judge Larry Jordan was first appointed as discovery master on August 17, 2011. (CP 570-71, 576) After Judge Jordan declined the appointment, retired Superior Court Judge Paris Kallas was appointed as discovery master on September 12, 2011. (CP 749-50)

relied upon as a basis for the February 5 dispositive sanctions order, in August 2011 (CP 686), February 2012 (CP 2182-95), and June 2012 (CP 2350).<sup>2</sup> After AVCO filed its 20-page declaration explaining its continuing discovery efforts in October 2011 (CP 2047-66), plaintiffs voiced no objection to AVCO's discovery for more than a year, in particular never asserting that the failure to provide additional discovery prevented them in any way from responding to AVCO's summary judgment motion in September 2012. Instead, plaintiffs moved for default, without ever

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<sup>2</sup> The extended (and argumentative) recital of counsels' discovery communications, in what is supposed to be the **fact** section of the response brief (at 21-26), is apparently intended to convince this Court that a week's – or day's – delay in addressing ongoing discovery issues, 18 months before trial, justifies a default judgment on the eve of trial. For instance, contrary to the claim that "AVCO refused to amend its responses" (Resp. Br. 22), the record states at the citation Houston/Crews provide that "AVCO agreed to supplement various responses. It did supplement those responses and it did provide thousands of pages of documents." (CP 4384) Contrary to Houston/Crews' claim (Resp. Br. 26), AVCO thoroughly, and at great length, explained for each request the production provided, and how it complied with plaintiffs' duplicative requests for discovery. (CP 2047-66) AVCO served verified responses to all requested discovery, answering multiple, duplicative interrogatories and production requests, asking for clarification so it could endeavor to answer following more explanation. (CP 411-14) AVCO did note the overly-broad scope of some requests, in part because other defendants had produced the requested discovery (CP 415) – a fact that was, inexplicably, used against AVCO when those very responses by other defendants were relied upon to impose a default judgment on AVCO, despite no evidence that AVCO had the documents produced by Precision, and despite plaintiffs' use of these documents both in response to summary judgment and at trial. *See* § D.2, *infra*.

demonstrating how AVCO's supplemental responses were insufficient. (CP 2001-14)

There is accordingly no basis for Houston/Crews' arbitrary excision from the procedural history in Appendix B of the interrelated discovery disputes that were, by court order, resolved by Master Kallas. Appendix B correctly reflects the indisputable facts that 1) Judge Spector finally and fully decided the appropriate sanction for AVCO's claimed discovery violations in fall 2011 and 2) Master Kallas rejected plaintiffs' renewed claim that AVCO had failed to comply in June 2012. (CP 963-64, 4563-66)

**1. In fall 2011, Judge Spector finally and fully decided the appropriate sanction for any discovery violation.**

Judge Spector initially found AVCO in contempt in September 2011 for failing to comply with July 2011 discovery orders. (CP 751-57) As a preliminary matter, neither Judge Spector's July discovery orders nor the September contempt orders identify with any specificity *how* AVCO had failed to fulfill its discovery obligations. As a consequence, AVCO could never have had notice it was in "plain violation" of any court order, as *Johnston*, 96 Wn.2d at 708, requires. (Opening Br. 43-44) Regardless, the issue of further sanctions was put to rest by Judge

Spector's subsequent order expressly declining to impose further sanctions after review of AVCO's discovery efforts.

Judge Spector initially "reserved" only three sanctions in September 2011 – including the possibility of prohibiting AVCO from asserting its federal defenses or opposing the availability of punitive damages, but *not* the possibility of a default judgment. There is no other possible interpretation of the September 2011 order:

maximum allowable sanction for Lycoming's conduct, the Court further ORDERS that Lycoming's contempt is to be met with the following sanctions:

Reserved Lycoming may not present a defense based on the General Aviation Revitalization Act (GARA) in these cases, and its GARA defense is stricken.

Reserved Lycoming may not oppose the availability of punitive damages in these cases.

Reserved Lycoming has a duty to warn owners and operators of its engines of the defective carburetor floats;

(CP 756) Houston/Crews assert that Judge Spector did not "strike" the possibility of imposing further sanctions, but there is no other word for the order entered in November 2011:

Plaintiff Becker is entitled to costs and attorney fees in opposing Avco's motion, and may submit the same to the Court. ~~In addition, this court will supplement the reserved sections of~~

~~Judge Spector's Contempt Orders Dated September 27, 2011.~~

(CP 4564)

In striking from plaintiffs' proposed order any provision for further "supplementation" of the previously ordered (and reserved) sanctions, Judge Spector made clear that no further sanctions would be imposed for AVCO's claimed discovery violations. And because all of Judge Spector's orders were entered without an evidentiary hearing, oral argument, or presentation, AVCO could not have had notice of any continuing claimed violation except through these written orders.

**2. In June 2012, Master Kallas confirmed that AVCO had fully complied with its discovery obligations.**

Houston/Crews' argument on appeal rests on the fiction that "Sanctions" and "Special Master" discovery were wholly unrelated.<sup>3</sup> As Appendix E to the opening brief illustrates, the "Sanctions" and

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<sup>3</sup> See Resp. Br. 18 ("Sanctions Discovery 1," "Sanctions Discovery 2," and Special Master Discovery"). "Sanctions Discovery 1" included Houston/Crews' First RFPs (CP 4340-75), addressed in Judge Spector's 2011 Orders and summarized in the left column of Appendix E to the opening brief. "Special Master Discovery" included Becker's Third Requests For Production (CP 17069-89), addressed in Master Kallas' June 12, 2012 Order and summarized in the right column of Appendix E. The discovery addressed by Judge Spector and Master Kallas included broad requests on many duplicative topics, as set out in Appendix E. For example, plaintiffs inquired multiple times about "engine failure" (compare CP 4358, 4366-67 ("Sanctions" RFPs 40, 55-57) with CP 17079, 17081 ("Special Master" RFPs 13, 19)), and about "AP [advanced polymer] floats" and "polymer floats." (Compare CP 4352-53, 4359, 4363, 4365-69, ("Sanctions" RFPs 25-27, 28, 42, 49, 52-57, 58, 60) with CP 17079-83, 17085 ("Special Master" RFPs 12-14, 16, 17-21, 26, 27, 35, 42))

“Special Master” discovery covered the same topics. Houston/Crews’ misleading labels cannot paper over Master Kallas’ rejection of their claim that AVCO had not complied with its discovery obligations.

Master Kallas squarely addressed AVCO’s discovery responses, without parsing among the various discovery requests, in two superior court orders. The first order, in June 2012, affirmed the reasonableness of AVCO’s efforts to provide complete responses, accepting AVCO’s certification that it had searched and provided responsive documents. (CP 961-64) The second order, in December 2012, ordered AVCO to pay \$18,683.58 (which it did) in fees related to Judge Spector’s 2011 finding of *previous* contempt. (CP 15447) This was the only issue remaining after entry of the November 2011 orders declining to award (or reserve) further sanctions against AVCO. The issue of the amount of fees was submitted to Master Kallas in November 2012 – again disproving Houston/Crews’ claim on appeal that the discovery master’s authority was limited to a single dispute over physical evidence, and further establishing that it was reasonable for AVCO to believe any issue of its compliance had been resolved.

Houston/Crews' claim on appeal that, having directed Master Kallas to handle all discovery disputes, nevertheless "Judge Benton rejected AVCO's assertion that the Special Master Discovery duplicated Sanctions Discovery 1 and 2" (Resp. Br. 19) is belied by the February 5 order itself. The dispositive sanctions order never mentions, much less "rejects," the fact that all plaintiffs' requests were related, and often duplicative – as were plaintiffs' claims that AVCO had failed to properly respond. Indeed, by relying on the broad discovery requests in plaintiffs' first request for production and plaintiff Becker's interrogatories and second production request (CP 2897), the February 5 dispositive sanctions order confirms that the substantive issues addressed by Master Kallas were the same as those at issue in the Spector orders. Houston/Crews on appeal attempt to distinguish their discovery from Becker's, but the plaintiffs jointly pursued discovery in their cases, which at their joint request had been consolidated in January 2011. (CP 29-31)

As Master Kallas determined in finding that AVCO had complied with its discovery obligations and in rejecting plaintiffs' motion for further sanctions: "AVCO's explanation [of its efforts to comply with its discovery obligations] makes sense and it does not

appear to be evasive.” (CP 963) AVCO reasonably relied on Judge Spector’s order declining to impose additional sanctions in fall 2011 (following AVCO’s account of its efforts undertaken throughout discovery) (CP 2047-66), and on the reaffirmance of AVCO’s efforts by Master Kallas in June 2012. Notwithstanding the continued complaints voiced by plaintiffs, no court order gave AVCO notice that it faced the loss of all of its substantive defenses to absolute liability for compensatory and punitive damages on the eve of trial for the same claimed discovery violations.

**D. The “discovery violations” identified in the dispositive sanctions order do not justify a default judgment against AVCO.**

The claimed discovery violations identified in the February 5 dispositive sanctions order do not justify a default judgment against AVCO for compensatory and punitive damages 1) because Houston/Crews failed to avail themselves of proffered responsive documents, 2) because AVCO, following its established business records retention policy, had not retained (and was not obligated to retain) certain documents before litigation could be anticipated, and 3) certainly not because AVCO had not formally answered a third amended complaint that merely asserted claims AVCO had already addressed in prior pleadings, including that AVCO could

not be liable for the claimed failure of an aftermarket carburetor installed on an engine that had left AVCO's control 23 years earlier. As a consequence, the dispositive sanctions order unconstitutionally deprived AVCO of its substantive defenses to liability.

**1. AVCO cannot be held in default because plaintiffs failed to avail themselves of proffered discovery.**

Houston/Crews' revisionist history of discovery in this case cannot obfuscate the fact that they simply failed to avail themselves of the opportunity for document review, fully authorized by CR 34(b)(3)(F) and the orders issued at their request. Houston/Crews now complain that AVCO did not engage in "production" or "discovery" by making files available in Philadelphia in February 2012. (Resp. Br. 46) But CR 34(b)(3)(F) expressly authorizes production in this manner: "A party who produces things, electronically stored information, or documents for inspection shall produce them as they are kept in the usual course of business *or* shall organize and label them to correspond with the categories in the request . . ." (emphasis added). The Houston/Crews' discovery orders imposed no other requirement, and Judge Benton was wrong when she relied on the proposition that "[p]roduction is

different than come look” (RP 45) in entering default judgment against AVCO.

Typical of the “discovery violations” now said to justify a default judgment for compensatory and punitive damages is AVCO’s supposed failure to provide its insurance policy. First, as Houston/Crews now concede (Resp. Br. 37), the policy was made available to them for review. Second, neither Houston/Crews nor the trial court have ever explained how offering inspection of an insurance policy at counsel’s office failed to satisfy CR 34. Finally, Houston/Crews have never attempted even a token explanation how non-production of an insurance policy could in any way impact the substantive claims and defenses – particularly given there has never been any assertion that the claims in this case, if proved, would not be fully covered. *See Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). That this supposed “failure” to provide discovery is now showcased as justification for the default judgment simply confirms there are no grounds for the dispositive sanctions order.

Houston/Crews complain both that AVCO did not provide enough discovery,<sup>4</sup> and that it provided too much. They assert that after a “10-15 minute” review of files made available for inspection, plaintiffs’ attorneys concluded “they had nothing to do with the discovery at issue in this case” (Resp. Br. 37), yet also claim that the files were too voluminous to examine. (CP 2025-31) Both propositions cannot be true. And AVCO cannot be held in default because plaintiffs failed to avail themselves of proffered discovery months after the “contempt” determination relied upon as a basis for the dispositive sanctions order.

**2. AVCO cannot be held in default for failing to produce pre-accident documents that were not in its files because of an established retention policy implemented long before litigation could be anticipated.**

Houston/Crews complain that AVCO “repeatedly asserts that the sanctions order refers to only one discovery violation – the withheld e-mails” (Resp. Br. 32), and now claim that the recital in

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<sup>4</sup> In particular, the claim that the “Moffett files” (a category of “discovery” newly minted by Houston/Crews on appeal) mysteriously went missing is wholly unsupported by the response brief citations (at 27). The files assembled for production in Philadelphia included requested materials from active cases and from one closed products liability case alleging defects in updraft carburetors. (CP 2182) Not only was nothing removed from the room, but plaintiffs’ counsel spent only 11 minutes with the files and then never said anything at the time to AVCO’s counsel about any allegedly missing files. (CP 2181-95)

the February 5 order – prepared by plaintiffs, and adopted wholesale by Judge Benton – of the supposed December 2005 “smoking gun” e-mail string, is only “one example” of AVCO’s discovery violations. (Resp. Br. 31) Leaving aside there is NO evidence this e-mail exchange was retained in AVCO’s files, the fact remains that this is the “one [and only] example” the trial court provided as justification for the default judgment, and on appeal the trial court’s reliance on this “one example” is not AVCO’s problem. This Court must examine the appropriateness of the court’s order based on the facts found by Judge Benton – not those Houston/Crews on appeal surmise, often out of whole cloth.

For instance, the assertion that “AVCO and Precision had weekly phone meetings, discussing the leaking floats” over the course of seven years (Resp. Br. 37) is unsupported by the record. The citation provided does not state that the floats were discussed at each of these weekly meetings, as Houston/Crews imply, but rather that floats were discussed at “some point,” but were not “the primary topic of the meetings.” (CP 2139) Regardless what was discussed, there is no evidence that AVCO retained any documents from these meetings, or any “test results.” (Resp. Br. 38) Indeed, the cited document purportedly establishing the existence of

“AVCO’s test results” is an internal email between *Precision* employees that has no AVCO recipients. (CP 2171)

That plaintiffs obtained documents from defendant Precision (and then used them in their case against AVCO) is not evidence that AVCO had those documents. It is evidence, however, that Houston/Crews were not prejudiced by failing to receive the documents from both AVCO and Precision.

Houston/Crews’ claim is, in essence, that AVCO engaged in “spoliation” by failing to retain electronically stored e-mails and documents in reliance on its long-standing document retention policy. Notably, plaintiffs have never taken the position that AVCO was obligated to retain the 2005 e-mail string and failed to do so. AVCO had no obligation under the rules governing discovery to retain electronically stored data (or other documents) absent some notice that the documents may be relevant to litigation. *See generally* Tegland, 5 Washington Practice § 402.6, at 291-92 (5<sup>th</sup> ed. 2007). Even then, the destruction of evidence must be intentional, given the likelihood of litigation, *Henderson v. Tyrrell*, 80 Wn. App. 592, 609-11, 910 P.2d 522 (1996), and spoliation gives rise to an evidentiary presumption, *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 383 n.4, 972 P.2d 475 (1999), not to a

substantive decision on the merits of the plaintiffs' claims. *Ripley v. Lanzer*, 152 Wn. App. 296, 327 ¶ 83, 215 P.3d 1020 (2009) (rejecting plaintiffs' argument they were entitled to summary judgment as remedy for claimed spoliation); *see generally Brookshire Brothers, Ltd. v. Aldridge*, \_\_\_ SW.3d \_\_\_, 57 Tex. Sup. Ct. J. 947, 2014 WL 2994435 (July 3, 2014). Contrary to this authority, in this appeal Houston/Crews ask this Court to make the giant leap to find not only that AVCO still had the 2005 e-mail string but that failing to produce it proved AVCO also intentionally withheld other discoverable documents.

When a party does not possess evidence, it cannot be found in default for failing to produce it. In *Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 902 ¶ 27, 138 P.3d 654 (2006), this Court reversed summary judgment imposed as a sanction when defendants had no control over the repair of a structure that "spoiled" evidence of a defect claimed by plaintiffs. Similarly here, there was no evidence (and, significantly, no finding in the February 5 order), that AVCO continued to possess the documents plaintiffs now claim it should have produced, or that AVCO intentionally deleted the identified e-mails or attachments in anticipation of litigation.

Houston/Crews attempt on appeal to supplement the 2005 e-mail string with additional claimed “prejudicial examples” of supposed discovery violations. (Resp. Br. 34-38 (referenced again at 48, with no further authority)) But plaintiffs presented absolutely no evidence that (with the exception of the insurance policy addressed *supra*) these documents existed in AVCO’s files, or that AVCO could have made them available. Nor does the February 5 order contain a finding that AVCO had in its possession either the documents that formed the basis for the dispositive sanctions order, or the unidentified documents Houston/Crews belatedly claims on appeal that AVCO also should have produced.

Houston/Crews also claim on appeal that AVCO withheld several classes of documents (Resp. Br. 52-53), but cite to nothing but the February 5 order, which addresses only the 2005 e-mail string plaintiffs obtained from Precision. The response brief’s assertions that “there is no telling what [AVCO] is hiding” (Resp. Br. 57) or that “AVCO’s discovery violations prevented plaintiffs from demonstrating just how bad AVCO really was” (Resp. Br. 59) are hyperbolic sophistry.

Houston/Crews purport to distinguish cases, including *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036

(1997) (Opening Br. 48-49), in which the appellate courts have reversed sanctions, by arguing that AVCO “cites no case in which the sanctioned party continues to withhold court-ordered discovery.” (Resp. Br. 53) But there is no evidence, or findings, that AVCO “continues to withhold court-ordered discovery.” To the contrary, the only finding in this case, by the decision-maker who actually supervised discovery, is that AVCO had complied with its discovery obligations. (CP 963-64) AVCO cannot be held in default for failing to produce pre-accident documents that were not in its files because of an established retention policy implemented long before litigation could be anticipated.

**3. AVCO cannot be held in default for failing to answer the third amended complaint.**

Finally, Houston/Crews cannot justify the dispositive sanctions order on the grounds that AVCO did not answer the third amended complaint filed in September 2012. (CP 7295-7322, 7323-52) “When the defendant has previously answered the plaintiff’s complaint, a failure to answer an amended complaint that makes no substantial changes does not create a default.” *Duryea v. Wilson*, 135 Wn. App. 233, 239, 144 P.3d 318 (2006). The trial court’s ruling that the plaintiff had not properly pleaded a substantive

claim also was rejected as an alternative basis for the discovery sanction reversed in *Burnet*, 131 Wn.2d at 492 (Opening Br. 49). AVCO challenged as a matter of law the legal basis for liability in its CR 12(b)(6) motion to dismiss (CP 10318-31), having asserted affirmative defenses in its April 2011 amended answer that apply with equal force to the allegations in the third amended complaint. (CP 4103-30; see CP 17808-09 (sub 83) (relieving AVCO of obligation to answer second amended complaint)) The claimed lack of an amended answer to the third amended complaint was not a proper basis for entry of default judgment on the eve of trial making AVCO solely and absolutely liable for compensatory and punitive damages.

**E. Default judgment for compensatory and punitive damages was too severe a sanction for any prejudice arising from alleged discovery violations.**

Houston/Crews concede that the February 5 dispositive sanctions order prevented resolution of AVCO's affirmative defenses. (Resp. Br. 60) But their justification for that denial is circular, premised solely on the correctness of the February 5 order and on unwarranted technical barriers to resolution of AVCO's defenses on the merits. AVCO's answer to previous complaints preserved these defenses, as did its September 2012 CR 12(b)(6)

motion and summary judgment motions in August and November 2012. (CP 5457-62, 10318-31, 10961-69) Houston/Crews' reliance on *Pappas v. Hershberger*, 85 Wn.2d 152, 154, 530 P.2d 642 (1975) (Resp. Br. 61), is particularly misplaced; in *Pappas* the Court dismissed as improvidently granted a petition for review based on an issue that had not been argued until rehearing in the Court of Appeals.

Houston/Crews' justification for imposition of punitive damages is similarly circular, premised on the correctness of the February 5 order and on the appropriateness of an unprecedented award of punitive *damages*, unavailable under Washington substantive law and reserved under Pennsylvania law for only the most outrageous misconduct in the underlying cause of action, as a *sanction* for claimed litigation misconduct. Imposition of a default judgment for compensatory and punitive damages was too severe a sanction for any prejudice to plaintiffs arising from alleged discovery violations.

- 1. AVCO cannot be liable for the claimed failure of an aftermarket product it neither designed nor manufactured, installed 23 years after an aircraft engine left AVCO's control.**

Defendant Precision (which was dismissed from this action after it went into bankruptcy), not AVCO, was responsible for the rebuilt aftermarket carburetor that plaintiffs claimed caused the accident. Houston/Crews characterizes Precision as being merely an “assembler” when in fact Precision was 1) certified and approved by the FAA as an original equipment manufacturer (OEM) and supplier of new carburetors for new factory engines for AVCO and others; 2) certified and approved by the FAA to design and manufacture new replacement (PMA) carburetor parts to be installed on used carburetors; and 3) certified and approved by the FAA to overhaul used carburetors. Houston/Crews merge these separate roles in asserting that AVCO was responsible for Precision's rebuilt aftermarket carburetor because it held a “type certificate” for the engine it had installed in the accident aircraft 30 years before the crash. (Resp. Br. 14) This reply restores the distinctions plaintiffs wrongly ignore:

There were three FAA type<sup>5</sup> certificates for the accident aircraft: for the airframe, engine, and propeller. 49 U.S.C. § 44704(1). The airframe manufacturer (in this instance, Cessna) dictates engine performance requirements, including the fuel metering system (carbureted or fuel injected), and receives approval from the FAA for the airframe/engine/propeller combination for a specific model aircraft. (CP 2423) After receiving the FAA type certificate (approval of the basic design), the manufacturer of each aircraft component (in this instance, AVCO for the engine) then builds a prototype and applies for a production certificate. The production certificate authorizes the manufacturer to produce copies of the prototype so long as they are identical to the “type” approved. *See U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (discussing airframe certification), *reh’g denied*, 468 U.S. 1226 (1984); *see also* 49 U.S.C. § 44074(c).

AVCO had type and production certificates for the engine it installed in the accident aircraft in 1978. But most of the 400 or so

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<sup>5</sup> In the certification context, “type” means similar in design, and includes the type design, operating limitations, certificate data sheet, applicable regulations with which the FAA records compliance, and any other conditions or limitations prescribed for the product. 14 C.F.R. § 1, 21.41.

internal engine parts and accessories were made by other suppliers (such as Precision), which are themselves certified and approved by the FAA to make new parts for new engines as original equipment manufacturers (OEM). (CP 2422-23) AVCO has “outline” drawings from its OEM carburetor suppliers – including the engineering drawings from Precision plaintiffs filed with Superior Court as supposed “proof” of AVCO’s claimed responsibility for the carburetor (CP 16963-70) – to make sure that the carburetor fits onto the outside of the engine. *But AVCO does not have “detail” drawings of the internal carburetor parts such as the float* – the part for which plaintiffs claimed AVCO had responsibility. (CP 2423) *See Skurka Aerospace, Inc. v. Eaton Aerospace, L.L.C.*, 781 F. Supp. 2d 561 (N.D. Ohio 2011) (FAA type and production certificate holders typically do not have proprietary drawings of their suppliers, “particularly at the detail level”).

FAA approval is required if a supplier of new engine parts wants to make a major change to a part such as the carburetor float material. (3/20 RP 153-54) In the case of the Delrin® (plastic) float at issue here, and the epoxy (foam) float that replaced it, *Precision* developed the new prototypes and obtained approval from the FAA in Seattle (which has geographic responsibility over Precision). (CP

2157-58, 5758, 5773, 16984) Once the FAA in Seattle signed off on the major change, *Precision* approached its new engine manufacturer customers, including AVCO, for approval to use the float material in new carburetors to be installed on new engines. (CP 2157-58; see Resp. Br. 15) AVCO then generated engineering change orders (ECOs), submitted them to the FAA in New York (which has geographic responsibility over AVCO), and received approval to use the *new* floats on *new* carburetors sold with *new* engines. (CP 16975-82)

The allegedly defective carburetor with the Delrin® float that plaintiffs claimed caused the crash was obtained by defendant Premier not from AVCO, or from an AVCO distributor, but from a Precision distributor, non-party Aviall. (CP 5473, 5506-08, 5510) A separate FAA regulatory regime governed these replacement parts in the secondary market and on overhauled or rebuilt engines and components. Precision also overhauled carburetors, under 14 C.F.R. pt. 145, and manufactured new replacement parts using its parts manufacturer approval (PMA) from the FAA. *See generally* 14 C.F.R. §§ 21.305-21.320. Precision's PMA was both a design (type) and production approval. (3/20 RP 161)

Parts used in overhauled carburetors or sold on the secondary market need not be exactly the same as the parts used on new engines, as long as the FAA approves the parts. *United Technologies Corp. v. F.A.A.*, 102 F.3d 688 (2d Cir. 1996) (specifications for a PMA replacement part need only be an adequate replacement as to fit, form, and function), *cert. denied*, 521 U.S. 1103 (1997). In 1997, Precision issued its own ECO to use Delrin® floats, before AVCO issued an ECO, for new engines only, in 1998. (Compare CP 2158, 16984 with CP 16975-78) And Precision received PMA approval to use its “replacement” epoxy float before it approached AVCO to obtain authorization for use on new factory engines. (Compare CP 5773 with CP 16981-82)

In other words, Precision used FAA-approved PMA parts on used carburetors that its repair station overhauled or rebuilt well before its OEM customers (including AVCO), at Precision’s request, sought FAA authorization to use those parts on new carburetors sold with new engines. To this day, the FAA approves a variety of float materials — brass, various composites, epoxy, and Delrin® — regardless of the float material used by AVCO’s new source supplier at any given time. (CP 5759) And Precision, in its PMA capacity, (not AVCO) had the responsibility to the FAA for the rebuilt

carburetor and its component parts at issue in this case. No federal standard of care required AVCO to provide warnings for this part it did not manufacture and that third parties installed on an engine 23 years after the engine left AVCO's control – nor did plaintiffs ever identify one. (3/19 RP 69, cited Resp. Br. 14) (*See also* Opening Br. 62-65 (discussing GARA's 18-year statute of repose))

This Court should hold as matter of law that AVCO was not responsible for aftermarket carburetor parts installed on an engine it had manufactured 30 years before the crash under applicable federal statutes and regulations or under Washington or Pennsylvania products liability law. (Opening Br. 63-64, citing *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 213, 254 P.3d 778 (2011).) *See also* *Sikkelee v. Precision Airmotive Corp.*, \_\_\_ F. Supp.2d \_\_\_ (M.D. Pa. Sept. 10, 2014). At a minimum, factual issues of causation and pilot Houston's negligence, wholly unrelated to any alleged discovery violation, should have been left to the jury under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) and its progeny. (Opening Br. 53, 57) *See* *Jones v. City of Seattle*, 179 Wn.2d 322, 388, ¶ 33, 314 P.3d 380 (2013) (authority to impose sanctions "cabined by . . . *Burnet* and its progeny").

**2. Houston/Crews are not entitled to punitive damages unauthorized by Washington law and Pennsylvania law.**

The trial court wrongly refused to conduct a choice of law analysis at any time before authorizing a jury to award punitive damages. AVCO was summarily held liable as a matter of law for a carburetor sold, installed, and allegedly causing injury in Washington state. Without a determination that another state had the most significant relationship, the imposition of punitive damages violated Washington's public policy. (Opening Br. 65-71) *See Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996).

Houston/Crews make no argument that Pennsylvania has the most significant relationship to any issue in this case, citing to AVCO's licensing agreement with Precision to sell carburetors in Washington as the only conduct that could subject AVCO to punitive damages under Pennsylvania law. (Resp. Br. 72-74) As explained in Argument § E.1, *supra*, AVCO did not manufacture, sell or supply the aftermarket replacement part installed on its engine. As set out in the opening brief at 68-69, AVCO cannot be liable under Pennsylvania law for compensatory, much less punitive damages, which are an "extreme remedy" available only when a

plaintiff proves the defendant acted in an outrageous fashion due to either “evil motive or his reckless indifference to the rights of others,” *Phillips v. Cricket Lighters*, 584 Pa. 179, 883 A.2d 439, 445-46 (2005), and “only *when the act which creates actual damage* also imports insult or outrage, and is committed with a view to oppress, or appears to have been committed in contempt of a plaintiff’s rights.” *Golomb v. Korus*, 261 Pa. Super. 344, 396 A.2d 430, 431 (1978) (emphasis added).

The punitive damages jury did not hear any evidence to suggest evil motive or reckless indifference necessary to support a punitive damages award under Pennsylvania law. Instead, the February 5 order allowed the jury to award punitive *damages*, intended by Pennsylvania law to compensate a party in its underlying cause of action, as a *sanction* for claimed litigation misconduct in the Washington courts. On appeal, Houston/Crews have not identified any authority for such an award of punitive damages as a discovery sanction, and there is none.

**F. AVCO’s right to offset is premised on the parties’ agreement, and on settled law.**

The dispositive sanctions order holding AVCO responsible as a matter of law for compensatory and punitive damages, regardless

of defenses wholly unrelated to any claimed discovery violations, cannot stand. The issue of offset for previous settlements becomes moot on dismissal of plaintiffs' claims, or on remand for trial on the merits. But Houston/Crews' insistence on benefiting from being perceived as victims of litigation tactics, rather than proving their case on the merits, extends to complaining that AVCO did not inform this Court that Houston/Crews agreed to the offset that the trial court inexplicably refused to grant. (Resp. Br. 40, 75) To the contrary, the parties' agreement was the basis for AVCO's request for offset at trial, and on appeal. (CP 355-56; Opening Br. 38: "the parties' stipulated request for a statutorily-required offset"; 71: "The parties agreed that AVCO is entitled to an offset") AVCO is entitled to offset under the parties' agreement and settled law that Houston/Crews do not refute.

### **III. CONCLUSION**

For the reasons set out in this and the opening brief, this Court should reverse the judgment and dismiss the claims against AVCO. At a minimum, this Court should reverse the judgment, which is premised on unwarranted dispositive sanctions that were inconsistent with a prior judge's orders and the discovery master's findings and rulings, and remand for a decision on the merits.

Dated this 22<sup>nd</sup> day of September, 2014.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 22, 2014, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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