IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JILL SIKKELEE, Individually and as personal representative of the ESTATE of DAVID SIKKELEE, Deceased,	:	Case No. 4:07-cv-00886
	:	(Judge Jones)
Plaintiff,	:	
v.	:	
PRECISION AIRMOTIVE, et al.,	:	
Defendants.	:	

BRIEF IN SUPPORT OF RENEWED MOTION FOR RECONSIDERATION OF ORDER ENTERED JULY 3, 2012

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I. PROCEDURAL HISTORY

Jill Sikkelee ("Sikkelee") commenced this products liability action on May 16, 2007, against seventeen defendants, all of whom were alleged to have sold, supplied, repaired and/or manufactured the aircraft carburetor and/or its components. (Doc. 1 ¶¶ 4, 5, 12, 13, 14, 15, 16, 17, 18, 19, 31, 124). Sikkelee has either dismissed or settled with all defendants other than AVCO Corporation, on behalf of its Lycoming Engines Division ("Lycoming"). A year and a half ago, this Court held that Sikkelee "abandoned" all causes of action against Lycoming other than negligence and strict liability. Sikkelee v. Precision Airmotive Corp., No. 4:07-cv-886, 2011 U.S. Dist. LEXIS 38382, at *15 n.8 (M.D. Pa. Apr. 8, 2011).[1]

Last year, Lycoming moved for summary judgment on the products liability claims against the carburetor (Doc. 220) and against the engine. (Doc. 252). On July 3, 2012, this Court issued a Memorandum & Order (Doc. 299) (the "July 3 Order"), granting summary judgment, in part, and denying summary judgment, in part. Sikkelee v. Precision Airmotive Corp., No. 4:07-cv-886, 2012 U.S. Dist. LEXIS 91497 (M.D. Pa. July 3, 2012). Lycoming timely sought reconsideration

[1] Claims traditionally classified as "strict liability" and "negligence" ostensibly remain, but as explained elsewhere in this Brief, only one theory may be sent to the jury pursuant to the RESTATEMENT (THIRD) OF TORTS.

pursuant to LR 7.10 (Doc. 300, 301) and simultaneously sought to amend the order to permit interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Doc. 302).

On July 26, this Court amended its July 3 Order to permit Lycoming to seek interlocutory appeal in the Third Circuit as to whether the RESTATEMENT (THIRD) OF TORTS ("RESTATEMENT (THIRD)") governed Sikkelee's claims. (Doc. 306). The Third Circuit initially denied Lycoming's request, citing decisions applying both RESTATEMENTS. Sikkelee v. Precision Airmotive Corp., No. 12-8081, 2012 U.S. App. LEXIS 22069 (3d Cir. Sept. 4, 2012). Lycoming requested that the panel clarify its dismissal order or submit the issue for rehearing en banc. (Doc. 321). Although rehearing was denied, the Third Circuit expressly declared that the RESTATEMENT (THIRD) continues to govern Pennsylvania products liability claims in federal court. Sikkelee v. Precision Airmotive Corp., No. 12-8081, 2012 U.S. App. LEXIS 22185 (3d Cir. Oct. 17, 2012).

This Court thereafter vacated the pending motion for reconsideration and permitted the parties to move for reconsideration under the RESTATEMENT (THIRD). (Doc. 324). Lycoming timely files this Brief in Support of its Renewed Motion for Reconsideration.

II. STATEMENT OF FACTS

Lycoming shipped an aircraft engine, serial number (S/N) L-6590-39A, to Beagle Aircraft, Inc., on September 4, 1969. (Doc. 221 ¶ 2; Doc. 221-1 ¶ 4, Ex. A).

Lycoming also shipped a carburetor, setting 10-3678-32, S/N A-25-15850, to Beagle Aircraft, Inc., on September 4, 1969. (Doc. 221 ¶ 3; Doc. 221-1, ¶ 4, Ex. A). The carburetor at issue claimed by Sikkelee to be defective was a different carburetor ("the replacement carburetor") that was "completely rebuilt or overhauled in 2004 by the Kelly defendants, which installed new or as new parts and components within the carburetor." (Doc. 205 ¶ 9; Doc. 221 ¶ 5). Kelly overhauled the replacement carburetor on or about August 3-5, 2004. (Doc. 205 ¶9; Doc. 221 ¶ 6). Kelly shipped the overhauled replacement carburetor to Triad Aviation, Inc. ("Triad") in North Carolina, where it was installed on the aircraft involved in the accident at issue in this case. (Doc. 205 ¶ 4; Doc. 221 ¶ 19; Doc. 221-2).

All new replacement parts installed were Kelly parts and the part numbers for the various new replacement parts all contain the letters "CF" (for Consolidated Fuel Systems) and the data plate installed on the overhauled carburetor contains the letters "KA" (for Kelly Aerospace). (Doc. 221 ¶¶ 8, 10, 12, 14, 16; Doc. 221-2). These facts are admitted and are not in dispute. (Doc. 234 ¶¶ 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 19).

III. QUESTIONS PRESENTED

1. Whether this Court committed a manifest error of law, requiring reconsideration, when it held that a defendant that did not place an allegedly

defective product into the stream of commerce could be liable under Pennsylvania products liability law?

Suggested Answer: Yes.

2. Whether this Court erred in its application of Fed. R. Civ. P. 56 by construing facts not in the record in favor of Sikkelee, resolving issues of fact rather than surveying the record for same, and failing to follow the mandatory command of Rule 56(a) in the absence of any disputed issue of material fact?

Suggested Answer: Yes.

IV. ARGUMENT

This Court denied summary judgment because, in its view, Sikkelee established a genuine issue of material fact regarding Lycoming's status as a "manufacturer." (Doc. 299 at 16). Citing no authority, this Court determined that Sikkelee should be permitted to proceed on her theory that Lycoming was a "*de facto* manufacturer" of the accident engine when the engine was overhauled by others in 2004. (Doc. 299 at 15-16). Pennsylvania has never recognized *de facto* manufacturer liability, and the RESTATEMENT (THIRD) explicitly limits products liability to parties who sell or distribute the products in question. The only product Lycoming manufactured and sold is an engine shipped in 1969 without a defect. (Doc. 299 at 13). This Court's conclusion that Lycoming may be liable as a *de facto* manufacturer of a product it did not sell or supply is a manifest error of law

that runs contrary to the applicable RESTATEMENT (THIRD), and this Court's obligations under Fed. R. Civ. P. 56.

A. Standard Of Review

Local Rule 7.10 authorizes this Court to reconsider the July 3 Order. The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). A motion for reconsideration may be granted where there is a need to correct a clear error of law. In re TMI Litig. Cases Consol. II, 922 F. Supp. 997, 1008 (M.D. Pa. 1996) (citation omitted). Such error exists here.

B. Effect Of The Third Circuit's Order

The Third Circuit's October 17 Order confirmed that this Court must apply the RESTATEMENT (THIRD), Sections 1 and 2, to Sikkelee's claims against Lycoming. The RESTATEMENT (THIRD) eliminates the distinction between strict liability and negligence under the RESTATEMENT (SECOND) in favor of three categories of defect. RESTATEMENT (THIRD) § 2. This Court interpreted Sikkelee's pleading to raise product-based defective design and failure to warn claims as to the replacement carburetor. (Doc. 299 at 23-24, 27). Sikkelee's claims may only be submitted to the jury under a single negligence theory of recovery for design

and warning defects at the time of sale or distribution. RESTATEMENT (THIRD) §§ 1, 2.

In its July 3 Order, and independent of its RESTATEMENT analysis, this Court held that Sikkelee did not allege or adduce evidence of any defect in the engine sold by Lycoming in 1969. (Doc. 299 at 13). This Court accordingly granted summary judgment as to the engine sold by Lycoming. (Doc. 299 at 35). Sikkelee did not timely seek reconsideration of that decision and it remains in force. As a result, the only issue before this Court following the October 17, 2012 order from the Third Circuit is whether Lycoming may be liable under the RESTATEMENT (THIRD) for defects in the replacement carburetor allegedly arising from the field overhaul of the accident engine in 2004.

C. Sikkelee Cannot Make A Prima Facie Case Under The RESTATEMENT (THIRD)

This Court should set aside the July 3 Order because Lycoming cannot be liable under the RESTATEMENT (THIRD) absent evidence that Lycoming sold or distributed the offending parts and because this Court misapplied Third Circuit precedent in articulating policy reasons to hold otherwise.

1. RESTATEMENT (THIRD) Liability Is Limited To Sellers Of The Defective Product

Imposing *de facto* manufacturer liability on Lycoming violates the express language of the RESTATEMENT (THIRD). Section 1 limits the class of defendants

who may be liable for injuries caused by a defective product to those "who sell[] or distribute[] [the] defective product" at issue. RESTATEMENT (THIRD) § 1. Adopting negligence principles, Section 2 provides categories of time-of-sale defects: A product is defectively designed:

> when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Id., at § 2(b). A product is defective for inadequate warnings if, at the time of sale:

> the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Id., at § 2(c). The RESTATEMENT (THIRD) further clarifies which defendants may be liable in Section 20 by defining "sells and distributes" thusly: "One sells a product when, in a commercial context, *one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption.*" RESTATEMENT (THIRD) § 20(a) (emphasis added).[2] Defendants who otherwise distribute products through non-sale commercial transactions transferring physical possession, such as leasing and bailment, may also be liable. Id. § 2(b).

[2] Manufacturers are sellers subjected to liability only if they meet the requirements of Section 20. RESTATEMENT (THIRD) § 20(a).

To establish liability under these provisions, Sikkelee must prove that Lycoming commercially transferred ownership or physical possession of any product alleged to be defective through a sale, lease, or bailment – in this case, the replacement carburetor and new carburetor parts installed on the engine in 2004. RESTATEMENT (THIRD) §§ 1, 2, 20. Sikkelee, however, has *conceded that Lycoming did not sell the replacement carburetor parts*. Any liability inquiry under the RESTATEMENT (THIRD) must end there.

In 2004, Lycoming had nothing to transfer that could give rise to liability. Sikkelee did not allege that Lycoming ever had ownership or physical possession of the accident carburetor or carburetor parts. Sikkelee similarly did not allege, and indeed cannot show, that Lycoming had ownership or physical possession of the engine at any time after it was sold without a defect in 1969. The sole product Lycoming transferred, in 1969, was an aircraft engine that was not in a defective condition. Thus, *as a matter of law*, Lycoming may not be subject to liability.

2. The 2004 Engine Overhaul Did Not Give Rise To Any Liability On The Part of Lycoming

This Court interpreted Sikkelee's theory of liability to be that the 2004 engine overhaul, "admittedly physically accomplished by others but pursuant to the strict requirements and direction of Lycoming's manuals and service bulletins, was, in essence, a Lycoming-controlled remanufacture of the engine and its component parts." (Doc. 299 at 15). This Court's *de facto* manufacturer liability

theory defies applicable federal law and the governing provisions of the RESTATEMENT (THIRD). An engine overhaul by a third party is not a remanufacture of the product by Lycoming. It involves no transfer between the engine manufacturer and the engine owner so as to allow liability to attach to Lycoming.

Here, there is only one product manufactured by Lycoming: the original non-defective O-320-D2C engine. There is similarly only one transfer of ownership or physical possession by Lycoming: the sale of an O-320-D2C engine without a defect in 1969. In the absence of a defect at the time of sale in 1969, the jury is not permitted to impose liability for the RESTATEMENT (THIRD) time-of-sale claims raised by Sikkelee as to the overhauled engine. RESTATEMENT (THIRD) §§ 1, 2, 20. This Court's decision to the contrary creates endless long-tail liability for manufacturers who have no control over how, when, where, why and by whom its products were "manufactured" and "sold" such that liability may be imposed. Indeed, this Court's decision will lead to results bordering on absurd: just as Chevrolet does not remanufacture and sell a brand new Camaro each time a mechanic replaces the transmission on a 1969 Chevy Camaro Z/28, Lycoming does not remanufacture and sell a brand new O-320-D2C engine each time its owner overhauls an old O-320-D2C engine.

This Court has previously recognized that federal regulation of aviation is pervasive, Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429, 432-38

(M.D. Pa. 2010), but this Court's *de facto* manufacturer theory explicitly contradicts and attempts to preempt federal law. An overhauled part such as the accident engine is one that is "removed for maintenance and returned to the aircraft." Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631, 663 (E.D. Pa. 2004). There is no transfer of ownership; the only exchange of physical possession is between the engine owner and the overhauling entity. The remanufacture of an aircraft engine by an engine manufacturer means something entirely different than a field overhaul of an engine by a third party such as Triad in terms of the functions regulated by the FAA, which circumscribe the manner in which each is performed, and by whom.

An overhaul is a service that involves disassembling, cleaning, repairing as necessary, and reassembling an aircraft engine. 14 C.F.R. § 43.2(a)(1). By contrast, "a rebuilt engine is a used engine that has been completely disassembled, inspected, repaired as necessary, reassembled, tested, and approved in the same manner and *to the same tolerances and limits as a new engine with either new or used parts*." Id. § 91.421(c) (emphasis supplied). Whereas certain categories of mechanics or repairmen may overhaul an aircraft engine, id. § 43.3(b)-(e), only the manufacturer of the engine may "rebuild or alter any aircraft, aircraft engine, propeller, or appliance manufactured by [it] under a type or production certificate." Id. § 43.3(j). See also id. § 43.2(b).

Like an overhauled engine, a rebuilt or remanufactured engine is a used engine already in the stream of commerce. Unlike an overhauled engine, which is overhauled to service tolerances and limits, a rebuilt engine is built to new engine tolerances and limits. Unlike an overhauled engine, a rebuilt or remanufactured engine may only be rebuilt by the holder of the type or production certificate for the engine. As a matter of federal law, then, Triad could not have "remanufactured" the used Lycoming O-320-D2C aircraft engine on behalf of Lycoming.

The aircraft engine was already in the stream of commerce when the field overhaul was performed in 2004 and had been in the stream of commerce since 1969. Triad could only overhaul, not remanufacture, the used engine under federal regulations. It took an aircraft engine owned by Randall Winchester, performed maintenance on the aircraft engine owned by Mr. Winchester, and put the overhauled aircraft engine owned by Mr. Winchester back on the airplane owned by Mr. Winchester. Invisible hands or not, Lycoming could not possibly have sold or supplied Randall Winchester with a product he already owned. Thus, the RESTATEMENT (THIRD) *requires* dismissal of Sikkelee's claims because Lycoming did not and could not enter into a transaction to transfer ownership or physical possession of a defective product. This Court erred in concluding otherwise.

3. This Court's Holding Violates Products Liability Public Policy

Pennsylvania law would not permit *de facto* or invisible hand remanufacture as grounds for liability because those concepts are foreign to the governing RESTATEMENT (THIRD) and products liability public policy. In the July 3 Order interpreting the RESTATEMENT (SECOND), this Court cites to, and misreads, Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir. 1986), as support for its determination that public policy requires Lycoming to bear Sikkelee's losses. (Doc. 299 at 18). Polius does not provide grounds for disregarding express limitations on liability in the RESTATEMENT (THIRD); to the contrary, Polius teaches that a court should not disregard legal and factual bars to recovery based simply on the court's own theory of justice.

In Polius, the Third Circuit addressed successor liability in its role as the Supreme Court of the Virgin Islands. Id. at 80. The Polius court was not addressing the scope of liability under the RESTATEMENT (THIRD) and, in this case by contrast, successor liability is not at issue as to Lycoming. This Court looked to, and quoted, language from the *district court's opinion* that was ultimately *rejected* by the Third Circuit in Polius as a primary basis for liability. Id. at 84. In its discussion of public policy, this Court identifies a single policy behind products liability law:

> Products liability actions grew out of the need to protect the public from harms most appropriately borne by the manufacturer and to apportion the burden of compensating for that harm to the party most able to bear the loss which, in the majority of cases, is the negligent manufacturer. See, e.g., Polius v. Clark Equipment Co., 802 F.2d 75, 76-77 (3d Cir. 1986) ("[T]he public policy underlying strict products liability . . . is to protect the injured party by placing the burden on the party most able to bear the loss by spreading the risk").

(Doc. 299 at 18).

Contrary to this Court's interpretation, Polius rejects such a tunnel-vision approach to policy because products liability is not determined by the ability to pay.[3] The district court in Polius imposed continuity-of-enterprise liability on a successor who did not sell or manufacture the product, which was placed on the market years before the defendant-successor acquired the manufacturer. The district court reasoned that the successor benefitted from purchasing the predecessor and assumed its obligations, and that "'the public policy underlying strict products liability [which] is to protect the injured party by placing the burden on the party most able to bear the loss by spreading the risk.'" Polius, 802 F.2d at 76-77 (quoting the district court's opinion).

In reversing, the Third Circuit found that policies of compensation and loss allocation do not operate in a vacuum outside of other law. Id. at 81. The Third

[3] Indeed, RESTATEMENT (THIRD) requires negligence by the seller for warning and design defects. RESTATEMENT (THIRD) § 2.

Circuit reviewed a number of other factors that could arise in a products liability claim, including duty, causation, corporate structure, and expectations of the parties. Id. at 81-84. Any policy supporting compensation for injured plaintiffs bumps up against, and must sometimes be subordinated to, other rules of law. The plaintiff in Polius sought to "jettison well-established corporate law [limiting successor liability] because the claim arises from an allegedly defective product." Id. at 77-78, 80. The Third Circuit rejected the notion that "strict liability [recovery] concerns should predominate over those of [other applicable law]." Id.

Polius reflects the basic proposition that this Court may not impose liability on Lycoming for a product it did not sell simply because that result seems "just." Indeed, the RESTATEMENT (THIRD) incorporates the logic of Polius by rejecting the notion that all parties with any connection to an allegedly defective product should be liable for a plaintiff's injuries. See RESTATEMENT (THIRD) §§ 1, 20 (limiting product liability to a party that transferred ownership or physical possession of a product with a defect at the time of transfer). As the Third Circuit recognized, even where the district court's opinion "may appear to reach a just result[,] . . . resolution of the issue should follow from a principled rule, not ad hoc rationalization." Polius, 802 F.2d at 83.

Moreover, the "justice" that informed the district court's approach in Polius is not even present in this case. Unlike the successor corporation in Polius, no

benefit accrued to Lycoming by the overhaul of the accident engine in 2004 such that liability might be appropriate. Even under a strict liability regime, a defendant may not be liable to a plaintiff injured by a product manufactured and sold by another, despite that manufacturer relying upon or copying the defendant's products. Cf. Madden v. Teva Pharms. USA, Inc., No. 0087, 2012 Phila. Ct. Com. Pl. LEXIS 293, at *15-16 n.5 (Phila. Com. Pls. Oct. 1, 2012) ("[M]ore than 40 cases in approximately 20 states have held that a name-brand manufacturer is not liable for injuries allegedly caused by the use of a generic manufacturer's product"). This Court's misinterpretation of Polius goes beyond loss allocation into windfall: Sikkelee already has been significantly compensated by the actual manufacturer of the replacement carburetor parts. (Doc. 146). The RESTATEMENT (THIRD) and the public policy of Pennsylvania do not permit recovery under such circumstances.

D. This Court Erred In Its Application Of Fed. R. Civ. P. 56(a)

The only question before this Court, for summary judgment purposes, was whether Sikkelee could make a *prima facie* products liability case absent evidence that Lycoming sold or supplied any allegedly defective product. (Doc. 220). The RESTATEMENT (THIRD) begins with a similar but more limited inquiry – the defendant must commercially transfer ownership or physical possession of the allegedly defective part to be liable. Lycoming met its threshold burden of

persuasion by showing an absence of evidence on this element of Sikkelee's causes of action. Sikkelee did not come forward with any countervailing evidence in the record to show that Lycoming placed any product into the stream of commerce in 2004. Indeed, Sikkelee has admitted that Lycoming did not sell, distribute, or even touch the allegedly defective carburetor. (Docs. 234 at ¶¶ 7-17; 299 at 13, 15). Where a non-moving party bears the burden of proof at trial but fails to make a showing sufficient to establish the existence of an element essential to that party's case, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Upon reconsideration, this Court must grant summary judgment.

1. This Court's Obligation To Grant Summary Judgment Is Mandatory

The obligation to grant summary judgment where there is a failure of proof on an essential element of party's claim or defense is not discretionary. Rule 56(a) provides, in no uncertain terms:

> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court **shall** grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

> matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56(a) (emphasis supplied). "The word 'shall' is ordinarily 'the language of command.'" Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (citing Escoe v. Zerbst, 295 U.S. 490, 493 (1935)). Indeed, "the mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion." Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (citing Yungkau, 329 U.S. at 485). See also Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 661-62 (2007) (use of the word shall indicates that there is no discretion); Lopez v. Davis, 531 U.S. 230, 241 (2001) ("Congress used 'shall' to impose discretionless obligations").

Shall means shall. Where, as here, there is no issue of material fact, and the moving party is entitled to judgment as a matter of law, "the plain language of Rule [56(a)] mandates the entry of summary judgment." Celotex Corp. v. Catrett, 477 U.S. at 322. See also Morrison v. Washington Cnty., Ala., 700 F.2d 678, 682 (11th Cir. 1983) ("The district court's order granting summary judgment is not a discretionary decision"); Fed. Deposit Ins. Corp. v. Dye, 642 F.2d 837, 841 (5th Cir. 1981) (holding that the granting of summary judgment is not discretionary and that the denial of summary judgment is discretionary); Nat'l Screen Serv. Corp. v. Poster Exch., Inc., 305 F.2d 647, 651 (5th Cir. 1962) ("discretion plays no real role in the grant of a summary judgment").

2. *This Court Erred In Making Factual Findings On Summary Judgment*

"In considering a motion for summary judgment a District Court may not make credibility determinations. . . ." Marino v. Indus. Crating Co., 358 F.3d 241, 247 (3d Cir. 2004). But that is what this Court did, reciting "fact" after "fact" rather than surveying the existence of evidence in the record to be resolved by a jury. Pursuant to Rule 43(c) of the Federal Rules of Civil Procedure, any facts outside the record are to be established by sworn affidavits or oral testimony, but Sikkelee was not held to that standard. Where a court has granted relief based on facts outside the record, "[t]he Third Circuit has pointed out the need for such a proper record." N. Am. Kiln Serv. Corp. v. Merriman Steel Corp., No. 91-7919, 1993 U.S. Dist. LEXIS 1745 (E.D. Pa. Feb. 5, 1993) (citing Plum Tree, Inc. v. Stockment, 488 F.2d 754, 756 (3d Cir. 1973)).

Nor are the facts recited by this Court material for purposes of the limited summary judgment inquiry that was before it in Lycoming's motions. A material fact is "[a] fact[ ] that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact that would otherwise be material to a claim or defense is rendered immaterial by the failure to establish some other essential element of the claim or defense. Anderson v. Cons. Rail Corp., 297 F.3d 242, 247 (3d Cir. 2002) (where certain plaintiffs

were unable to prove the fourth element in an age discrimination case, all other factual disputes were rendered immaterial for purposes of Rule 56).

The only question before this Court was and is whether Lycoming could be liable for defects in replacement parts it did not sell or distribute by transferring ownership or possession. Those facts are undisputed – indeed, admitted – and they are the material facts relevant to the relief sought by Lycoming in the motion that this Court denied. Those facts, however, are missing from Part III of the Memorandum, entitled Statement of Material Facts, which purports to "briefly state the pertinent facts herein and supplement them as necessary throughout our analysis." (Doc. 299 at 7). Those "facts" ostensibly "are derived from the record and viewed in the light most favorable to Plaintiff in accordance with the standard of review applicable to summary judgment." (Doc. 299 at 7). Without complaint or rancor, the facts stated on the three pages of the Statement of Facts are not pertinent to the issues raised by the Motion for Partial Judgment and the Memorandum in toto is replete with "facts" that are not facts at all.

Lycoming cannot discuss all such instances given the page limitations in the Local Rules. By way of illustration, however, this Court states on page 14 of the Memorandum that "the subject engine and carburetor were overhauled in 2004 pursuant to Lycoming's manual and Service Bulletin 366." (Doc. 299 at 14). The record citation is to paragraph 6 of the Counterstatement of Facts submitted in

opposition to the Motion for Partial Summary Judgment (Doc. 234). Paragraph 6 of that document states that "The engine and carburetor were overhauled in 2004 pursuant to Lycoming manuals." (Doc. 235 at 5). No record citation, however, is referenced to support that statement of fact, even though LR 56.1 requires that "[s]tatements of material fact ... in opposition to ... a motion **shall** include references to the parts of the record that support the statement." M.D. Pa. LR 56.1 (emphasis supplied).

Indeed, nowhere in the avalanche of virtual paper filed in opposition to the Motion for Partial Summary Judgment is a single "Lycoming manual" or excerpt thereof, much less one that would support the statement that the carburetor was overhauled pursuant to a Lycoming manual. This unsupported commentary and argument "fail[s] to abide by LR 56.1 and cannot create a genuine issue of fact, Robinson v. Consol. Rail Corp., 668 F. Supp. 2d 678, 683 n.2 (M.D. Pa. 2009), yet this Court accepted this unsupported denial and construed it in Sikkelee's favor. (Doc. 299 at 7, 14).

And, indeed, the unauthenticated Kelly Aerospace carburetor overhaul records submitted by Sikkelee directly contradict what Sikkelee says in paragraph 6 of the Counterstatement of Material Facts. The FAA Form 8130-3, the Airworthiness Approval Tag signed by Kelly Aerospace Power Systems when it completed the carburetor overhaul in 2004, certifies that the carburetor was:

OVERHAULED IN ACCORDANCE WITH
PRECISION MSA-FSM (FSM-OH1) DATED 9/30/93

(Doc. 234-11 at 4). In other words, Kelly Aerospace used a Precision manual, not a Lycoming manual and the factual predicate that compelled this Court to conclude that Lycoming can somehow be deemed a *de facto* remanufacturer because Lycoming controlled the overhaul of the carburetor is not true, and demonstrably so. This Court should vacate the July 3 Order and rely solely upon the evidence in the record upon reconsideration under the RESTATEMENT (THIRD).

V. CONCLUSION

This Court has, in the past, expressed its willingness to admit it was wrong. E.g., DuVall v. AVCO Corp., No. 4:CV-05-1786, 2006 U.S. Dist. LEXIS 31445, at *8-*9 (M.D. Pa. May 19, 2006) (Jones, J.). It is most respectfully requested to do so again here, to reconsider the July 3 Order, and to enter summary judgment for Lycoming.

Respectfully submitted,

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Dated: October 31, 2012

CERTIFICATE OF WORD COUNT PURSUANT TO LR 7.8

I HEREBY CERTIFY that the Brief in Support of Renewed Motion for Reconsideration of Order Entered July 3, 2012 contains 4,899 words, exclusive of the Cover Page, Table of Contents, Table of Authorities, Certificate of Word Count, and Certificate of Service.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 31, 2012, a true and correct copy of the foregoing **Brief in Support of Renewed Motion for Reconsideration of Order Entered July 3, 2012** was served by electronic means, upon all counsel of record through the Court's ECF system.

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