12-8081 AWI

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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JILL SIKKELEE, Individually and as personal representative of the Estate of David Sikkelee, deceased,	:	NO.
Respondent,	:	
v.	:	In the Court Below: M.D. Pa. 4:07-CV-00886 Hon. John E. Jones, III
AVCO CORPORATION, on behalf of its Lycoming Engines Division, et al.,	:	
Petitioner	:	

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b) FROM A CERTIFIED ORDER DENYING SUMMARY JUDGMENT IN FAVOR OF AVCO CORPORATION

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. _____

Jill Sikkelee

v.

AVCO Corporation

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, AVCO Corporation makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

Textron, Inc.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Textron, Inc.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Catherine Stavin
(Signature of Counsel or Party)

Dated: August 6, 2012

I. INTRODUCTION

AVCO Corporation, on behalf of its Lycoming Engines Division ("Lycoming"), petitions this Court, pursuant to 28 U.S.C. § 1292(b) and FED. R. APP. P. 5, for leave to appeal an order, entered on July 3, 2012 ("the July 3 Order"), by the United States District Court for the Middle District of Pennsylvania ("the District Court"). In contravention of binding precedent from this Court, the District Court held that the RESTATEMENT (SECOND) OF TORTS, rather than the RESTATEMENT (THIRD) OF TORTS, governs strict products liability claims under Pennsylvania law. Purporting to apply the RESTATEMENT (SECOND), the District Court concluded that Lycoming could be held liable as a "*de facto* manufacturer" under Pennsylvania law for products it did not place into the stream of commerce.

Lycoming seeks the Court's permission to proceed with an interlocutory appeal. Lycoming should be granted leave to take an immediate appeal because the July 3 Order involves a controlling question of law to which there are substantial grounds for a difference of opinion, including a split among the lower courts regarding application of the appropriate RESTATEMENT in products liability actions, and an interlocutory appeal will advance the ultimate termination of this litigation.

A copy of the July 3 Order is attached as **Exhibit "A"**. A copy of the order dated July 26, 2012 ("the July 26 Order"), amending the July 3 Order to allow an immediate appeal pursuant to 28 U.S.C. § 1292(b), is attached as **Exhibit "B"**.

II. FACTS NECESSARY TO THE QUESTION PRESENTED

This case arises out of an aircraft accident involving a Cessna 172N aircraft that crashed near Penrose, North Carolina, on July 10, 2005. Respondent Jill Sikkelee, individually and on behalf of the Estate of David Sikkelee ("Sikkelee"), commenced a products liability action against seventeen defendants, including Lycoming, all alleged to have manufactured and/or sold certain carburetor parts claimed to be defective. Sikkelee has since settled with and/or dismissed all defendants other than Lycoming.

A. Factual Background

Lycoming, with a factory located in Central Pennsylvania, is the last remaining American-owned manufacturer of reciprocating (piston) aircraft engines for small airplanes. On September 4, 1969 – less than two months after Neil Armstrong first walked on the Moon and two weeks after Woodstock – Lycoming shipped an aircraft engine to Beagle Aircraft, Inc., in the United Kingdom, along with a carburetor that had been manufactured by another company. This transaction was the last contact between Lycoming and the aircraft engine.

The allegedly defective carburetor claimed to have caused the aircraft accident in 2005 was not the same carburetor that was shipped with the aircraft engine in 1969, but was a different carburetor ("the replacement carburetor") that was overhauled in 2004 by Kelly Aerospace, Inc., an aftermarket manufacturer of

carburetor parts, which installed a number of new replacement parts when it overhauled the replacement carburetor. After completing the carburetor overhaul, Kelly Aerospace, Inc. sent the overhauled carburetor with the new Kelly Aerospace, Inc. replacement parts directly to Triad Aviation, Inc., in Burlington, North Carolina, which in turn installed the replacement carburetor on the Cessna 172N aircraft when it overhauled the aircraft engine.

B. Procedural Background

This civil action was commenced on May 16, 2007 and was stayed for a period of time due to the bankruptcy of certain of the defendants. After the bankruptcy stay was lifted, the District Court granted a motion for judgment on the pleadings filed by some of Lycoming's co-defendants, holding that state law standards of care were preempted in this aviation products liability case, dismissing the complaint for failure to allege federal standards of care, and allowing Sikkelee leave to amend to plead breaches of federal standards of care. *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 426 (M.D. Pa. 2010).

Lycoming and other defendants thereafter moved to dismiss and/or strike the amended pleading. Among other things, Lycoming argued that Sikkelee failed to allege sufficient facts identifying Lycoming as the manufacturer or seller of a defective product. The District Court granted those motions, in part, and denied them, in part. As to Lycoming's challenge to the sufficiency of the allegations

regarding its relationship to the replacement carburetor, the District Court concluded: "Though Plaintiff *alleges at length the collective responsibility of the carburetor by other parties*, she likewise provides numerous and detailed allegations that, when viewed in the light most favorable to her cause, support a claim that Lycoming was *the manufacturer or in the chain of production of the subject carburetor*." *Sikkelee v. Precision Airmotive Corp.*, No. 07-CV-886, 2011 U.S. Dist. LEXIS 38382, at *16 (M.D. Pa. Apr. 8, 2011) (emphasis supplied).

Lycoming thereafter filed a motion for a choice of law determination, asking the District Court to apply the law of North Carolina, where the injury occurred and where the allegedly defective carburetor was first installed on the aircraft. The motion was denied, and the District Court instead applied Pennsylvania law to liability.[1]

C. Lycoming's Motions For Summary Judgment

Lycoming moved for summary judgment on Sikkelee's remaining claims of strict liability (Count IV) and negligence (Count VI), the District Court having found that Sikkelee "abandoned" all other claims against Lycoming. *Sikkelee*, 2011 U.S. Dist. LEXIS 38382, at *15 n.18. Lycoming filed two motions for summary

[1] Pennsylvania and North Carolina law conflict in a number of respects. Pennsylvania recognizes strict liability; North Carolina does not. North Carolina has a statute of repose applicable to products; Pennsylvania does not. For purposes of this appeal, Lycoming does not challenge the choice of law determination.

judgment, one against the new carburetor parts installed in 2004 that Lycoming did not place into the stream of commerce, the other against the engine that Lycoming did place into the stream of commerce in 1969.

As to the allegedly defective carburetor parts manufactured and sold in 2004, Lycoming sought summary judgment because it did not manufacture, sell, or supply those parts. The facts underlying that motion were not in dispute and, indeed, were agreed to by all parties. The replacement parts claimed to be defective were aftermarket parts manufactured by a third party (Kelly Aerospace, Inc.) with no relationship to Lycoming.

As to the engine that Lycoming did place into the stream of commerce in 1969, Lycoming sought summary judgment because Sikkelee failed to come forward with any evidence that the engine was in a defective condition with when it left Lycoming's hands in 1969. Indeed, all of Sikkelee's record evidence focused on post-sale events unrelated to the sale of the engine forty-three years ago, which did not impose liability upon Lycoming.

After the District Court ruled that Pennsylvania law would apply to liability, Lycoming submitted a supplemental brief arguing, *inter alia*, that Sikkelee's strict liability claims were governed by the RESTATEMENT (THIRD) pursuant to this Court's decisions in *Covell v. Bell Sports, Inc.*, 651 F.3d 357, 359 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1541 (2012), and *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d

38 (3d Cir.), *cert. denied*, 130 S. Ct. 553 (2009). Sikkelee disagreed, arguing that the RESTATEMENT (SECOND) governed her strict liability claims.

D. The July 3 Order Declining To Apply *Berrier* And *Covell*

On July 3, 2012, the District Court denied Lycoming's motions for summary Judgment, in part, holding that the RESTATEMENT (SECOND) governed Sikkelee's strict liability claims under Pennsylvania law. *Sikkelee v. Precision Airmotive Corp.*, No. 07-CV-886, 2012 U.S. Dist. LEXIS 91497 (M.D. Pa. July 3, 2012). At the outset, and although acknowledging that this Court "has twice predicted that the Pennsylvania Supreme Court, when presented with the opportunity to do so, will adopt the Restatement (Third) of Torts . . . to supplant the Restatement (Second) of Torts," (Ex. A at 20), the District Court nevertheless stated that it would "apply the dictates of the Restatement Second in resolving the strict products liability questions in this action." (Ex. A at 22-23).

In *Bugosh v. I.U. N. Am., Inc.*, the Supreme Court of Pennsylvania granted a petition for allocatur to consider whether to adopt the RESTATEMENT (THIRD) in products liability actions in Pennsylvania. 596 Pa. 265, 942 A.2d 897 (2008). While that appeal was pending, this Court predicted that the Supreme Court of Pennsylvania would adopt the RESTATEMENT (THIRD). *Berrier*, 563 F.3d at 40. The Supreme Court of Pennsylvania thereafter dismissed the *Bugosh* appeal as improvidently granted, without reaching the merits. *Bugosh v. I.U. N. Am., Inc.*,

601 Pa. 277, 279, 971 A.2d 1228, 1229 (2009). Two years after the *Bugosh* appeal was dismissed, this Court re-affirmed its holding in *Berrier* that "federal courts sitting in diversity and applying Pennsylvania law to products liability cases should look to [the RESTATEMENT (THIRD)]." *Covell*, 651 F.3d at 362.

Covell notwithstanding, the District Court reasoned that the RESTATEMENT (SECOND) governed because, in *Beard v. Johnson & Johnson, Inc.*, ___ Pa. ___, 41 A.3d 823 (2012), the Pennsylvania Supreme Court "declin[ed] to take advantage of the opportunity to adopt the Restatement Third." (Ex. A at 22). The District Court did not predict that the Supreme Court of Pennsylvania would **not** adopt the RESTATEMENT (THIRD), but, rather, dodged the issue, stating only that "we believe that the Pennsylvania Supreme Court, by again declining to take advantage of the opportunity to adopt the Restatement Third, has indicated that the Restatement Second remains the law of Pennsylvania." (Ex. A at 22).[2]

Having determined that the RESTATEMENT (SECOND) governed Sikkelee's strict liability claims, the District Court granted summary judgment, in part, and denied summary judgment, in part. The District Court granted summary judgment,

[2] The District Court's application of the RESTATEMENT (SECOND) is in direct conflict with another case from the Middle District of Pennsylvania, which followed *Covell* and held that the RESTATEMENT (THIRD) governs in a strict liability case under Pennsylvania law. *Giehl v. Terex Utils.*, No. 3:12-0083, 2012 U.S. Dist. LEXIS 49354, at *28 (M.D. Pa. Apr. 9, 2012). *Giehl* was cited in the lower court briefing but is not discussed or even mentioned in the July 3 Order.

in part, because the engine was not in a defective condition when sold in 1969. (Ex. A at 13). The District Court denied summary judgment, in part, even though it noted that "Plaintiff does not dispute ... that the Kelly Defendants manufactured, replaced, and shipped the carburetor and its component parts." (Ex. A at 13). The District Court concluded that Lycoming was a "*de facto* manufacturer" of the engine when the engine was overhauled by others in 2004. (Ex. A at 15-16).

Lycoming timely moved for reconsideration, asking the District Court to correct its manifest errors of fact and law in reaching the conclusion that Lycoming could be liable for alleged defects in a product (the carburetor) it did not place in the stream of commerce and in reaching the conclusion that it could be the "*de facto* manufacturer" in 2004 of a product (the engine) that already was in the stream of commerce and had been placed into the stream of commerce in a non-defective condition in 1969. In addition to seeking reconsideration, Lycoming filed a separate motion asking the District Court to certify the July 3 Order for interlocutory appeal.

The District Court granted the motion to amend the July 3 Order to include the language required by Section 1292(b) for immediate appeal and certified the question of the governing RESTATEMENT for immediate appeal (Ex. B), and simultaneously suspended briefing on the motion for reconsideration to allow Lycoming to take an interlocutory appeal to this Court.

III. QUESTION PRESENTED FOR REVIEW

Whether the RESTATEMENT (THIRD) OF TORTS or the RESTATEMENT (SECOND) OF TORTS governs products liability claims asserted under Pennsylvania law?

IV. RELIEF SOUGHT

Lycoming seeks leave to take an immediate appeal of the District Court's July 3 Order denying summary judgment to Lycoming on the basis of the RESTATEMENT (SECOND) OF TORTS, contrary to binding authority from this Court.

V. REASONS WHY AN APPEAL SHOULD BE PERMITTED

Lycoming moves this Court, pursuant to the Interlocutory Appeal Act, 28 U.S.C. § 1292(b) and FED. R. APP. P. 5, for permission to appeal the July 3 Order. An interlocutory order may be appealed under the Interlocutory Appeal Act if (1) it involves a controlling question of law; (2) there are substantial grounds for difference of opinion among courts on the issues decided; and (3) the interlocutory appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). The District Court has certified that all three requirements have been met with respect to the July 3 Order. (Ex. B).

This Court's guidance is needed to determine whether the RESTATEMENT (THIRD) or RESTATEMENT (SECOND) provides the standard for deciding Pennsylvania products liability cases in federal court. This case also provides this Court with the opportunity to clarify the relationship between federal appellate

predictions of state law pursuant to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and intervening action by a state's highest court that does not explicitly resolve an issue predicted by this Court.

A. There Is A Controlling Question Of Governing Law

An order "which, if erroneous, would be reversible error on final appeal," involves a controlling question of law under the Interlocutory Appeal Act. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974). Section 1292(b) is intended to permit appeal of questions that are "serious to the conduct of the litigation, either practically or legally." *Id.* at 755 (citations omitted). In the July 3 Order, the District Court denied summary judgment to Lycoming, finding that Lycoming could be liable under the RESTATEMENT (SECOND) and that the RESTATEMENT (THIRD) did not govern. (Ex. A at 22-23). The District Court's application of the RESTATEMENT (SECOND) is a byproduct of the ongoing struggle by state and federal courts to define the relationship between strict liability and negligence concepts under Pennsylvania law, which is treated differently under the RESTATEMENT (SECOND) and the RESTATEMENT (THIRD). The RESTATEMENT (THIRD) was designed to "eliminate much of the confusion" by expressly indicating the ways in which negligence-type concepts are permitted to be incorporated into strict liability. *Berrier*, 563 F.3d at 55.

The District Court's decision to proceed under the RESTATEMENT (SECOND) is reversible error if this Court reaffirms its prior decisions holding that the RESTATEMENT (THIRD) governs Pennsylvania strict liability claims in federal court. *E.g.*, *Berrier*, 563 F.3d at 61 (vacating grant of summary judgment under RESTATEMENT (SECOND) because the RESTATEMENT (THIRD) applied). Immediate resolution of this threshold question will avoid the risk of further delaying ultimate resolution of Sikkelee's remaining claims by eliminating the potential for a second trial under the correct standard. A determination of the applicable RESTATEMENT, then, is a controlling question of law.

B. Substantial Grounds For A Difference of Opinion Exist And Have Resulted In Conflicting Orders By District Courts In This Circuit

Substantial grounds for difference of opinion exist where "pivotal questions of law [are] not settled by controlling authority" or where district courts have issued "[c]onflicting and contradictory opinions." *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 599-600 (E.D. Pa. 2008) (citing *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994); *McGillicuddy v. Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984)). Such grounds are present here.

This Court has, on two previous occasions, addressed the very question raised by this appeal: to wit, whether the RESTATEMENT (THIRD) or the RESTATEMENT (SECOND) governs strict liability claims under Pennsylvania law. In

each instance, this Court held that the RESTATEMENT (THIRD) governs strict liability actions under Pennsylvania law. *Covell*, 651 F.3d at 362; *Berrier*, 563 F.3d at 40. The District Court, however, failed to follow this binding precedent, holding instead that the RESTATEMENT (SECOND) governs Sikkelee's claims. (Ex. A at 22-23).

Third Circuit decisions predicting Pennsylvania law are binding on district courts "absent a change" in the law of the Commonwealth. *Covell*, 651 F.3d at 363. The decision by the Supreme Court of Pennsylvania in *Beard*, cited by the District Court, did not change Pennsylvania law but merely maintained the status quo.

In the only post-*Beard* decision issued prior to the July 3 Order, Judge Caputo of the Middle District of Pennsylvania recognized that he was bound by this Court's precedential decisions in *Berrier* and *Covell*. Unlike Judge Jones herein, Judge Caputo did not interpret *Beard* to unbind Third Circuit precedent:

> The Court, however, does not interpret *Beard* as a "contrary" decision to the Third Circuit's prediction of Pennsylvania products liability law – as the Pennsylvania Supreme Court did not resolve the disrepaired state of Pennsylvania products liability law nor did the Supreme Court adversely comment on the Third Circuit's prediction that Pennsylvania will ultimately adopt the Restatement (Third) of Torts. The Court is thus bound by the *Berrier* and *Covell* holdings. Such a resolution comports with the mandates of *Erie* and Third Circuit precedent.

Giehl, 2012 U.S. Dist. LEXIS 49354, at *28 n.4. Judge Caputo properly recognized that only intervening authority squarely addressing the precise question, not mere

intervening action, can abrogate this Court's precedential decisions predicting Pennsylvania law. *Covell*, 651 F.3d at 363-64.

In holding "that the Pennsylvania Supreme Court of Pennsylvania, by again declining to take advantage of the opportunity to adopt the Restatement Third, has indicated that the Restatement Second remains the law of Pennsylvania," (Ex. A at 22), the July 3 Order resurrected the flawed approach the District Court previously applied in *Milesco v. Norfolk S. Corp.*, No. 1:09-CV-1233, 2010 U.S. Dist. LEXIS 780 (M.D. Pa. Jan. 5, 2010) (Jones, J.), which was rejected in *Covell*.[3] Absent an affirmative and explicit ruling on the question when it is presented to the Supreme Court of Pennsylvania, inaction is too vulnerable to multiple interpretations that lead to conflicting opinions. *Covell,* 651 F.3d at 363-64. As it did in *Milesco*, the District Court relied too heavily upon intervening *events* rather than intervening or existing *authority*, the very "reading of tea leaves" this Court has cautioned against. *Id.* at 364.

The conflict between Judge Jones and Judge Caputo in the Middle District has spilled over beyond the geographic boundaries of that District, in part because the decision issued by Judge Jones has been followed by Magistrate Judge Perkin in

[3] In *Milesco*, Judge Jones held that the "Supreme Court's dismissal of *Bugosh* was a clear indication" that the RESTATEMENT (SECOND) continued to apply, 2010 U.S. Dist. LEXIS 780, at *9-*10. This Court disagreed with that approach. *See Covell.* 651 F.3d at 364 (finding *Bugosh* to be "of no consequence" because the Pennsylvania Supreme Court admonished "against reading between the lines of an allocatur dismissal").

the Eastern District. *Carpenter v. Shu-Bee's, Inc.*, No. 10-0734, 2012 U.S. Dist. LEXIS 94447, at *8 (E.D. Pa. July 9, 2012) (citing to the July 3 Order and applying the RESTATEMENT (SECOND)). Judge Hornak in the Western District, however, recently recognized the conflict in authority and determined that the RESTATEMENT (THIRD) applies: "Absent the most express, crystal clear current and *post-Covell* affirmation of an obligation to look only to the Restatement (Second) by the Pennsylvania Supreme Court, this Court believes, as a matter of judicial hierarchy, that it is obligated to rely upon the Third Circuit decisions of *Berrier* and *Covell* and apply the Restatement (Third)." *Sansom v. Crown Equip. Corp.*, No. 2:10-cv-0958, 2012 U.S. Dist. LEXIS 102734, at *18-*20 n.5 (W.D. Pa. July 24, 2012) (finding RESTATEMENT (THIRD) binding but conducting analyses under both RESTATEMENTS due to uncertainty). Interlocutory appeal is necessary in light of the post-*Beard* conflict now extant in this Circuit.[4]

In Harrisburg, Williamsport, and Allentown, the RESTATEMENT (SECOND) governs strict liability claims. *Carpenter*, 2012 U.S. Dist. LEXIS 94447, at *8; (Ex A. at 22). In Pittsburgh and in Scranton, the RESTATEMENT (THIRD) governs the

[4] District courts in other cases have recognized the confusion even in the absence of a definitive decision. *See, e.g., Westfield Ins. v. Detroit Diesel Corp.*, No. 3:10-cv-100, 2012 U.S. Dist. LEXIS 64301, at *24 n.9 (W.D. Pa. May 8, 2012) (explaining the "present[ ] . . . disagreement as to which Restatement governs strict liability actions in Pennsylvania"). Granting leave to appeal here will also provide guidance for courts facing the prospect of deciding this issue in the near future.

same claims under the same precedent. *Sansom*, 2012 U.S. Dist. LEXIS 102734, at *18-*21; *Giehl*, 2012 U.S. Dist. LEXIS 49354, at *28.

Intra-circuit conflict such as this is unfair to litigants and is precisely the type of difference of opinion intended to be remedied by Section 1292(b). "Without guidance from the Third Circuit, Judges of this Court will undoubtedly continue to disagree." *Johnson v. SmithKline Beecham Corp.*, No. 11-5782, 2012 U.S. Dist. LEXIS 44315, at *25 (E.D. Pa. Mar. 29, 2012) (looking to conflicting decisions among judges in the Eastern District of Pennsylvania as to the principal place of business of GlaxoSmithKline LLC as grounds for certifying an order pursuant to Section 1292(b)).

The July 3 Order has engendered a conflict among the district courts in the Third Circuit based on an erroneous interpretation of *Beard*, demonstrating a substantial difference of opinion requiring appellate intervention instanter.

C. Immediate Appeal Will Materially Advance The Ultimate Termination Of The Litigation

If the District Court erred in applying the RESTATEMENT (SECOND) to Sikkelee's products liability claims under Pennsylvania law, then the ultimate verdict holder will not hold onto the verdict for very long, causing considerable burden and expense to the parties, the District Court, and the citizens of Central Pennsylvania. Waste avoidance is at the heart of the Interlocutory Appeal Act;

indeed, the legislative history "referred specifically to cases in which a long trial from a pretrial order erroneously overruling a defense going to the right to maintain the action." *Katz*, 496 F.2d at 754 (citation omitted).

The instant matter is a complex dispute involving multiple parties, the relationship between federal and state law, and numerous expert opinions. Resolution by the Third Circuit will relieve Sikkelee of the burden and expense of taking this aviation case through trial and appeal. Immediate appeal will save Lycoming the considerable burden and expense associated with a trial, as well as saving it from the consequences of certain rulings it believes are clearly erroneous. An interlocutory appeal will spare the District Court those same burdens in that the basis for the appeal will be already briefed and on file, and the District Court will not need to decide additional pretrial motions, preside over a lengthy products liability trial, or decide post-trial motions, without the benefit of guidance from this Court.

VI. CONCLUSION

The July 3 Order falls within the class of opinions for which 28 U.S.C. § 1292(b) was intended to provide immediate redress. This Honorable Court is respectfully requested to grant this Petition and permit an immediate appeal of the July 3 Order.

Respectfully submitted,

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Date: August 6, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 6, 2012, a true and correct copy of the foregoing **Petition for Permission to Appeal** was served by first class mail, postage prepaid, upon the following:

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Exhibit "A"

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;	:	4:07-cv-00886
Plaintiff,	:	
v.	:	Hon. John E. Jones III
PRECISION AIRMOTIVE, CORPORATION, *et al.*,	:	
Defendants.	:	

MEMORANDUM & ORDER

July 3, 2012

Presently pending before the Court in this wrongful death and survival action is the Motion for Partial Summary Judgment (Doc. 220) and the Motion for Summary Judgment (Doc. 252) of Defendant AVCO Corporation on behalf of its Lycoming Engines Division (collectively "Lycoming"). The Motions have been fully briefed (Docs. 223, 235, 249, 257, 269, 276, 292, 296) and are therefore ripe for our review. For all of the reasons fully articulated herein, we will grant in part and deny in part Lycoming's Motions.

I. PROCEDURAL HISTORY

The parties and the Court are intimately familiar with the lengthy and complex procedural and factual predicate of this litigation and we thus recite only

the most pertinent procedural points here. Plaintiff initiated this action on May 16, 2007 with the filing of a Complaint that asserted claims for strict liability, negligence, breach of warranty, concert of action, and misrepresentation against seventeen different Defendants[1] arising out of an aircraft accident that resulted in the death of her husband, David Sikkelee ("the decedent"). (Doc. 1). The Defendants filed individual answers to the Plaintiff's Complaint between July 25 and August 1, 2007. (Docs. 52-57).

Several Defendants filed, or eventually joined in, a Motion for Judgment on the Pleadings on March 17, 2009. (Doc. 107). We granted in part and denied in part said motion after finding that the field of aviation safety is preempted by federal law and regulation. We thus dismissed Plaintiff's claims which were based on alleged violations of state law standards of care but permitted the Plaintiff to seek state law remedies for alleged violations of federal standards of care. (Doc. 158). The Court directed the Plaintiff to file an Amended Complaint within twenty

[1] The Complaint places the seventeen Defendants into three different groups: the Precision Defendants, the Kelly Defendants, and the Lycoming Defendants. The Precision Defendants include: Precision Airmotive, LLC; Precision Airmotive Corporation; Precision Aerospace Corporation; Precision Aerospace Services f/k/a Precision Aerospace Group, LLC; Precision Aviation Products Corporation and Precision Products, LLC; Former Fuel Systems, Inc. f/k/a Facet Fuel Systems, Inc.; and Mark IV Industries, Inc. The Kelly Defendants include: Kelly Aerospace, Inc., Kelly Aerospace Power Systems, Inc., Consolidated Fuel Systems, Inc., and Electrosystems, Inc., which merged with Consolidated Fuel Systems, Inc. The Lycoming Defendants include: Textron, Inc.; AVCO Corporation; and Textron Lycoming Reciprocating Engine Division, a division of AVCO Corporation.

(20) days. (*Id.*).

On August 31, 2010, within the prescribed twenty (20) day period, Plaintiff filed her First Amended Complaint. On September 17, 2010, Defendants AVCO and Lycoming Engines filed a Motion to Dismiss and/or Strike, (Doc. 165), Defendant Textron filed a Motion to Dismiss, (Doc. 166), and Defendants Precision Airmotive Corporation and Precision Airmotive LLC filed a Motion to Dismiss and/or Strike. (Doc. 167). On October 15, 2010, the Kelly Defendants filed their Motion to Dismiss. (Doc. 175).

On April 8, 2011, the Court entered a Memorandum and Order granting in part and denying in part the above motions.[2] The Court denied Lycoming's Motion to the extent it related to Counts IV (strict liability) and VI (negligence), but granted it to the extent it related to Counts V (breach of warranties), X (misrepresentation) and XI (concert of action). We further ordered Plaintiff to file a second amended complaint within ten (10) days in accordance with our decision. (Doc. 204). Plaintiff filed the Second Amended Complaint within the prescribed

[2] Throughout the pendency of the litigation and the above-noted motion practice, all Defendants, with the exception of Defendant AVCO, on behalf of Defendant Lycoming Engines, have been terminated from the action. On July 13, 2010, the Court approved a settlement between Plaintiff and the Kelly Defendants. (Doc. 146). Defendant Textron was terminated from the action on November 2, 2010, pursuant to a Stipulation of Dismissal. (Doc. 184). Defendants Precision Aerospace Corporation, Precision Aerospace Services, LLC, Precision Aviation Products Corporation, Precision Products LLC, Zenith Fuel Systems LLC, Former Fuel Systems, Inc., and Mark IV Industries, Inc., were terminated on April 20, 2011.

ten (10) day period, (Doc. 205), and the Defendants answered on May 5, 2011. (Docs. 206-208).

On July 22, 2011, Lycoming filed a Motion for Determination of Applicable Law, (Doc. 219), seeking application of North Carolina law to all matters concerning liability in this litigation. On August 5, 2011, Lycoming filed the instant Motion for Partial Summary Judgment, seeking summary judgment on Count IV and Count VI to the extent that those causes of action relate to alleged defects in certain carburetor replacement components. (Doc. 220). On October 3, 2011, Lycoming filed a Motion for Summary Judgment on the remainder of the claims in Count IV and Count VI relating to alleged defects in the subject aircraft engine. (Doc. 252).

On October 14, 2011, Plaintiff filed a Motion to Supplement the Record with several recently-discovered AVCO admissions. (Doc. 256). By Order dated December 21, 2011, the Court granted the Motion to Supplement. (Doc. 279). Consistent with the Order's mandate, on January 10, 2012, the Plaintiff filed a supplemental statement of facts (Doc. 280), and on February 3, 2012, Lycoming filed a responsive statement of facts. (Doc. 284).

On March 13, 2012, the Court ruled on Lycoming's Motion to Determine Applicable Law and concluded that Pennsylvania law will apply to the liability

portion of this action. (Doc. 288). In the Memorandum and Order denying the Motion, the Court noted that Lycoming had relied considerably on the application of North Carolina law in its Motions for Summary Judgment and thus granted the parties leave to supplement their briefs in light of this determination. (*Id.*). On April 20, 2012, Lycoming filed supplemental briefs in support of its Motions (Docs. 292-93), and Plaintiff filed a brief in opposition on May 21, 2012. (Doc. 296). Both Motions have now been fully and excellently briefed by the parties and are thus ripe for our review.

II. STANDARD OF REVIEW

Summary judgment is appropriate if the record establishes "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant meets this burden by pointing to an absence of evidence supporting an essential element as to which the non-moving party will bear the burden of proof at trial. *Id.* at 325. Once the moving party meets its burden, the burden then shifts to the non-moving party to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e)(2). An issue is "genuine" only if there is a sufficient evidentiary basis for a reasonable jury to find

for the non-moving party, and a factual dispute is "material" only if it might affect the outcome of the action under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

In opposing summary judgment, the non-moving party "may not rely merely on allegations of denials in its own pleadings; rather, its response must . . . set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). The non-moving party "cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial." *Jones v. United Parcel Serv.*, 214 F.3d 402, 407 (3d Cir. 2000). Arguments made in briefs "are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion." *Jersey Cent. Power & Light Co. v. Twp. of Lacey*, 772 F.2d 1103, 1109-10 (3d Cir. 1985). However, the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the non- moving party. *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 852 (3d Cir. 2006).

Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences that a fact finder could draw therefrom. *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982). Still, "the mere existence of *some* alleged factual dispute between the parties will not defeat

an otherwise properly supported motion for summary judgment; there must be a *genuine* issue of *material* fact to preclude summary judgment." *Anderson*, 477 U.S. at 247-48.

III. STATEMENT OF MATERIAL FACTS

The following facts are derived from the record and viewed in the light most favorable to the Plaintiff in accordance with the standard of review applicable to a motion for summary judgment. Due to the factual complexity of this litigation and the familiarity of the parties and the Court with the record, we briefly state the pertinent facts herein and supplement them as necessary with additional facts throughout our analysis.

This action arises out of an aircraft accident involving a 1976 Cessna 172N airplane on July 10, 2005 at the Transylvania County Airport in Brevard, North Carolina. The accident resulted in the death of David Sikkelee ("the decedent"), husband of Jill Sikkelee ("Plaintiff"), and significant injuries to the decedent's brother, Craig Sikkelee ("the passenger"). Shortly after takeoff on July 10, 2005, the plane crashed to the ground, resulting in the death of the decedent and serious injuries to the passenger. Plaintiff alleges that the accident was caused by a faulty carburetor, specifically a loosening throttle body to bowl assembly within said carburetor, installed in the subject engine.

Lycoming designed and manufactured a certain 0-320-D2C aircraft engine, bearing serial number L-6590-39A ("engine S/N L-6590-39A" or "the subject engine"), in Williamsport, Pennsylvania. (Doc. 253, ¶ 1). Lycoming shipped the subject engine to Beagle Aircraft, Inc., on September 4, 1969. (*Id.* ¶ 2). The Lycoming O-320 engine, S/N L-6590-39A, was installed on the Cessna 172N aircraft when it crashed on July 10, 2005. (*Id.* ¶ 3). Plaintiff admits that the carburetor that was installed on the Cessna 172N was not the same carburetor Lycoming shipped with the subject engine in 1969 but was instead a different carburetor. (Doc. 221, ¶ 5). The carburetor installed in the subject engine on the accident aircraft ("replacement carburetor"), a Precision MA-4SPA carburetor, was manufactured by the Precision Defendants and was completely overhauled by the Kelly Defendants on or about August 3-5, 2004. (*Id.* ¶ 6; Doc. 253, ¶ 5).

Lycoming holds the FAA-issued Type Certificate for the MA-4SPA model carburetors and the MA-4SPA carburetor at issue here was manufactured pursuant to Lycoming design, which cannot be modified or altered without approval from Lycoming (Doc. 234, ¶ 5). Defendant Precision and its predecessors were permitted to manufacture the carburetor pursuant to a licensing agreement with Lycoming. (*Id.*). The MA-4SPA carburetor design is not approved separately and is part of the Lycoming engine type design. (*Id.*).

As the holder of the Type Certificate for the engine, Lycoming approved and implemented the engineering change which effected the throttle body to bowl screw design at issue here in lieu of a safety wire assembly. (*Id.* ¶ 5, 22). This change was made in 1965. (*Id.* ¶ 22). Since 1972, Lycoming has been made aware of various reports of malfunctions and defects related to its O-320 series engines and the MA-4SPA carburetors, specifically concerning loosening throttle body to bowl assemblies. (*Id.* ¶¶ 24-25).

The 2004 overhaul of the subject engine, including the overhaul of the carburetor, was accomplished pursuant to and required by Lycoming's continued airworthiness instructions, which the FAA mandates Lycoming, as the Type Certificate holder for the entire engine design, maintain in compliance with federal aviation regulations. (*Id.* ¶¶ 5-6). The Kelly Defendants further complied with Lycoming's Service Bulletin 366, which was intended to alleviate the known throttle body to bowl assembly defects. (*Id.* ¶ 6). Lycoming's continued airworthiness instructions recommend that the carburetor be replaced at the time of the engine overhaul, and its Type Certificate Data Sheet ("TCDS") instructs mechanics to use MA-4SPA replacement carburetors when overhauling this engine. (*Id.*). Accordingly, as required by Lycoming's design, an MA-4SPA carburetor was installed on the subject engine during the 2004 overhaul.

The replacement carburetor on the subject engine at the time of the crash was a Lycoming-approved Marvel Schebler MA-4SPA model 10-5135 carburetor, which bore Lycoming part number, LW-13659. (*Id.*). Plaintiff's three experts conclude that the carburetor design was and is defective and dangerous. (Docs. 234-4, 234-5, 234-6). Donald E. Sommer, P.E., an expert who investigated the subject engine subsequent to the crash, noted that the carburetor bowl screws had loosened in the subject engine; he conducted several tests and concluded that "[t]he accident O-320 MA-4SPA carburetor is unreasonably dangerous and caused the death of David Sikkelee." (Doc. 234-6, pp. 34). He ultimately concluded that Lycoming "failed to exercise reasonable care in the design, manufacture, and support of the accident aircraft's engine and carburetor" and that Lycoming's O-320-D2C engine "is a defective engine due to the incorporation of the Precision MA-4SPA carburetor." (*Id.*)

IV. DISCUSSION

As stated above, the only remaining causes of action sound in negligence and strict liability. As a threshold matter, Lycoming contends that both of these claims fail because the Plaintiff is unable to establish that Lycoming either manufactured, sold, or distributed a defective product. We first address this critical preliminary issue and, because we find that a reasonable jury could conclude that

Lycoming was a *de facto* manufacturer of a defective product, proceed next to analyzing the remaining elements of the Plaintiff's negligence and strict liability claims.

A. Is There a Genuine Issue as to Whether Lycoming Manufactured, Distributed, or Sold an Allegedly Defective Product?

Under both of the Plaintiff's remaining causes of action, her burden of proof requires that she establish that Lycoming is a manufacturer, distributor, or seller of the allegedly offending product. *See Mellon v. Barre-Nat'l Drug Co.*, 636 A.2d 187, 191 (Pa. Super. Ct. 1993) (in a negligence-based products liability action, the "defendant must be identified as the manufacturer, distributor, or seller of the offending product before the injuries suffered by the plaintiff may be found to be proximately caused by some negligent act or omission of the defendant"); *Kimco Dev. Corp. v. Michael D's Carpet Outlets*, 637 A.2d 603, 606 (Pa. 1983) ("Strict product liability is premised on the concept of enterprise liability for casting a defective product into the stream of commerce."). Thus, as a threshold matter, we must address the parties' arguments with respect to whether or not Lycoming cast a defective product into the market.

Lycoming contends that it is entitled to summary judgment because, while it admittedly sold the subject engine in 1969, the allegedly defective replacement parts installed during the engine's overhaul in 2004 were manufactured and sold by

others, thus failing the preliminary requirement of a Pennsylvania products liability action. Indeed, Lycoming submits that its last physical "contact" with the product was in 1969. Lycoming asserts that the evidence is entirely "one-sided" and establishes that it did not manufacture, sell, distribute, or otherwise "place[] an allegedly defective product into the stream of commerce," thus requiring entry of summary judgment in its favor on both of Plaintiff's remaining claims. (Doc. 249, pp. 10-11). Indeed, Lycoming submits that the facts are *undisputed* that it did not manufacture, distribute, sell, or otherwise cast into the stream of commerce the allegedly defective replacement carburetor and its component parts.

In support of this argument, Lycoming points to the following facts: that it manufactured the subject engine, S/N L-6590-39A, in 1969 (Doc. 253, ¶ 1); that said engine was installed on the subject Cessna 172N aircraft when it crashed on July 10, 2005 (*Id.* ¶ 3); that the carburetor installed at the time of the 2005 crash was not the same carburetor shipped with its S/N L-6590-39A engine in 1969 (*Id.* ¶ 5); that the carburetor installed at the time of the crash was in fact a replacement carburetor, a Precision MA-4SPA (*Id.* ¶ 5); that the replacement carburetor was completely rebuilt or overhauled by the Kelly Defendants in 2004, which installed new or as new parts and components with the carburetor (*Id.*); and that the Kelly Defendants manufactured the carburetor's replacement component parts, rebuilt or

overhauled the replacement carburetor, and shipped the replacement carburetor. (*Id.* ¶ 6).

In sum, Lycoming contends, and Plaintiff does not dispute, that the Kelly Defendants manufactured, replaced, and shipped the carburetor and its component parts. (Docs. 221, ¶¶ 7-17). Lycoming asserts that its last physical contact with the product was in September of 1969 when it was shipped and placed in long-term storage and that Plaintiff has failed to prove that a defect existed at that time. On this point, we agree with Plaintiff, and will grant summary judgment to the limited extent that Plaintiff's claims may be construed to allege a defect in the engine in 1969. Plaintiff has offered no evidence, expert or otherwise, demonstrating that the engine was defective when it left the Lycoming's Williamsport manufacturing plant in 1969 or that a defect existing at that time caused the 2005 aircraft accident.

However, while Plaintiff does not contest Lycoming's factual recitation thus far, she does disagree with its ultimate legal conclusion—that Lycoming cannot possibly be deemed a manufacturer, seller, or distributor subject to liability for injuries purportedly caused by the allegedly defective carburetor in light of Defendant Precision's manufacture and the Kelly Defendant's overhaul of said product. As she must to satisfy her burden at the summary judgment level, Plaintiff points to several substantial facts of record which Lycoming omits in making its

arguments seeking summary disposition of both claims and submits to the Court that they sufficiently support her claims and warrant submission of the case to a jury.

Specifically, Plaintiff points to the following: that the replacement carburetor on the subject engine at the time of the crash was a Lycoming-approved Marvel Schebler MA-4SPA model 10-5135 carburetor (Doc. 234, ¶ 5); that the MA-4SPA carburetor was manufactured by Defendant Precision and its predecessors pursuant to a licensing agreement with Lycoming (*Id.*); that MA-4SPA carburetors are assigned a Lycoming part number, LW-13659 (*Id.*); that Lycoming holds the FAA Type Certificate for the MA-4SPA model carburetors and that the MA-4SPA carburetor at issue here was manufactured pursuant to Lycoming design drawings, which cannot be modified or altered without approval from Lycoming (*Id.*); that Lycoming approved the allegedly defective throttle body to bowl screw design at issue here (*Id.*); that the subject engine and carburetor were overhauled in 2004 pursuant to Lycoming's manual and Service Bulletin 366 (*Id.* ¶ 6); that Lycoming, in its continued airworthiness instructions, recommends that MA-4SPA carburetors be replaced when an engine is serviced or overhauled (*Id.*); and that Lycoming's Type Certificate Data Sheet ("TCDS") instructs mechanics to

use MA-4SPA replacement carburetors when overhauling this engine. (*Id.*).[3]

Our understanding of Plaintiff's argument, then, is not that Lycoming was the physical manufacturer of the allegedly defective carburetor; indeed, Plaintiff admits that Lycoming's hands did not physically touch the carburetor. (*See* Doc. 234, ¶¶ 7-17). Instead, the argument appears to be that the 2004 overhaul of the engine itself, 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. Thus, it follows that because Lycoming exercised such control over the MA-4SPA carburetor and the engine overhaul in its entirety, Plaintiff's argument would conclude that Lycoming can fairly be said to be a *de facto* manufacturer of the overhauled engine, rendered defective by the replacement carburetor installed pursuant to its direction.[4]

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[3] Likewise compelling language is found in a 1972 letter the FAA provided to Lycoming with reports of malfunctions within its Marvel Schebler carburetor designs. That letter notes the following: "Marvel Schebler carburetors are a part of the engine type design and are not approved separately. The type certificate holder is responsible for the type design and also the correction of service problems. Marvel Schebler manufactures carburetors under PMA procedures, but this is based on a licensing agreement with the engine manufacturers . . . Service problems which may be design-related should be referred to the engine manufacturer for corrective action." (Doc. 234-13). This language supports Plaintiff's contention a reasonable trier of fact could conclude that Lycoming is, for purposes of products liability, the designer of a defective product.

[4] Relatedly, Plaintiff contends that Lycoming's continued airworthiness instructions, which specifically require the defective throttle body to bowl screws and lock tab washers, and

Lycoming's argument, at first blush, appears sound. A tunnel vision approach to this case—considering Lycoming's limited factual summary—indeed would likely conclude that Lycoming is not possibly a "manufacturer, distributor, or seller." *See Mellon*, 636 A.2d at 191 (negligence product liability); *Kimco Dev. Corp.*, 637 A.2d at 606 (strict product liability). However, Lycoming neglects critical facts regarding its role in the manufacture of the replacement carburetor and the overhaul of the engine; indeed, a reading of Lycoming's papers would could convince a layperson that Lycoming effectively washed its hands of the subject engine in 1969 and has had no control over it since. Review of the record as a whole, however, demonstrates that this is not necessarily the case, and that Plaintiff has created genuine issues of material fact with respect to whether Lycoming is indeed a manufacturer of the defective engine following its 2004 overhaul.

In this Court's opinion, it would entirely defy concepts of fairness and justice and run counter to the considered history of products liability policy to hold

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which Defendant Kelly was required to follow in overhauling the engine, are also defective and independently support a products liability action. Based upon our analysis herein, we find that the instructions themselves, including Lycoming's overhaul manuals, continued airworthiness instructions, and service bulletins, are part of the design defect itself which led to the ultimate "manufacture" of the defective engine upon its overhaul in 2004. Accordingly, we find it unnecessary to distinguish between the instructions and the product as the ultimate design defect is a culmination of the two.

that a Type Certificate holder who exclusively controls the design and manufacture of replacement component parts and mandates the installation of said parts during an overhaul of its engine could escape liability for a defect in a component part simply because it is not physically involved in the manufacture and installation process. Indeed, in our opinion, sufficient evidence has been submitted from which a reasonable jury could find that, while Lycoming's hands were not physically present in the plant during the manufacture or in the shop during the overhaul, its invisible hands were undeniably present as it was Lycoming's design directive which caused the allegedly defective carburetor to be produced and placed in the engine, ultimately leading to the 2005 crash.

In an instructive and factually similar case, the Pennsylvania Supreme Court held that "the status of type certificate holder and/or designer fall under the umbrella of manufacturer for purposes of GARA." *See Pridgen v. Parker Hannifin Corp. (Pridgen I)*, 905 A.2d 422, 436 (Pa. 2006). In *Pridgen*, the court was addressing issues of GARA repose and not questions of liability as here, but the court's opinion nonetheless aids our conclusion that a Type Certificate holder who knows of an alleged defect and knowingly fails to inform the FAA and ultimate consumer should not be relieved of liability merely because it was not the physical manufacturer of the replacement carburetor. Indeed, the court implied as much in

affirming its decision on rehearing, stating that "in the absence of GARA repose, [Lycoming] might indeed be liable for design defects in a replacement [carburetor] and/or the aircraft systems within which such components function." *Pridgen v. Parker Hannifin Corp. (Pridgen II)*, 974 A.2d 1166, 1172 (Pa. Super. Ct. 2009).

Finally, we would be remiss to turn a blind eye to the public policy rationales which support products liability causes of action. 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 great 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.").

A consideration of this public policy ultimately undermines Lycoming's argument and highlights our conclusion that an injustice would be accomplished by permitting a company such as Lycoming to exercise so much control over the manufacturing process while at the same time immunizing itself from liability for defects resulting from its process. Lycoming does not deny that it designed the MA-4SPA carburetor, that its design must be complied with by the manufacturer to

which it granted the design license, that the overhauling mechanic must comply with its design, or that the 2004 overhaul of its engine, including manufacture and installation of an MA-4SPA carburetor allegedly known to have been defective, was in fact accomplished pursuant to its binding designs and mandatory directives.

Ultimately, we agree with Sikkelee that questions of fact abound regarding whether or not Lycoming was the manufacturer of the overhauled engine in 2004. Indeed, to hold otherwise would be to immunize Lycoming from liability arising from defects within its own design. This Court declines to permit Lycoming to shift liability for a defective engine to its physical component part manufacturers and overhauling mechanics simply by physically removing itself from the overhaul process even though its directives control every aspect of said process. Such a decision would fly in the face of justice and defeat the long-established purposes of products liability actions. It is clear to this Court that the record contains ample evidence from which a reasonable finder of fact could conclude that Lycoming is, in essence, a *de facto* manufacturer of the allegedly defective engine upon its 2004 overhaul, subjecting it to products liability under Pennsylvania law.

Accordingly, we find that a genuine issue of material fact exists with regard to whether Lycoming is a manufacturer of the subject engine, allegedly rendered defective in 2004 upon the installation of a carburetor that Lycoming designed and

required to be installed in the subject engine.

B. Strict Liability

Our inquiry does not end with the determination that a reasonable jury could find that Lycoming is a manufacturer with regard to the 2004 engine overhaul. Strict liability also requires a showing that the product was defective and that the defect was the proximate cause of the plaintiff's injuries. However, as exemplified by the parties fervid briefing of the issue, the parameters of the strict liability requirements in Pennsylvania have, for some time, been in a state of flux.

As Lycoming correctly observes, the Third Circuit has twice predicted that the Pennsylvania Supreme Court, when presented with the opportunity to do so, will adopt the Restatement (Third) of Torts ("Restatement Third") to supplant the Restatement (Second) of Torts ("Restatement Second"). *See Covell v. Bell Sports, Inc.*, 651 F.3d 357, 359 (3d Cir. 2011); *Berrier v. Simplicity Mfg. Inc.*, 563 F.3d 38, 46 (3d Cir. 2009). Lycoming thus asserts that pursuant to both *Berrier* and *Covell*, the Plaintiff's strict products liability claim is governed by the Restatement Third. An abbreviated analysis of the intervening case law leads the Court to a different conclusion.

In *Bugosh v. I.U. North Am., Inc.*, 942 A.2d 897 (Pa. 2008), the Supreme Court of Pennsylvania certified for appeal the question of "[w]hether this Court

should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts." *Id.* While that appeal was pending, the Third Circuit in *Berrier* was tasked with predicting how Pennsylvania's highest court would answer this question. The Circuit concluded, after extensive analysis of Pennsylvania law, that the state court would likely adopt the Restatement Third when presented with the opportunity to do so. *Berrier*, 563 F.3d at 46.

Shortly after *Berrier* was decided, the Supreme Court of Pennsylvania, after extensive argument, dismissed the *Bugosh* appeal as improvidently granted; it thus did not decide whether the Restatement Third should definitively become the governing law in Pennsylvania. Not long thereafter, this Court was presented with the question of whether the Restatement Third or Restatement Second should be applied in a diversity action governed by Pennsylvania law in light of the *Berrier* and *Bugosh* actions. In *Milesco v. Norfolk S. Corp.*, 2010 U.S. Dist. LEXIS 780 (M.D. Pa. Jan. 5, 2010), this Court held that "the Pennsylvania Supreme Court's dismissal of *Bugosh* was a clear indication that it intends for the Second [Restatement] to apply in the Commonwealth for the time being." *Id.* at 9-10; *see also Durkot v. Tesco Equip., LLC*, 654 F. Supp. 2d 295, 297 (E.D. Pa. Sept. 9, 2009) (concluding that the court's dismissal of the *Bugosh* appeal was an affirmative declination of the Restatement Third).

As we made clear in our decision in *Milesco* in addressing the conflicting interpretations of the *Bugosh* and *Berrier* interplay, the Third Circuit's prediction in *Covell* is binding upon federal district courts sitting in diversity absent an affirmative indication from the Pennsylvania Supreme Court that it intends to retain the Restatement Second as the law in Pennsylvania. In our opinion, this indication was provided in *Beard v. Johnson & Johnson, Inc.*, 41 A.3d 823 (Pa. 2012), where the Pennsylvania Supreme Court expressly took notice of "the continuing state of disrepair in the arena of Pennsylvania strict-liability" law and nonetheless declined to take the opportunity to replace the Restatement Second with the Restatement Third. *Id.* at 836.[5]

Consistent with our rationale in *Milesco*, we believe that the Pennsylvania Supreme Court, by again declining to take advantage of the opportunity to adopt the Restatement Third, has indicated that the Restatement Second remains the law in Pennsylvania. Indeed, Justice Baer, in a concurring opinion, expressly observed the same, stating that "the current law of Pennsylvania . . . is Section 402A of the Restatement Second." *Id.* at 839 (Baer, J., concurring). Accordingly, we will apply the dictates of the Restatement Second in resolving the strict products liability

[5] Indeed, *Beard* makes it abundantly clear that there remains an ideological split within the Pennsylvania Supreme Court relative to adoption of the Restatement Third. The Third Circuit's prediction in *Covell* assumed the formation of a consensus that has not yet crystalized.

questions in this action.

In Pennsylvania, a manufacturer "is effectively the guarantor of his products' safety." *Salvador v. Atlantic Boiler Co.*, 319 A.2d 903, 907 (Pa. 1974). The Restatement Second subjects to liability anyone "who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property . . . for physical harm thereby caused to the ultimate user or consumer . . . if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." RESTATEMENT (SECOND) OF TORTS § 402A.

Under Pennsylvania's interpretation of the Restatement Second, "the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1022 (Pa. 1978). Defective conditions give rise to three types of strict products liability claims: (1) manufacturing defects, (2) design defects, and (3) warning defects. *See French v. Commonwealth Assocs.*, 980 A.2d 623, 632 (Pa. Super. Ct. 2009). Plaintiff's papers are suffused with allegations of negligence, strict liability, and defects, however her actual allegations are less than pellucid. It appears to the Court, however, that she is advancing both a design defect theory and a failure to

warn theory. We address these claims *seriatim*.

1. Design Defect

In *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), the Pennsylvania Supreme Court articulated the definition of a design defect within the context of then-recently adopted Section 402A. The court explained that "a manufacturer . . . is effectively the guarantor of his product's safety" and stated that the "seller must provide with the product every element necessary to make it safe for use." *See id.* at 1026 (quoting *Salvador v. Atlantic Broiler Co.*, 319 A.2d 903, 907 (Pa. 1974); *Berkebile v. Brantley Helicopter Corp.*, 337 A.2d 893, 902 (Pa. 1975)).

Lycoming first submits that Plaintiff cannot prevail on her design defect allegations because Lycoming did not manufacture the allegedly defective part. Having already determined that Lycoming might be subject to liability if the jury concludes that it was a manufacturer and designer of the carburetor and mandated its installation during the overhaul, we dismiss this contention. Lycoming also contends that the Plaintiff has failed to identify a defect in the engine design; it asserts that "[t]he only alleged design element related to the allegedly defective 'fuel metering system' [Plaintiff] identifies is that the engine was carbureted and not fuel injected." (Doc. 276, p. 7). Lycoming submits that utilizing a carburetion system instead of a fuel injection system does not support a design defect claim.

Lycoming's argument not only blatantly mischaracterizes Plaintiff's contentions, but also treads dangerously on the precipice of disingenuity. A review of the record and Plaintiff's submission clearly evidences that the Plaintiff's contention has continually been that the throttle body to bowl system incorporated in the carburetor renders the entire engine defective, that alternative options such as a safety wire would have been safer than the throttle body to bowl system, and that three experts have opined that the defect was not the mere fact of a carburetor system as opposed to a fuel-injected system, but the loosening of the throttle body to bowl assembly utilized by that carburetion system. Accordingly, Lycoming's only argument in this respect is without merit.

Plaintiff, on the other hand, provides abundant evidence to satisfy her burden at the summary judgment stage. Plaintiff's experts have concluded that the defective throttle body to bowl assembly—installed pursuant to Lycoming's Type Certificate design for its O-320 engine—was the cause of the accident.[6] Richard

[6] In its brief in Brief in Support of Motion for Summary Judgment (Doc. 257), Lycoming contends that Plaintiff's expert reports consist entirely of legal conclusions and that their opinions are thus inadmissible. *See, e.g., Berckeley Inv. Grp. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006). A review of the expert's submissions, however, indicates that this is not the case. The report of each of the Plaintiff's experts review the type certificate and the design drawings of the MA-4SPA carburetor and the O-320 engines, specifically focusing on the safety of the throttle body to bowl assembly, and address whether or not the defective assembly was a proximate cause of the 2005 aircraft accident. (*See, e.g.*, Doc. 234-4, ¶¶ 5.0, 6.10-.13; Doc. 234-5, p. 24; Doc. 234-6, pp. 15-16, 34). We thus summarily reject this argument.

H. McSwain, Ph.D, P.E., concludes that the "Lycoming LW-13659, Model MA-4SPA, carburetor has multiple failure modes that are related to design, materials selection, and construction that have the potential to cause in-service carburetor and engine malfunction" and that the throttle body to bowl assembly did in fact fail in the accident aircraft. (Doc. 234-4, ¶¶ 5.0, 6.10-.13). William R. Twa, Jr., in his report, recounts the lengthy history of the defect and concluded that the carburetor design and continued airworthiness instructions for overhauling the engine, including the mandated inclusion of a carburetor designed consistent with Lycoming's Type Certificate, are defective. (Doc. 234-5, p. 24).

Mr. Donald E. Sommer, P.E., also reviewed the history of the loosening throttle body to bowl assemblies. (Doc. 234-6, pp. 15-20). He investigated the subject engine after the crash and noted that the carburetor bowl screws were indeed loose. (*Id.*). After investigation, Mr. Sommer concluded that "[t]he accident O-320 MA-4SPA carburetor is unreasonably dangerous and caused the death of David Sikkelee," that Lycoming "failed to exercise reasonable care in the design, manufacture, and support of the accident aircraft's engine and carburetor," and that Lycoming's O-320-D2C engine "is a defective engine due to the incorporation of the Precision MA-4SPA carburetor." (*Id.* p. 34).

Lycoming has thus failed to present any law or evidence to this Court which

requires summary dismissal of the Plaintiff's design defect claim. Plaintiff has established by expert and other evidence that a design defect existed which a jury could reasonably conclude was the proximate cause of the accident. Plaintiff has further demonstrated that alternative designs were feasible and contemplated but, ultimately, rejected by Lycoming in favor of the defective throttle body to bowl assembly herein at issue. Thus, as Plaintiff has overcome her burden and presented evidence which, viewed in a light most favorable to her, creates genuine issues of fact to be determined by a jury, we will deny summary judgment on the Plaintiff's design defect claims.

2. Failure to Warn

A manufacturer is subject to failure to warn liability where a product contains a defect and "was distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product." *Donoughe v. Lincoln Elec. Co.*, 936 A.2d 52, 61-62 (Pa. Super. Ct. 2007). We have already stated above that the Plaintiff has presented enough evidence to support a finding that Lycoming's design was defective and a finding that said defective design was the proximate cause of the 2005 airplane crash. Thus, we must consider for this analysis only whether Lycoming failed to adequately warn of the defective carburetor installed within its engine pursuant to its mandate.

Lycoming again relies on its contention that it is not a "manufacturer" and thus fails to offer any evidence to disprove or dispute Plaintiff's allegation that it should have, and failed to, provide warnings regarding the defective carburetor design incorporated in its O-320 series engines advising potential users of the known dangers associated with the loosening throttle body to bowl assembly. Instead, Lycoming maintains only that it did not "manufacture" the product, an argument disposed of above.

Plaintiff cites to Lycoming's continuing airworthiness instructions and manual, void of any warning with respect to the defective carburetor design, as proof that Lycoming has failed to warn of a dangerous defect. Further, Plaintiff notes a complete lack of reports to the FAA regarding the various defects and malfunctions regarding the throttle body to bowl assembly. Without any argument or contradictory evidence presented by the Defendant to prove otherwise, ample evidence exists to put this issue to the jury. The evidence, viewed in a light most favorable to the Plaintiff, establishes a dearth of warnings from Lycoming with respect to an allegedly defective product, sufficient to survive summary judgment on her failure to warn claim.

B. Negligence

As with the strict liability claim, our negligence analysis is not complete

simply because genuine issues of material fact remain with respect to Lycoming's manufacturer status. Lycoming additionally contends that the Plaintiff has failed to establish the remaining elements of its negligence claim—that is, Lycoming asserts that Plaintiff has failed to submit evidence from which a jury could conclude that it breached an applicable standard of care and that said breach resulted in defects that proximately caused Plaintiff's injuries. (Doc. 276, pp. 7-9).

Lycoming states, correctly, that the Plaintiff's burden of proof on a strict liability negligence claim is to "show that the defendant had a duty to conform to a certain standard of conduct, that the defendant breached that duty, that such breach caused the injury in question, and actual loss or damage." *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1008 (Pa. 2003). In the products liability context, the duty of care arises where a reasonable jury might find that the defendant is a manufacturer, seller, or distributor of the allegedly defective product. *See Mellon*, 636 A.2d at 191. Here, we have concluded that the jury could reasonably attribute just such a duty to Lycoming in light of its control over the design, manufacture, and overhaul of the MA-4SPA carburetor and engine.

We have previously held that federal standards of care promulgated by the FAA apply in aviation cases such as this one and accordingly granted the Plaintiff leave to amend her negligence claims in order to fully state the federal standards

which she believes control. *See Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 438 (M.D. Pa. 2010). Plaintiff, in her Second Amended Complaint, asserts that Lycoming has breached copious federal standards in its promulgation of a defective design, mandated installation of the defective product, and failure to report the same, more specifically as follows:

- by not submitting truthful submissions to the FAA, including mandated reports of malfunctions and defects, in violation of 14 C.F.R. §§ 21.2, 21.3, 21.14, 21.21, 33.35, and 33.4;

- by incorporating design features or details which experience has shown to be hazardous or unreliability in violation of 14 C.F.R. § 33.15 and CAR § 13.100, 13.101, and by willfully concealing the same from the FAA in violation of mandatory reporting requirements

- knowingly designing or constructing an engine part which permits an unsafe condition of the engine between overhaul periods in violation of 14 C.F.R. § 33.19 and Civil Air Regulation ("CAR") § 13.104

- by designing and constructing a fuel supply system which did not ensure an appropriate mixture of fuel to the cylinders under all flight and atmospheric conditions in violation of 14 C.F.R. § 33.35 and CAR § 13.110

- by issuing continued airworthiness instructions which were defective as to the throttle body to bowl assembly for the MA-4SPA carburetor in violation of 14 C.F.R. § 33.4

- by holding the Type Certificate for a defective product and failing to report known malfunctions to the FAA regarding that defective product within twenty-four (24) hours after it

discovered said malfunctions in violation of 14 C.F.R. §§ 21.3, 21.303;

- by operating as an FAA licensed and certified repair facility and failing to make known to the FAA the defect in the carburetor design within ninety-six (96) hours of discovery of the defect in violation of 14 C.F.R. § 145.221(a);

- and by knowingly misrepresenting and willfully concealing the defect in the throttle body to bowl screws and attachment problems to the FAA in violation of 14 C.F.R. § 21.3.

The Plaintiff contends that, as an entity causing a product to be cast into the stream of commerce, Lycoming had the duty to abide by the above regulations. The parties' briefs focus primarily on the issue of whether or not Lycoming is a manufacturer, hence our detailed analysis of that issue and the parties respective positions above. Lycoming does not offer much argument with respect to the remaining elements of a negligence claim and we thus briefly engage in a largely independent analysis with respect to these elements.

To establish breach of the above standards, Plaintiff cites to the following facts: Lycoming approved the design change to the throttle body to bowl screw and assembly at issue while there were feasible design alternatives available (Doc. 268, ¶ 15); Lycoming required the defective throttle body to bowl screw and assembly at issue to be utilized by overhaulers such as the Kelly Defendants when overhauling the O-320 engine (*Id.* ¶ 17); Lycoming issued SB 366 in attempt to

alleviate the problem of loosening throttle body to bowl screws on MA-4SPA carburetors in its O-320 engines (*Id.* ¶ 19; Doc. 234-10); and Lycoming did not report this known defect to the FAA (Doc. 268, ¶¶ 7-8). Further, Plaintiff's experts, including an aircraft certification consultant and licensed mechanical engineers involved in forensic engineering and aircraft accident reconstruction, concluded that the O-320 engine at issue in this case was rendered defective by the mandated inclusion of a carburetor known to be defective. (*Id.* ¶ 20 (citing Doc. 234-5, pp. 22-26; Doc. 234-6, pp. 15)).

To prove that Lycoming was aware of the defect, Plaintiff points to two letters from Precision Airmotive to Mr. Rick Moffett at Lycoming on September 8, 2004 and November 8, 2004 advising Lycoming, as the Type Certificate holder for MA-4SPA carburetors, of loose throttle body to bowl issues related specifically to the Lycoming O-320 engine which had been occurring since Lycoming made the design change in 1965; the letter asked that Lycoming, as the Type Certificate holder, help research and alleviate the problem. (Doc. 268, ¶ 19 (quoting Doc. 234-14, pp. 3-4)). During his deposition, Mr. Moffett confirmed receipt of these letters; he stated that he may have forwarded the letter to the legal department, but took no other action. (*Id.* ¶ 22-23 (citing Doc. 234-7, pp. 74-75, 86-87).

This evidence, viewed in the light most favorable to Plaintiff as it must be at

this stage, creates a genuine issue of material fact with respect to Lycoming's alleged breach of federal standards of care governing it. A reasonable trier of fact could find from this evidence that Lycoming manufactured a defective product in violation of the FAA's regulations and that it was aware of the defect and failed to remedy it or notify the FAA as mandated by federal law.

Finally, we reach the question of causation. Based on the evidence presented to the Court by the Plaintiff, it is clear that questions of fact remain with respect to the issue of causation and that the question is thus undisputably within the province of the jury and not the Court. Plaintiff has provided ample evidence from which a reasonable trier of fact could conclude that the defective engine was the cause of the 2005 aircraft accident from which Plaintiff's injuries arose, most specifically, the following.

Plaintiff's experts have concluded that the defective throttle body to bowl assembly installed pursuant to Lycoming's instructions on Lycoming's O-320 engine was the cause of the accident. Richard H. McSwain, Ph.D, P.E., concludes in his report that the "Lycoming LW-13659, Model MA-4SPA, carburetor has multiple failure modes that are related to design, materials selection, and construction that have the potential to cause in-service carburetor and engine malfunction" and that the throttle body to bowl assembly did in fact fail in the

accident aircraft. (Doc. 234-4, ¶¶ 5.0, 6.10-.13). William R. Twa, Jr., in his report, detailed the lengthy history of the defect and concluded, among other things, that the design and continued airworthiness instructions for maintaining and overhauling the Lycoming LW-13659, MA-4SPA carburetor are defective. (Doc. 234-5, p. 24).

The report of Mr. Donald E. Sommer, P.E., is perhaps the most inculpative. Mr. Sommer reviewed the considerable history of the loosening throttle body to bowl assemblies and Lycoming's decades-long knowledge thereof. (Doc. 234-6, pp. 15-20). In addition, he investigated the subject engine and crash site, noting that the carburetor bowl screws were indeed loose at the time of the accident and concluding that "[t]he accident O-320 MA-4SPA carburetor is unreasonably dangerous and caused the death of David Sikkelee." (*Id.* pp. 15-20, 34). He further reports that Lycoming's continued airworthiness instructions for the carburetor were defective, that Lycoming "failed to exercise reasonable care in the design, manufacture, and support of the accident aircraft's engine and carburetor," and that the O-320-D2C engine "is a defective engine due to the incorporation of the Precision MA-4SPA carburetor." (*Id.*).

By presenting this evidence to the Court, the Plaintiff has created a genuine issue of material fact for the jury with respect to whether Lycoming breached the

applicable federal standards of care by negligently designing a defective product that proximately caused the death of the Plaintiff's decedent and substantial injury to the Plaintiff's brother. Accordingly, we will deny Lycoming's Motion as it pertains to Plaintiff's negligence claim.

V. CONCLUSION

For all of the reasons articulated above, we will grant Lycoming's Motions to the extent that they relate to the 1969 engine manufacture as the Plaintiff has failed to present any evidence which indicates that the engine as it left Lycoming's plant in 1969 was defective. All the same, for the reasons detailed at length above, the Court finds that genuine issues of material fact remain with regard to whether Lycoming is a manufacture relative to the defective carburetor and overhaul of the engine in 2004, whether a defect existed, and whether said defect proximately caused the Plaintiff's injuries. We will thus deny the Motions to the extent they relate to the 2004 overhaul of the subject engine.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Lycoming's Motion for Partial Summary Judgment (Doc. 220) and Motion for Summary Judgment (Doc. 252) are **GRANTED** to the extent that they seek judgment as a matter of law with respect to the condition of the engine in 1969.

2. Lycoming's Motion for Partial Summary Judgment (Doc. 220) and Motion for Summary Judgment (Doc. 252) are **DENIED** in all other respects. The case shall proceed on the negligence and strict liability design defect theories asserted by the Plaintiff as they relate to the 2004 engine overhaul.

3. The parties **SHALL FILE** a stipulation identifying new case management deadlines in accordance with the Court's calendar, as attached hereto, within twenty (20) days of today's date.

/s John E. Jones III
John E. Jones III
United States District Judge

Judge Jones
2012 Court Calendar

Trial List	Discovery Cut-off	Dispositive Motions Cut-off	Final Pre-Trial Conferences	Jury Selection
January	~~7/29/11~~	~~9/1/11~~	~~12/1/11~~	~~1/4/12~~
February	~~8/31/11~~	~~10/3/11~~	~~1/3/12~~	~~2/2/12~~
March	~~9/30/11~~	~~11/1/11~~	~~2/1/12~~	~~3/2/12~~
April	~~10/31/11~~	~~12/1/11~~	~~3/1/12~~	~~4/3/12~~
May	~~11/30/11~~	~~1/2/12~~	~~4/2/12~~	~~5/2/12~~
June	~~12/30/11~~	~~2/1/12~~	~~5/1/12~~	~~6/4/12~~
July	~~1/31/12~~	~~3/1/12~~	~~6/1/12~~	~~7/5/12~~
August	~~2/29/12~~	~~4/2/12~~	~~7/2/12~~	~~8/2/12~~
September	~~3/30/12~~	~~5/1/12~~	8/1/12	9/5/12
October	~~4/30/12~~	~~6/1/12~~	9/4/12	10/2/12
November	~~5/31/12~~	~~7/2/12~~	10/1/12	11/2/12
December	~~6/29/12~~	~~8/1/12~~	11/1/12	12/5/12

Case Management Conferences:

1/31/12
2/28/12
3/30/12
4/30/12
5/30/12
6/29/12
7/31/12
8/31/12
9/28/12
10/31/12
11/30/12
12/31/12

Judge Jones
2013 Court Calendar

Trial List	Discovery Cut-off	Dispositive Motions Cut-off	Final Pre-Trial Conferences	Jury Selection
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February	8/31/12	10/1/12	1/2/13	2/4/13
March	9/28/12	11/1/12	2/1/13	3/4/13
April	10/31/12	12/3/12	3/1/13	4/2/13
May	11/30/12	1/1/13	4/1/13	5/2/13
June	12/31/12	2/1/13	5/1/13	6/4/13
July	1/31/13	3/1/13	6/3/13	7/2/13
August	2/28/13	4/1/13	7/1/13	8/2/13
September	3/29/13	5/1/13	8/1/13	9/4/13
October	4/30/13	6/3/13	9/3/13	10/2/13
November	5/31/13	7/1/13	10/1/13	11/4/13
December	6/28/13	8/1/13	11/1/13	12/3/13

Case Management Conferences:

1/30/13
2/27/13
3/27/13
4/30/13
5/31/13
6/28/13
7/31/13
8/30/13
9/30/13
10/30/13
11/27/13
12/30/13

Exhibit "B"

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;	:	No. 4:07-cv-00886
Plaintiff,	:	Hon. John E. Jones III
v.	:	
PRECISION AIRMOTIVE, CORPORATION, *et al.*,	:	
Defendants.	:	

ORDER

July 26, 2012

This matter came before the Court on the Motion of Defendant, Lycoming Engines, to Amend Pursuant to 28 U.S.C. § 1292(b). (Doc. 302). The Court has been thoroughly advised of the premises for said Motion and, upon consideration of the substantial disagreement within this District and others within this Circuit brought now to the Court's attention by the Defendant, will grant the Defendant's Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion to Amend Pursuant to 28 U.S.C. § 1292(b) (Doc. 302) is **GRANTED**.

2. The Order entered July 3, 2012 is hereby **AMENDED** to include the following language:

> "The Court is of the opinion that such Order involves a controlling question of law, specifically and limited to the issue of whether the Pennsylvania Supreme Court would adopt the RESTATEMENT (THIRD) OF TORTS or continue in its application of the RESTATEMENT (SECOND) OF TORTS, as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation."

/s John E. Jones III
John E. Jones III
United States District Judge

JILL SIKKELEE,
individually and as personal representative
of the Estate of David Sikkelee, Deceased

v.

PRECISION AIRMOTIVE CORPORATION;
PRECISION AIRMOTIVE LLC,
individually and as Successor-in-Interest
to Precision Airmotive Corporation;
BURNS INTERNATIONAL SERVICES CORPORATION,
individually and as Successor-in-Interest to Borg-Warner Corporation,
and Marvel-Schebler, a Division of Borg-Warner Corporation;
TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION,
a Division of Avco Corporation;
AVCO CORPORATION;
KELLY AEROSPACE, INC.,
individually and Joint Venturer and as Successor-in-Interest;
KELLY AEROSPACE POWER SYSTEMS, INC.,
individually and as Joint Venturer and Successor-in-Interest,
a/k/a Electrosystems, Inc., a/k/a Confuel, Inc.;
ELECTROSYSTEMS, INC.,
individually and as Joint Venturer and as Successor-in-Interest,
a/k/a Consolidated Fuel Systems, Inc., a/k/a Confuel, Inc.;
CONSOLIDATED FUEL SYSTEMS, INC., a/k/a Confuel, Inc.

Avco Corporation, Petitioner