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Case No. 83030-4

SUPREME COURT OF THE STATE OF WASHINGTON

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.

Reply to Answer

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

Petitioner.

REPLY TO CROSS-PETITION FOR REVIEW OF
ADDITIONAL ISSUES

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I. INTRODUCTION

In Respondents' Answer to Twin Commander's Petition for Review & Cross-Petition for Review of Additional Issues ("Cross-Petition"), Respondent-Appellant Kenneth C. Burton seeks review of two additional issues. First, Burton argues that Alert Service Bulletin 235 ("SB 235") is a new "part" sufficient to restart the period in which suit can be filed under the General Aviation Revitalization Act of 1994 ("GARA"), 49 U.S.C. § 40101, note. Second, Burton argues that the exception to GARA for knowing misrepresentation in the course of communications with the Federal Aviation Administration ("FAA") applies because the original manufacturer, Gulfstream, operated under Delegation Option Authority and thus did not affirmatively pass on certain information to the FAA. There is no need for review of these issues, and the Court should affirm the Court of Appeals and trial court as to them.

II. ARGUMENT

A. **SB 235 Is Not a New Part That Restarts GARA's 18-Year Period in Which Suit Can Be Brought.**

Burton seeks review of the portion of the Court of Appeals' decision ("Decision") that affirmed the trial court and held that SB 235 is not a new part that restarts GARA's 18-year period in which suit can be filed against an aircraft manufacturer. There is no need for the Court to grant review on this issue because the Court of Appeals' decision is correct and comports with all existing authority. The question is not a difficult one.

GARA provides that the 18-year period in which claims can be brought is restarted:

- “with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft,”
- “and which is alleged to have caused such death, injury, or damage,”
- “on the date of completion of the replacement or addition.”

GARA § 2(a)(2). Thus, to bring this lawsuit within the exception, Burton must prove that SB 235 is (1) a new “component, system, subassembly, or other part” of the aircraft that (2) caused the accident. Burton can do neither.

1. SB 235 Is Not a New Part.

Whether considered as a matter of GARA’s plain language or policy, SB 235 quite simply is not a “new component, system, subassembly, or other part.” GARA § 2(a)(2). Burton states that “there is authority on both sides of this issue” and then opines that “the authority on Burton’s side is more persuasive.” (Cross-Petition at 14.) Burton’s assessment of the state of the case law is overly optimistic. In fact, there is *no* authority for the proposition that a service bulletin is a new part for purposes for GARA.

Burton’s argument rests on *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1157 (9th Cir. 2000), in which the Ninth Circuit held that a *flight manual* is a “part” of an aircraft. The Ninth Circuit stated various factors in support of its conclusion, which overlap to some extent:

(1) manufacturers must include a flight manual with each aircraft; (2) the flight manual must contain “information that is necessary for safe operation because of design, operating, or handling characteristics”; (3) a flight manual is “detailed and particular to the aircraft to which it pertains,” rather than being a general instructional guide like a book on how to ski; and (4) in sum, a flight manual is “an integral part of the general aviation aircraft product that a manufacturer sells” and is “the ‘part’ of the aircraft that contains the instructions that are necessary to operate the aircraft and is not separate from it.” *Id.* (emphases added) (quoting 14 C.F.R. § 27.1581(a)(2)).

A service bulletin is very different from a flight manual. Service bulletins are publications prepared by the type certificate holder to advise the field of safety or maintenance issues with the certificated aircraft.¹ FAA Advisory Circular 20-114, § 4.b, at 3 (Oct. 22, 1981) (“Service documents’ mean publications . . . that communicate useful information relative to safety, produce improvement, economics, and operational and/or maintenance practices. Typical forms of publications include: service bulletins . . .”).² Service bulletins are to be consulted and used by

¹ For example, Twin Commander issued SB 235 in response to two accidents in which “the fiberglass composite rudder tip appears to have departed the aircraft in flight” as well as reports from the field of wear and cracking. (CP 3807.) SB 235 requires a one-time “Close Visual Inspection unless preliminary findings call for further inspection by another method” of the “rudder tip and attendant structure.” (CP 3808.) SB 235 states that if damage to the rudder tip is found, the rudder tip should be replaced. (*Id.*) It also states that if damage is found to structural parts other than the rudder tip, Twin Commander should be contacted for advice. (*Id.*)

² 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).

mechanics and others performing maintenance on the aircraft. *Id.* § 3.a, at 1. Federal law requires that manufacturers issue flight manuals, 14 C.F.R. § 27.1581(a)(2), but service bulletins are voluntarily issued by manufacturers and there is no legal requirement that they be issued.³ FAA Advisory Circular 20-114, § 3.c, at 2 (“Manufacturers are not required by FAR either to coordinate service documents with the FAA or to gain FAA approval . . .”). Unlike flight manuals that have to be kept onboard the aircraft, *see* 14 C.F.R. §§ 121.137(b), 121.139, service bulletins do not have to be kept onboard. Instead, service bulletins, along with airworthiness directives, maintenance manuals and other documents, are to be kept at certificated repair stations. *Id.* § 145.109(d). Service bulletins do not have part numbers (*e.g.*, CP 3807-14), while flight manuals do have part numbers. Because of these differences, a service bulletin is not an “integral part,” *Caldwell*, 230 F.3d at 1157, of an aircraft and thus is not a “part” under GARA.

Maintenance manuals differ from flight manuals in many of the same ways, but further, a service bulletin is different from a maintenance

³ Burton’s assertion—without citation—that “service publications like SB235 . . . are mandatory under the FARs to promote safety of flight” (Cross-Petition at 15) is incorrect. Burton’s reliance on 14 C.F.R. § 21.24(a)(2)(iii) (Cross-Petition at 15) also is misplaced. Without in any way minimizing the importance that Twin Commander places on its service publications, the point that Burton is trying to make—service publications and compliance therewith are required by federal law, and therefore they are a “part”—is simply incorrect. Compliance with service bulletins is not mandated by federal law. *See* 14 C.F.R. § 43.13(a); FAA Order 8620.2A, § 6.b, at 2 (Nov. 5, 2007) (“[U]nless any method, technique, or practice prescribed by an OEM in any of its documents is specifically mandated by a regulatory document, such as Airworthiness Directive (AD), or specific regulatory language such as that in § 43.15(b); those methods, techniques, or practices are not mandatory.”), *available at* http://fsims.faa.gov/wdocs/orders/8620_2a.pdf.

manual. Contrary to Burton's assertions (Cross-Petition at 14, 16), service bulletins do not revise or replace the maintenance manual; they are a separate type of publication. See FAA Advisory Circular 20-114, § 4.b, at 3 ("Publications, such as flight manuals and certain maintenance manuals, that are required for FAA type certification or approval are excluded [from the definition of service documents, which includes service bulletins]."); FAA Order 8620.2A, § 6.b, at 2 (Nov. 5, 2007) (explaining that a manufacturer "may legitimately incorporate an SB [service bulletin] or SL [service letter] into one of its maintenance manuals by reference") (emphasis added). Otherwise there would be no need for the maintenance manual to direct users to consult service publications (CP 680), and they would not be listed in separate categories in the federal regulation requiring them to be kept at certificated repair stations, 14 C.F.R. § 145.109(d).

The Fourth Circuit has held in a non-GARA case that *Caldwell* does not compel the conclusion that a maintenance manual—as compared to the flight manual—is a "part" of an aircraft. See *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 277 (4th Cir. 2007) (stating "we reject the district court's conclusion, based on the line of case authority involving flight manuals, that a maintenance manual is part of the aircraft as a matter of law"; remanding for resolution of fact issues regarding whether the parties' communications and contracts evinced an intent to treat the manual as a part of the aircraft). If maintenance manuals are not necessarily component parts, then surely a service bulletin, which is one

further step removed, is not.

In his Cross-Petition, Burton cites four cases in addition to *Caldwell*, but none support him. The cases merely restate the holding of *Caldwell* but do not extend or apply it, and they reach their decisions on other grounds.

First, Burton quotes a statement in *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 552 (Iowa 2002), that “[c]ourts are divided on whether manuals are a ‘part’ subject to the rolling provision of GARA.” (Cross-Petition at 17.) But *Mason* cites only *Caldwell* for Burton’s position and did not decide whether the maintenance manual at issue was a new “part” because it rejected the claim on other grounds. 653 N.W.2d at 552.

Second, *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1088 (9th Cir. 2001) (Cross-Petition at 17), merely restates the holding of *Caldwell* but involved a claim based solely on failure to warn and did not involve a new part or manual or writing of any kind.

Third, *Holliday v. Extex*, 457 F. Supp. 2d 1112, 1118 (D. Haw. 2006) (Cross-Petition at 18), held that the *modification* of a helicopter’s impeller was not a *replacement* of the impeller under GARA. The court distinguished *Caldwell* on the grounds that a modification to a manual necessarily requires the issuance of a new writing, whether that be a new page or a new book, and thus in the context of manuals there is no difference between a modification and a replacement. 457 F. Supp. 2d at 1118. The court did not purport to extend *Caldwell* and the actual issue

addressed by the court was the treatment of the impeller—indisputably a “part.” *Id.*

Fourth, *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 430 S.E.2d 476, 482 (1993) (Cross-Petition at 18), addressed whether an “Information Manual” adequately warned the pilot about carburetor icing, which occurs during flight, and thus the manual was a flight manual rather than a maintenance manual or service bulletin. Further, *Driver* predates GARA and thus did not address whether the Information Manual was a “part” of the aircraft, as the state statute of repose at issue had no similar requirement. *Id.* at 483.

Burton also purports to make a policy argument based on GARA’s legislative history, which includes Congress’s belief that “any design or manufacturing defect not prevented or identified by the Federal regulatory process by [18 years after manufacture] should, in most instances, have manifested itself.” H.R. Rep. No. 103-525, pt. 2, at 6 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1644, 1648. Burton argues that “GARA’s foundation presumes *appropriate identification* and *prevention*, exactly what the FAA requires service publications and (revised) maintenance manuals to accomplish. Any failure to properly *identify* and *prevent* should therefore invoke GARA’s ‘rolling’ provision because the foundation for GARA immunity is lacking.” (Cross-Petition at 15.)

Burton completely misses the point and his argument proves too much. As stated in the House Report, the impetus for GARA was an understanding that *within the first 18 years after manufacture*, most

defects should appear. If Burton were right that any (alleged) failure to identify or prevent a defect, occurring at any time, restarts the clock, there is nothing left of GARA. Again, in Burton's own words: "Any failure to properly *identify* and *prevent* should therefore invoke GARA's 'rolling' provision because the foundation for GARA immunity is lacking." (Cross-Petition at 15.) But by definition, any time there is a defect, there has been a failure to identify or prevent it. Thus, Burton's proposed test for the onset of the rolling provision would apply in any lawsuit, regardless of whether a new part was installed, and thus would do away with GARA altogether.

2. SB 235 Is Not Alleged to Have Caused the Accident.

Even if in some set of circumstances a service bulletin could constitute a new "part" under GARA, SB 235 does not suffice to restart the 18-year period because Burton does not allege that SB 235 "caused [the] death, injury, or damage" at issue. GARA § 2(a)(2).

To be sure, Burton facially so states. (Cross-Petition at 14 ("Burton's amended complaint clearly alleges SB235 as the defective product")) But Burton's mere conjoining of the words "SB 235" and "defective" in his amended complaint, and careful excision of the allegations of traditional defect and failure to warn claims that were stated in his original complaint (*see* Decision at 6, 14 & n.11) does not make it so. Burton claims that the accident "resulted from loss of [the aircraft's] rudder." (Cross-Petition at 3; *see also* CP 218 (Am. Compl. ¶ 11 ("The rudder tip and rudder assembly separated from the aircraft causing both

the pilot and co-pilot to lose control of the subject aircraft . . .”).) He cannot deny that he claims there was something wrong with the aircraft. That is the entire thrust of pages and pages of his experts’ declarations. Thus, even if Twin Commander had never issued SB 235, on Burton’s theory the accident would still have occurred.

Burton’s reliance on the existence of a defect in the aircraft for his claims renders this case unlike *Caldwell*. In that case, the Ninth Circuit was quite careful to note that the plaintiffs “concede[d] that the fuel tanks themselves were in good working order.” 230 F.3d at 1156. It is self-evident that when there is an alleged defect in the aircraft itself, then it cannot be said that any alleged failure in a writing to warn of or correct the defect, rather than the flaw defect, was the cause of a subsequent accident.

Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631 (E.D. Pa. 2004), is squarely on point. In that case, the plaintiffs’ expert opined that the inspection procedures set forth in an overhaul manual were defective because they were inadequate to detect pitting on the blade that led to an accident. *Id.* at 662. The court rejected the plaintiffs’ attempt to rely on the overhaul manual as the defective product and thereby avoid GARA’s bar, stating:

Plaintiffs’ arguments focus on the overhaul manual’s failure to provide adequate inspection requirements for the detection of corrosion—corrosion that was present because of the soft aluminum alloy used to make the propeller. *The alleged failure of the manual adequately to warn aircraft owners about this defect in the propeller blade did not proximately cause*

the accident. Because the 1984 overhaul manual is not “alleged to have caused” plaintiffs’ injury, plaintiffs cannot rely on the date of its issuance as an appropriate date to start the statute of repose.

Id. at 662 (emphasis added).

In numerous other cases, courts have rejected attempts, like the one Burton makes here, to shoehorn traditional defect and failure-to-warn claims about an aircraft into claims based on revised manuals. *E.g.*, *Carolina Indus. Prods., Inc. v. Learjet, Inc.*, 189 F. Supp. 2d 1147, 1171 (D. Kan. 2001) (rejecting attempt to rely on flight and maintenance manuals and service bulletin as the defective products because “the plaintiffs allege that the accident was caused by Learjet failing to warn owners of its planes about a defect in the landing gear hydraulic and failing to instruct owners how to fix the defect”); *Alter v. Bell Helicopter Textron, Inc.*, 944 F. Supp. 531, 541 (S.D. Tex 1996) (rejecting attempt to assert “claim of failure to warn concerning a condition in the aircraft as it was manufactured and delivered in 1975 . . . as a replacement part theory by claiming that Bell issued manuals within the repose period that did not adequately warn of the propensity of the stator vane to fatigue and fail prematurely and to prescribe proper inspection procedures to detect this design flaw”); *see also Brewer v. Dodson Aviation*, No. C04-2189Z, 2006 WL 3231974, at *9 (W.D. Wash. Nov. 7, 2006) (rejecting attempt to recharacterize failure-to-warn claim as a claim that written publications issued within GARA’s 18-year period were defective), *aff’d sub nom. Brewer v. Parken Hannifin Inc.*, 298 Fed. Appx. 582, 2008 WL 4750343

(9th Cir. Oct. 30, 2008). This Court should do the same.

B. GARA's Knowing Misrepresentation Exception Does Not Apply to the Original Manufacturer's Communications with the FAA to Obtain Type Certification.

Burton also attempts to resurrect an argument he advanced below: that the knowing misrepresentation exception to GARA applies because of alleged misinformation in the type certification documents prepared by the original manufacturer, Gulfstream, and never subsequently corrected by Twin Commander. (Cross-Petition at 18-20.) Although the Court of Appeals stated that it did not reach "Burton's argument related to Twin Commander's status under the FAA's Delegation Option Authority" (Decision at 16 n.15), it did affirmatively "reject Burton's argument that the failure to conduct proper tests of the Model 690C when obtaining certification from the FAA . . . creates a material issue of fact" (*id.* at 22 n.19). In any event, the argument is without merit and again there is no need for the Court to grant review.

As described in more detail in Twin Commander's petition for review, GARA's statute of repose does not apply if the plaintiff pleads and proves with specificity a knowing misrepresentation, concealment, or withholding of "required information" by the manufacturer in communications with the FAA that is material and relevant to the performance or maintenance of the aircraft or part and is "causally related" to the alleged harm. GARA § 2(b)(1).

Burton's argument consists of two related parts. First, Burton argues that Gulfstream had information in its files that it, somewhat

obviously, did not share with the FAA because it operated under Delegation Option Authority (“DOA”). (Cross-Petition at 19 (“the original Gulfstream certification documents[] do not reveal distribution to the FAA, nor do any records reveal any review by the FAA”).) This argument is a nonstarter. The very purpose of the DOA program is to eliminate the requirement that all materials be submitted to the FAA and reviewed by it. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984) (“With fewer than 400 engineers, the FAA obviously cannot complete this elaborate compliance review process alone. Accordingly, 49 U.S.C. § 1355 authorizes the Secretary to delegate certain inspection and certification responsibilities to properly qualified private persons.”).⁴ Because Gulfstream, as a DOA designee, had no obligation to submit all the underlying certification data to the FAA, it cannot have misrepresented or concealed anything by failing to do so, and Twin Commander’s alleged failure to correct anything from the original certification process also cannot be a misrepresentation or concealment.

Second, Burton argues that “it was misrepresented to the FAA at the time of applying for Type Certification of the accident model aircraft that all flight flutter testing had been performed when it had not. (CP 1009-38; 1126-44.) [Twin Commander] never corrected this

⁴ Actions taken by a manufacturer acting under DOA are equivalent to and have the same legal import as actions taken by the FAA. *See* 49 U.S.C. § 44702; 14 C.F.R. §§ 183.1, 183.41, 183.49; FAA Orders 8100.9A (Aug. 30, 2005), 8110.37D (Aug. 10, 2006); *see also* FAA Advisory Circular 20-114, §§ 3.b, 5.b(4).

misinformation.” (Cross-Petition at 19.) Burton’s record citations are to the declarations of its expert, Robert Donham. In his supplemental declaration, Mr. Donham takes issue with the extent of flutter testing and asserts that additional or different flutter testing should have been done. (CP 1129-32.)⁵

But for purposes of the knowing misrepresentation exception to GARA, the issue is not what testing could or should have been done. The issue is whether in the course of required communications with the FAA, the manufacturer knowingly misrepresented or concealed material information. Again, the Model 690C aircraft was type certificated by Gulfstream through the DOA process. Mr. Donham concedes that all the information about the true nature and extent of flutter testing actually done is contained in the Model 690C type certification file, held by Gulfstream and now by Twin Commander. (CP 1133.) This file was and is fully available to the FAA. *See Varig Airlines*, 467 U.S. at 817-18. Under DOA procedures, Gulfstream and Twin Commander had no further obligation to communicate with the FAA, a fact Mr. Donham nearly concedes when he states, “The sources of the factual information documenting this violation are in Twin Commander’s certification files. . . . With the DOA (Delegation Option Authority) available, as it was back during this time, it is not difficult to understand how this

⁵ Mr. Donham’s report is written as though Twin Commander was the original manufacturer and was the entity performing the tests at issue. (*E.g.*, CP 1130, 1133.) As explained in more detail in Twin Commander’s petition for review, Twin Commander acquired the type certificate in 1989.

misrepresentation, withholding and concealment can occur”

(CP 1133.)

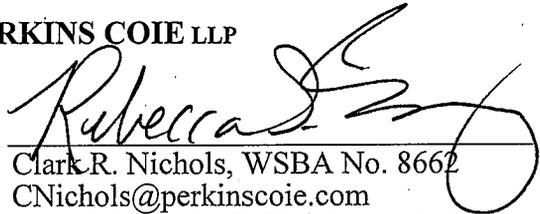
Gulfstream properly used the DOA procedures available to it under law. Burton’s dissatisfaction with the existence of DOA procedures cannot be used to create a misrepresentation claim where no misrepresentation or concealment occurred.

III. CONCLUSION

For the foregoing reasons, Burton’s cross-petition for review of additional issues should be denied.

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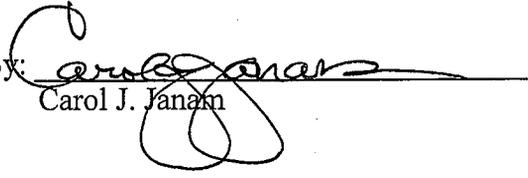
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