IN THE

Supreme Court of Virginia

RECORD NO. 130627

MICHELLE C. HARMAN,
Administratrix of the ESTATE of
JOSEPH A. GRANA, III, Deceased,
and
STEPHANIE E. GRANA BEMBERIS,
Personal Representative of the ESTATE OF
JOSEPH E. GRANA, SR., Deceased,

Appellants,

v.

HONEYWELL INTERNATIONAL, INC.,

Appellee.

OPENING BRIEF OF APPELLANTS

Roger T. Creager (VSB No. 21906)
THE CREAGER LAW FIRM, PLLC
1500 Forest Avenue, Suite 120
Richmond, Virginia 23229
Telephone: (804) 747-6444
Facsimile: (804) 747-6477
rcreager@creagerlawfirm.com

John C. Shea (VSB No. 17436)
Mark S. Lindensmith (VSB No. 20452)
MARKS & HARRISON, P.C.
1500 Forest Avenue
Richmond, Virginia 23229
Telephone: (804) 282-0999
Facsimile: (804) 288-1853
jshea@marksandharrison.com

Anita Porte Robb (*pro hac vice*)
Gary C. Robb (*pro hac vice*)
ROBB & ROBB LLC
1200 Main Street, Suite 3900
Kansas City, Missouri 64105
Telephone: (816) 474-8080
Facsimile: (816) 474-8081
arobb@robbrobb.com

Counsel for Appellants

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

PRELIMINARY STATEMENT.....1

ASSIGNMENTS OF ERROR.....2

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW.....3

STATEMENT OF FACTS.....6

ARGUMENT.....30

A. Hearsay opinions in the 'Mooney Report,' and the hearsay report itself, were erroneously introduced in evidence under the 'authoritative treatise' statute even though there was no testimony which brought the report within the requirements of that statute.....30

B. The trial court erred in overruling the Administrators' objections to Honeywell's closing arguments which violated Virginia law and the pretrial rulings excluding any "evidence or argument" regarding the purported safety history of Honeywell's product.....33

C. In view of the evidence of multiple proximate causes, it was critically important that the jury be instructed that "there may be one or more proximate causes" and "proximate cause need not be proved with such certainty as to exclude all other possible causes".....39

D. The trial court erred in overruling the Administrators' objections to testimony from Abel that was inadmissible because it lacked a sufficient foundation, was tainted by missing variables, was speculative, was irrelevant and invaded the province of the jury.....44

E. The trial court erred in allowing Norman to give testimony about his subjective feelings and experiences in flying the Mooney airplane and his subjective comparison of flying it to flying a Skyhawk. 47

CONCLUSION 50

CERTIFICATE OF SERVICE 52

TABLE OF AUTHORITIES

CASES

Bostic v. About Women OB/GYN, P.C., 275 Va. 567 (2008) 31, 32

Carolina, Clinchfield & Ohio Railway Co. v. Hill, 119 Va. 416 (1916) 42

City of Radford v. Calhoun, 165 Va. 24, 181 S.E. 345 (1935) 33

Commonwealth v. Wynn, 277 Va. 92 (2009) 31

Cooper Industrial, Inc. v. Melendez, 260 Va. 578 (2000) 34

Doe v. Dewhirst, 240 Va. 266 (1990) 44

Featherall v. Firestone Tire & Rubber Co., 219 Va. 949 (1979) 45, 48

Ford Motor Co. v. Boomer, 285 Va. 141 (2013) 41, 42

Goins v. Wendy's International, Inc., 242 Va. 333, 410 S.E.2d 635 (1991) 33

Holmes v. Levine, 273 Va. 150 (2007) 40

Jones v. Ford Motor Co., 263 Va. 237 (2002) 37

Keesee v. Donigan, 259 Va. 157 (2000) 46, 47

Landrum v. Chippenham & Johnston-Willis Hospitals, Inc., 282 Va. 346 (2011) 30

Lawlor v. Commonwealth, 285 Va. 187 (2013) 39

McClung v. Commonwealth, 215 Va. 654 (1975) 39, 40, 41

McMunn v. Tatum, 237 Va. 558 (1989) 31

Moore v. City of Richmond, 85 Va. 538, 8 S.E. 387 (1888) 33

Norfolk & W. Railway v. Puryear, 250 Va. 559 (1995) 30, 46, 47

Pettus v. Gottfried, 269 Va. 69 (2005)..... 45, 46

Reid v. Baumgardner, 217 Va. 769 (1977) 35, 36

Schlimmer v. Poverty Hunt Club, 268 Va. 74 (2004) 39

Tittsworth v. Robinson, 252 Va. 151 (1996)..... 46

Velocity Express Mid-Atlantic v. Hugen, 266 Va. 188 (2003)..... 35, 36, 37

Walker v. Commonwealth, 281 Va. 227 (2011) 30

White Consolidated Industry, Inc. v. Swiney, 237 Va. 23 (1989) 43

Wood v. Woolfolk Properties, Inc., 258 Va. 133, 515 S.E.2d 304 (Va. 1999) 33

STATUTES

Va. Code § 8.01-401.1 ..... 15, 31

Va. Code § 8.01-379.2 40

RULES OF EVIDENCE

Va. R. Evid. 2:802 30

Preliminary Statement

At 10:16 a.m. on April 27, 2008, a Mooney airplane took off from the Chesterfield airport. It crashed 2 1/2 minutes later. The pilot and his father were killed. Investigation showed a malfunction of the plane's defective Honeywell flight control system caused the crash. At trial:

- In this warranty case, Honeywell was allowed to admit hearsay on key disputed issues by claiming a crash report was an 'authoritative treatise.'
- In violation of Virginia law and the pretrial Order barring evidence or argument regarding the purported absence of prior incidents, Honeywell repeatedly argued in closing that the jury should find in its favor because no prior incidents had been proved. The court gave apparent approval to this by overruling objections and refusing a curative instruction.
- Despite evidence of multiple proximate causes, the court refused to instruct the jury there may be more than one proximate cause and proximate cause need not be proved with certainty.
- Two witnesses who were never present at the airfield were allowed to give subjective, improper, unfounded, irrelevant, highly prejudicial testimony (e.g., one said he "concerns" about the pilot's "judgment" in taking off, and the other said he was "afraid of" the airplane).
- The Administrators of the Decedents seek a new trial.

Assignments of Error

1. The trial court erred in overruling the Administrators'[1] objections to the introduction into evidence of the hearsay "Mooney Report" and testimony regarding its contents (JA1520-25).[2]

2. In closing argument, Honeywell International, Inc. ("Honeywell") asserted that there was a complete absence of prior similar incidents; the trial court erred in overruling the Administrators' objections to Honeywell's arguments which violated both the pretrial limine Order and Virginia law (JA56-57, 338, 401, 601-610, 1584, 1605-07).

3. The trial court erred in refusing to grant the Administrators' jury instruction that there may be more than one proximate cause of a crash and proximate cause need not be proved with such certainty as to exclude all other possible causes (JA352, 1545-47).

4. The trial court erred in allowing William Abel, who was not present at the airfield, to testify that he "had some concerns about the [pilot's] judgment taking off into conditions based on the weather that – that was reported to me" and to give other testimony which was inadmissible because it lacked a sufficient foundation, was tainted by missing variables, speculative, based on hearsay, improper opinion testimony, improperly prejudicial, irrelevant, and invaded the province of the jury (JA135-143, 723-741).[3]

---

[1] Michelle C. Harman, Administratrix of the Estate of Joseph A. Grana, III, Deceased and Stephanie E. Grana Bemberis, Administrator of the Estate of Joseph E. Grana, Sr. are, respectively, the administrators of the estates of the pilot and the pilot's father (the "Administrators").

[2] The Joint Appendix is cited as, "JA___ [page numbers]." In the few instances where Trial Transcript pages are cited which are not in the Appendix they are cited as, "TT___ [page numbers]." The text of the Assignments of Error is identical to the Assignments of Error set forth in the Petition for Appeal. The citations to the Record have been converted to cite the corresponding pages of the Joint Appendix.

[3] Abel's testimony was presented by edited videotaped deposition testimony. *See, e.g.,* JA1266-1336, 1349-61. The Administrators'

5. The trial court erred in allowing Robert Norman, a co-owner of the airplane in question, who had a very different level of training, qualifications, and experience from the deceased pilot, to give extensive testimony regarding his subjective feelings and experiences concerning flying the Mooney airplane and another airplane; this testimony was inadmissible because it lacked sufficient foundation and was irrelevant, subjective, conclusory, improper opinion testimony, and grossly prejudicial (JA756-83).[4]

Nature of the Case and Material Proceedings Below

At 10:16 a.m. on April 27, 2008 a single-engine Mooney airplane piloted by Joseph Grana, III and carrying Joseph Grana, Sr., his father (also a licensed pilot) took off from the Chesterfield County Airport and was in the air for only two and one-half minutes before it crashed (JA978, 992).[5] Both men were killed. The first 90 seconds of the flight were entirely normal (JA978-92). The pitch of the airplane then suddenly began to move up and down in a very erratic manner (JA948-49). Although the pitch during the first half of the flight was a normal climb pitch of 7 to 8 degrees

---

objections were raised and preserved during pretrial arguments and rulings on the objections to Abel's deposition testimony (JA 723-31).

[4] Norman's testimony was presented by edited videotaped deposition testimony. *See, e.g.,* JA 1380-1409. The Administrators' objections were raised and preserved during pretrial arguments and rulings upon the Administrators' objections prior to presentation of Norman's videotaped deposition testimony (JA756-783).

[5] Citations are provided to pages of the record which support the statements made in this Opening Brief. In many instances, additional citations to the record could be provided but they would be so numerous they were not provided.

upwards, the plane then started “turning and pitching up and down” (JA984-92). The pitch then became and remained steeply “nose-down” and the plane crashed (JA986, 1074-75).

Two gears in the Honeywell autopilot (the “capstan gear” and the “pinion gear”) in the “pitch servo” portion of the Honeywell autopilot determined and controlled the pitch of the Mooney airplane (JA1009-11). Those gears move horizontal portions of the tail (JA970, 1005-06). When the gears move the tail pieces upwards, the tail moves down and the airplane’s nose moves up; when the gears move the tail pieces downwards, the tail moves down and the nose moves down (JA974).

The Administrators’ experts testified that post-crash examination of the airplane components (in particular a certain jackscrew) indicated the pitch setting at the time the plane crashed was “nose low” due to a malfunction of the pitch servo gears that created a condition known as “runaway trim,” rendering the airplane uncontrollable (JA985-86, 1005-07, 1074-75). They testified that pitch aberrations had been caused by “binding” and “jamming” of the two gears in the autopilot resulting from thousands of particles that a hole in the design of Honeywell’s pitch servo had allowed to enter the unsealed area of the gears and become wedged between them (JA851-57, 964-73, 1000-06).

Other manufacturers sealed the portion of their autopilot that contained the pitch-servo gears (JA1015-1028). In contrast Honeywell's design did not seal the gears but instead included a hole directly above the gears that created a "passageway" that allowed foreign debris to fall down onto and jam the gears (JA876-878, 973, 1185-87). The Administrators' experts concluded that Honeywell's design was unreasonably dangerous and caused the crash (*Id.*).

The Administrators brought these wrongful death actions. The only claim that was tried was the claim for <u>breach of the warranty of merchantability</u> against Honeywell. The actions were consolidated for trial. In this warranty action, contributory negligence and assumption of the risk were not a defense (JA338). [Honeywell even stipulated that assumption of the risk was not a defense. *Id.*] The trial court also held (and even Honeywell conceded) there was no evidence to support any defense that the product had been misused (JA1548-49). The trial court ruled there was no evidence to support a 'superseding cause' instruction (JA1565-66). [Honeywell did not assign any cross-error]. <u>Under the law governing this warranty action, Honeywell could be held liable even if there was more than one proximate cause</u>. Even if Honeywell established that the pilot had done something that was "<u>a proximate cause</u>" of the crash (as Honeywell

claimed its evidence showed), Honeywell would still be liable if its product was also a proximate cause of the crash.

The trial court bifurcated the trial. At the close of the Administrators' evidence, and at the close of all the evidence, Honeywell made a motion to strike asserting that the evidence was not sufficient to allow the jury to find that its product was defective and caused the crash. The trial court denied Honeywell's motion to strike (JA1212-1215) and Honeywell has not assigned any cross-error. On appeal, Honeywell cannot deny that the Administrators' evidence was entirely sufficient to prove Honeywell's product was defective and was a proximate cause of the crash.

At the end of liability stage of the trial, the jury returned a defense verdict on the issue of liability. The Administrators filed a post-trial motion to set aside the verdict and for new trial which raised all of the issues which are now the subject of the Administrators' Assignments of Error (JA421-25, 1635-1714). The trial court overruled all aspects of the Administrators' post-trial motion and entered judgment for Honeywell (JA428-37). The Administrators timely noted and were granted these appeals.

Statement of Facts

At 10:16 a.m. on Sunday, April 27, 2008, Joseph Grana, III ("Grana"), and his father began their flight from the Chesterfield County Airport.

Honeywell's own evidence showed it was a mild Spring day (62 degrees); there were no storms or lightning, no significant rain (at most perhaps a light drizzle), and there was almost no wind (4 knots) (JA451). At ground level and up to an altitude of 800 feet visibility was very good (10 miles); beginning at 800 feet there were clouds (JA451, 990).

Grana had all licensing and authority under Federal Aviation Administration (FAA) regulations to fly in the conditions that existed (JA1140-48, 1318-28). He was licensed and qualified to fly under Visual Flight Rules. He had an endorsement for cross-country flight. Since April of 2007, he had been licensed and qualified to fly under the Instrument Flight Rules ("IFR") that apply when the pilot must fly by instruments because visibility is impaired by clouds or other weather conditions ("Instrument Meteorological Conditions" or "IMC") (*Id.*). Grana had more than 334 hours of total flight time, over 30 hours of IMC flight time, and an additional 34 hours of simulated (hooded) IMC flight time (*Id.*, JA471). He had performed 103 instrument landing approaches (*Id.*). He was qualified and proficient in flying complex, high-performance aircraft (*Id.*, JA 1320-26). He was very familiar with the Mooney aircraft he was flying on April 27, 2008 since he was a co-owner of that plane and had spent more than 73 hours flying it (JA471). Because there were clouds above 800 feet, the

short flight to Franklin was going to add additional IMC flight time to Grana's previous IMC experience. Grana and his father spent an hour planning the flight the night before and checked the weather conditions on a computer at the airfield immediately before takeoff (JA451, JA1132).

Grana was cleared by air traffic controllers to fly to the Franklin airport (JA1169-70). The Mooney aircraft did not have a "black box" or other data recorder and there were no radio communications during the very short flight. But the National Transportation Safety Board Air Traffic Control Radar Study of the radar data provided specific details every 4.5 seconds regarding the exact position of the airplane (JA976-77). The radar flight data showed the flight was initially entirely normal (JA980-92). In the normal, initial stage of the flight the aircraft climbed and began to make a 180-degree-left-turn as directed by air traffic control (*Id.*) After the initial part of the flight, however, the movements of the airplane suddenly changed. The nose suddenly began pitching up and down and turning (*Id.)* The plane went into a "nose-down pitch," out of control, and crashed (*Id.*).

The wreckage was examined by experts for both sides. Detailed examination was made of the components that were necessary to control the airplane in flight. The Honeywell autopilot system included a pitch servo that causes the horizontal stabilizer in the tail of the airplane to move

up or down (JA1102-03). Movement of this horizontal stabilizer (or "elevator") causes the airplane's pitch to change. The pitch servo also causes another flight control device, a trim servo, to operate (*Id.*) If the gears in the pitch servo become jammed and operate improperly the autopilot system "continues to increase the pitching down and pitching up as the auto-trim trims the airplane" (*Id.*). Airplane experts refer to this situation as "runaway trim" and the Administrators' experts testified it renders the airplane uncontrollable (*Id.*). Runaway trim is "an uncommanded movement of the controls that is completely unexpected by the pilot" and that takes control of the pitch away from the pilot (JA1134).

The Administrators' experts testified the crash was caused by runaway trim and downward pitch which resulted from jamming and binding of the Honeywell autopilot pitch servo gears (JA851-58, 965-66, 1004-06). Their inspection of the jackscrew which controlled the tail position (and thus the pitch of the plane) showed that at the time of the crash the tail was in a "nose low" position and "nose down" position (JA1074-75, 1098, 1107). The jammed pitch-servo gears caused runaway trim and nose-down pitch and rendered the aircraft uncontrollable (JA941-92, 1099-1100).

High-magnification examination of the teeth of the gears revealed damage in a particular area where they meshed together (JA818-880, 966).

The Administrators' expert found thousands of particles of metal debris between the gears (JA855). The particles were bent and flattened due to being crushed between the pitch-servo gears (JA855-863). Chemical analysis of the debris particles showed they consisted of metals of various types which were different from the airplane components and thus had entered into the unsealed area of the pitch-gears from outside the autopilot system (Id.)[6] The Administrators' experts testified Honeywell's autopilot system was designed in an unreasonably dangerous manner since it had a hole that created a "passageway" for the foreign particles to enter into, contaminate, jam, and interfere with the operation of the pitch servo gears and render the airplane uncontrollable (JA893, 965-963, 986, 996, 1006-08).

Donald E. Sommer, Ph.D., an expert with 42 years of experience in failure analysis and airplane crash investigation, testified:

> The analysis of the accident parts proves that there was foreign debris -- there was foreign debris in there that was in an area and of such hardness and created such resistance that it literally broke and damaged hardened steel gear teeth. The particles that were between the gear teeth were smashed and rolled as they would be with extreme forces. . . . So we found positive evidence, positive proof there was contamination in the

[6] Honeywell contended that the damage to the gears had occurred in the impact, during the fire after the crash, or during removal or movement to storage. The Administrators' presented extensive evidence disproving this contention (JA841-875).

> gears of the servo. . . . [T]he very design of the servo is that it responds to resistance. That's the purpose of the servo is to respond to resistance. That response to resistance unfortunately is an autotrim . . . . When the pilot attempts to overcome the autotrim, he causes further autotrim. It's an unfortunate characteristic of the system. Once that autotrim has got that airplane essentially wound up against the pilot to where he can't hold onto the control anymore, the airplane goes into an uncontrollable descent, the airplane goes into uncontrollable turns exactly like the accident airplane did and the pilot is in serious trouble or the occupants of the airplane are in serious trouble (JA941-942).

The Administrator's evidence showed that even if the autopilot was not actively being used the entry of foreign debris into the gears would interfere with control of the aircraft since the <u>gears within the autopilot were always used to control the pitch of the airplane</u>, regardless of whether the autopilot was being used to fly the plane (JA919, 995, 1004-07). Further, there was evidence showing that the autopilot <u>was</u> being used at the time of the flight.[7]

Additional facts pertinent to the Assignments of Error ("AOE") follow:

- **AOE 1**:
  <u>Admission into evidence of hearsay statements and opinions in the "Mooney Report" on crucial, hotly contested issues was error.</u>

---

[7] As soon as the airplane master radio switch is turned on the autopilot system is energized (JA995). An expert testified that the extremely smooth movements of the airplane during the initial part of its flight showed that the autopilot was in use (JA982-83). Moreover, Grana's flight-instructor testified that he had trained Grana how to use the autopilot when he flew the plane (JA1304-05).

The critically important issue in the case was whether contaminated gears in Honeywell's autopilot system had caused the pitch of the airplane to become erratic and go nose-down, and thus rendered the airplane uncontrollable. The tail pitch-setting at the time of the impact (whether normal take-off, or nose-down) was also critically important. These issues were hotly contested. The experts for both sides agreed that the pitch-trim position of the horizontal tail-stabilizers at the time of the crash was indicated by the position of a particular "jackscrew" in the airplane and they agreed on the position of the jackscrew shown by examination after the crash (JA1074-75, 1098, 1123, 1513, 1499, 1504-05, 1513-1515). They disagreed, however, about whether that jackscrew position indicated a nose-low pitch setting or normal takeoff pitch-setting (*Id.*). The experts for the parties also disagreed about whether the airplane had become uncontrollable at the time of the crash (*Id.*, JA838, 965-66, 975, 984-87, 1001-08, 1099-1100).

Honeywell recognized that the crucial importance of these disputed issues. Thus, Honeywell's counsel emphasized in closing argument that in order to prevail the Administrators had to prove that the autopilot "servo caused the tail to get in an uncontrollable position" (JA1580). Honeywell's hired expert claimed the position of the jackscrew (and thus the tail pitch-

setting) was normal and safe, and did not render the plane uncontrollable (JA1513). Honeywell then sought to use the hearsay opinions of non-testifying witnesses to bolster the contentions of its hired expert on these points. Despite timely objection, the trial court erroneously allowed Honeywell to accomplish this by introducing inadmissible hearsay statements and opinions contained in a report (hereinafter the "Mooney Report") (JA459-69) prepared by an employee of the manufacturer of the aircraft, the Mooney Airplane Company.

The last page of the text of the Mooney Report contained the Mooney employee's hearsay opinion on the ultimate issue in the case, i.e., whether the airplane was uncontrollable at the time of the accident:

> Conclusions: The IIC, Lycoming representative and myself did not find any evidence that the aircraft engine was not capable of producing power or that the aircraft was uncontrollable at the time of the accident.

(JA463) (all emphasis in this brief is added). Worse still, the Mooney Report actually stated this was the opinion held by three people.

On the related crucial issue—whether the jackscrew position indicated a "nose-low" tail position or a normal takeoff position—one of Honeywell's most important experts was allowed to read from and display to the jury hearsay from the Mooney Report to support his opinion that the

jackscrew position showed the pitch was in an entirely normal takeoff position. Honeywell's expert testified:

> Q. And what did the Mooney Aircraft Company investigation indicate with respect to that trim position?
> A. It says in the last sentence, This indicates an approximate takeoff position trim setting. . . .
> Q. And again, it is Exhibit 11. And would you show that page from the Mooney Aircraft report? We're looking at the Mooney Aircraft page 0006.
> A. Yes. And this was the part that I just read. This indicates an approximate takeoff position trim setting. And to validate what we just spoke about, it says that there were six threads exposed on the jackscrew. And it's the same six threads we were talking about from the full nose-down position. (JA 1524).

The improperly prejudicial impact of these inadmissible hearsay opinions was further underscored since Honeywell's expert not only was erroneously allowed to read from and display the hearsay report to the jury, he was allowed to introduce the entire hearsay report into evidence as an exhibit (JA1525).

The Mooney Report was not an authoritative, published book, article, or pamphlet on any subject of science. Honeywell's expert never testified that it had been accepted as a reliable authority on any subject. Instead, it was a hearsay report issued by a single employee of the Mooney Airplane Company containing his opinions concerning this very crash and the disputed issues in this case.

When Honeywell's counsel sought to elicit this hearsay from its expert during his direct examination, the Administrators' counsel immediately objected on the grounds the statements were inadmissible hearsay, were not an 'authoritative treatise,' contained inadmissible opinions and conclusions, and no proper foundation had been laid (JA1520-23). Honeywell claimed that the 'authoritative treatise' hearsay exception of *Virginia Code* § 8.01-401.1 applied. Even though no testimony was ever presented to show that the requirements of the statute were met (JA1520-25), the trial court overruled the Administrators' objections and ruled that the Mooney hearsay document constituted a "pamphlet" which was admissible under the statute (JA1523).

The hearsay Mooney Report was vitally important to Honeywell's efforts to bolster its expert's opinions. Honeywell's argued in closing:

> We looked at the Mooney report, the Mooney report that Dr. Clarke said. It was at one and three-quarters inch on the end of the threads at the forward edge of the trim screw. This indicates an approximate takeoff position trim setting. Perfectly safe position. (JA1582-83).

- **AOE 2**:
  Honeywell violated Virginia law barring evidence or argument regarding a purported absence of other incidents.

It was very important to a fair trial of the case in accordance with Virginia law that Honeywell not be allowed to present evidence or argument

regarding a purported absence of previous incidents involving its product malfunctioning. The Administrators filed Motion in Limine X which moved the trial court to apply Virginia law and rule that Honeywell could not present any evidence or argument referring to the purported safety history of its product (JA53-57). Honeywell argued that the trial court should not follow the decisions of the Supreme Court of Virginia but instead should follow several federal decisions which it contended supported its argument that a product's allegedly "'safe history'" (i.e., absence of previous incidents) is relevant and admissible on the issue of whether or not a product is defective (JA200-203, 601-610). But the Administrators noted that the Supreme Court of Virginia has held the rule prohibiting reference to a purported absence of previous incidents is applicable not only in negligence actions but also applies in warranty actions (JA56). Moreover, Honeywell's own pretrial briefs admitted that under Virginia product liability law whether there were previous incidents of the same kind of malfunction is not relevant or admissible to show the incident happened in the manner claimed by the product user (JA63).

At the pretrial hearing, the Court heard extensive argument and, ruling from the bench, rejected Honeywell's argument (JA601-610). The trial court granted the Administrator's Motion in Limine X and ruled that

Virginia law prohibited any "evidence or argument" regarding the purported safety history of Honeywell's product (JA610). The trial court issued both a letter opinion (JA338) and a written Order granting the Administrators' motion in limine (JA401) ("[On] Plaintiffs' Motion in Limine X the Court GRANTS this Motion and <u>any evidence or argument as to the 'safety history' of Honeywell's autopilot is to be excluded</u>"). No cross-error has been assigned to this ruling.

Despite all this, in closing argument Honeywell's counsel blatantly violated Virginia law and the pretrial Order of the Court when he argued:

> . . . They walk you into this courtroom and tried to convince you of this theory. Don't have one test. Didn't sprinkle any debris in it to show does this happen. How can it run away? Don't you expect that out of them? If they have the burden of proof here to prove this happened, why didn't they show you this stuff? **Why didn't they prove it? <u>It's never happened before. There is no evidence this has ever happened anywhere any time</u>.** (JA1584).

The Administrators' counsel immediately objected on the ground that the argument violated the trial court's ruling on the motion in limine (JA1584). The prejudice caused by Honeywell's improper argument was then gravely compounded by the fact that the trial court <u>overruled</u> the objection, thereby gave its apparent approval to the improper argument, and directed Honeywell's counsel to "[p]lease proceed" (JA1584).

Honeywell thus improperly argued to the jury that the binding or jamming of the autopilot gears due to foreign matter had "never happened before" under any circumstances ("anywhere", "anytime").[8] Honeywell's counsel was erroneously allowed to make the very argument that Virginia law and the pretrial limine ruling and Order prohibited, i.e., that the absence of previous similar incidents showed its product was safe and not defective.

The trial court's overruling of the Administrators' objection not only in effect approved the improper argument, the erroneous ruling emboldened Honeywell's counsel to hammer the improper argument home. *See* JA1591 ("[s]afe design for 35 years, and no complaints")[9]; 1591-92 ("we submit to you that with . . . the lack of any prior evidence of a problem, that it was reasonably designed, and perfectly safe, and not an unreasonably

---

[8] Not only was there no evidence of that sweeping, improper argument, it was **untrue**, since there was evidence of previous problems with autopilot gears (including Honeywell autopilot gears) binding or jamming and autopilot systems malfunctioning [evidence that was not admissible to prove a defect in the product and the resulting jammed gears caused the crash because Virginia law previous incidents are not admissible to prove the incident happened in the manner claimed by the plaintiff (i.e., to 'corroborate' the plaintiff's contentions). *See, e.g.,* JA63, 354-79, 472-508, 1618-34)].

[9] Remarkably, this was almost a verbatim repetition of the argument that Honeywell had, at the pretrial hearing, unsuccessfully contended it should be allowed to make at trial (JA606).

dangerous design"); 1603 ("it can't do that and has never happened before"). Some of Honeywell's lawyer's final arguments to the jury were:

> . . . I would suggest that you **use common sense. <u>No evidence of a prior problem at all ever</u> . . . .** (1603).

The Administrators' counsel objected again. The issue was so critically important the Administrators' counsel delayed his rebuttal closing argument so he could renew his objection. The Administrators' counsel specifically asked the Court to give a curative instruction to the jury:

> MR. ROBB: I objected at the time. He said it again. And rather than object, I immediately approached after the conclusion of his closing. <u>He said not once, but twice, there was a lack of any prior problem. There are no other accidents, which is a direct, absolute contravention of this court's ruling as to the lack of any prior incidents</u>. It was beyond asking Mr. Sommer [referring to cross-examination probing the expert's previous knowledge and experience with this type of crash].[10] He affirmatively stated that there were no prior incidents. Your Honor, that is a violation of his [your] ruling. And as to relief, what we seek at this juncture is an instruction by the court that there was a statement about that, ladies and gentlemen, and you are to disregard that statement. (JA 1606).

---

[10] In probing the qualifications of the Administrator's experts, Honeywell's counsel had asked the Administrators' experts about their previous work, experience, and knowledge of autopilot crashes, including crashes involving Honeywell's autopilot. When Honeywell's counsel went further, however, and asked what reports of problems with Honeywell product they had heard, objections were made and sustained numerous times (JA1043-46, 1203). Moreover, whether a <u>particular</u> expert knows about or <u>remembers</u> having heard reports of previous problems would not, in any event, prove there had been no previous problems.

The trial court once again failed to sustain the objection, and refused to grant the Administrators' motion for a curative instruction (JA1606).

- **AOE 3**:
  The trial court refused to give the Administrators' proper jury instruction on proximate cause.

  The Administrators' proposed jury Instruction Number 11 stated:

  > A proximate cause of an accident, injury, or damage is a cause which in natural and continuous sequence produces the accident, injury, or damage. It is a cause without which the accident, injury, or damage would not have occurred. **There may be one or more proximate causes. Proximate cause need not be established with such certainty so as to exclude every other possible conclusion.**

(JA352). The Court refused to grant the last two sentences of this instruction (JA1545-47). There was evidence to support this instruction, it correctly stated Virginia law, and it should have been given.

Honeywell itself presented evidence throughout the case which it claimed showed that the pilot had done something that was a proximate cause of the crash. *See, e.g.*, JA789, 1589. For example, Honeywell presented evidence it said showed that even if there had been a problem with the gears in the Honeywell autopilot, the pilot nevertheless caused the crash by failing to disconnect it or manually override it using the flight control stick (JA2784-86). [The Administrators' experts testified that in the runaway trim situation the autopilot could not have been disconnected or

overridden (JA1003-06, 1027-28, 1330-41)]. Honeywell's experts also testified that in their opinion Grana had at some point become spatially disoriented and as a result done something to cause the crash (JA1440-41). [The Administrators' evidence contradicted this contention as well (JA1154-44)].

It was critically important that the jury be instructed that there could be more than one proximate cause. This was necessary so the jury would understand, and the Administrators' counsel would be properly equipped in closing argument with a jury instruction which established, that even if the jury concluded that pilot Grana did something which was a proximate cause of the crash that would not rule out a finding that Honeywell's product was also a proximate cause of the crash, and Honeywell thus would be liable.

For this very reason, after the close of the evidence, during the colloquy with the court regarding jury instructions, the Administrators' counsel specifically asked the trial court to grant Instruction 11 so that the jury would be told that "proximate cause need not be established with such certainty so as to exclude every other possible conclusion" and "that there may be one or more proximate causes[.]" (JA1545-47). The Administrators' counsel emphasized the instruction correctly stated the law and was important since the court had allowed evidence of multiple causes:

> The case law that is cited in the commentary as well as the commentary itself makes it clear that that is Virginia law, and we think it would be important to say in this case, given the fact that Your Honor has permitted evidence of another proximate cause, that there may be one or more proximate causes. For that reason, we ask that it be included because of the court's ruling on that issue.

(JA1547). Honeywell did not argue and the trial court did not find that Instruction 11 was not a correct statement of Virginia law or that there was no evidence to support the instruction. Honeywell merely argued:

> [Honeywell's counsel]: The Model Jury Instruction is the Model Jury Instruction, . . . -- it ought to be in line with what the Model Jury Instruction is.
>
> THE COURT: The last two sentences, deleted, over the objection of the plaintiff.

(JA1547). It was especially important in this case that the jury be told in very clear terms that there could be more than one proximate cause and that proximate cause need not be proved with such certainty as to exclude every other possible conclusion.

- **AOE 4:**
  <u>The trial court allowed William Abel, who was never present at the airfield and did not know the conditions, to testify that he "had some concerns" with the pilot taking off in the conditions that were reported and to give other similar testimony</u>.

William Abel provided training to Grana and to other pilots. Honeywell was allowed to present prejudicial, irrelevant, unfounded, speculative testimony from Abel. For example, over objection Abel testified:

> "[T]he fact that he [Grana] took off on this day makes -- makes me have some concerns about the judgment, taking off into conditions based on the weather that -- that was reported to me. (JA1350).
>
> . . .
>
> . . . I had concerns about why he would take off into those conditions on that day. (JA1351-52).

Abel also testified:

> Q With respect to Mr. Grana's lack of experience in this airplane in actual IFR [Instrument Flight Rules] conditions and the judgment that he used in taking off that day, in your opinion, was that a cause or contributing cause of this accident?
> A I don't know what happened in that airplane. In my opinion, it wasn't the best of judgment to take off in those conditions. (JA1357).

Over objection, Abel was allowed repeatedly to give this kind of testimony. Whether or not Grana used the "best of judgment" in deciding to fly was not relevant or admissible since contributory negligence, assumption of the risk, misuse, and superseding cause were no defense, and the issue (which was for the jury, not Abel, to decide) was not whether Grana "should" have taken off but instead was what caused the crash. Furthermore, Abel was not present, never saw, and admitted he did not know the actual conditions at the airport. Abel admitted:

> Q Do you know what the cloud formations were?
> A No.
> Q Do you know what the precipitation was?
> A No.

> Q Do you know the dew points.
> A No.
> Q Do you know the temperatures that existed before and immediately after the crash.
> A No.
> **Q And, sir, as you sit here today, you have no way of knowing what the visual conditions were at the time the aircraft departed from control flight.**
> **A True?**
> **A You have no idea, as you sit here today, of knowing what the forward visibility was vis-à-vis Mr. Grana, as he was operating this airplane, at the time immediately before there was loss of control of flight. True?**
> **A True.** (JA1334-35).

The Administrators objected to Abel's deposition testimony as speculative, improperly prejudicial, lacking sufficient foundation, based on hearsay, irrelevant, and improper testimony which invaded the province of the jury (JA725-41). The trial court overruled the objections (*Id*).

The trial court made its rulings on the Administrators' objections to Abel's testimony two days before trial began. Armed with the trial court's pre-approval of the testimony, Honeywell decided to make it a centerpiece of the defense. Honeywell prepared short video excerpts of this testimony which it played during both opening statement and closing argument. All told, the jury heard Abel's improper opinion regarding his "concerns" about Grana's "judgment" in flying that day <u>five</u> times (JA792, 1352, 1354, 1594-95, 1645).

- **AOE 5:**

  The trial court allowed Robert Norman, a co-owner of the Mooney airplane who had never flown it solo under any conditions and was not licensed to do so, to give extensive testimony regarding his subjective feelings and experiences concerning flying the Mooney airplane and another plane under conditions not shown to be similar.

A co-owner of the airplane, Robert Norman, who had an entirely different level of expertise and experience than Grana, was allowed to testify regarding his subjective impressions, and even his emotional feelings, about his own operation (not Grana's operation) of the Mooney airplane under circumstances which were not the same. He was also allowed to compare those subjective impressions with his subjective impressions regarding flying a Cessna, a plane which was not involved in any way in this crash. For example, Norman was allowed to testify:

> Q Did you ever fly the Mooney solo?
> A No.
> Q Why not?
> A I still to this day am afraid of that Mooney.
> Q Why --
> A I have a healthy fear of it.
> Q Why is that?
> A It's fast. If you've ever flown a Skyhawk, you pull the yoke back, you let go, it goes back to level. You turn it like this, you let go, it goes back to level. The Mooney wasn't like that. The Mooney, you pulled back, it went up and it kept going up as fast and powerful as it could. It was heavy. It was fast. Retractable gear. A lot of moving parts. You had manifold pressures and propeller pitches to deal with. You didn't have that in the Skyhawk. There was so much math going on in your brain and it was not something

> that I would ever want to fly solo until I could do that instantly . . . . (JA1380-81).
>
> . . .
>
> Q . . . [D]id Mr. Abel ever solo you in this airplane?
> A I never asked to.
> Q Okay. And why was that?
> A I wasn't ready.
> Q When you say you weren't ready, was the Mooney a more complex airplane than the [Cessna Skyhawk] 172? For those who don't fly, can you tell us the differences?
> A As I was told when I learned to fly the Skyhawk, you have -- I don't -- can I speak unpolitically correct? Because I'll use the exact terminology I was told. I was told you'd have to be retarded to crash a Skyhawk. You push the throttle in, it goes up. You get it close to the runway, you pull the throttle out, it goes back down. You cannot do anything wrong in a Skyhawk that would cause you to crash. The Mooney, totally opposite. The Mooney, there are a thousand different mistakes you can make that would lead you to have something bad happen.

(JA1381-82). Norman was allowed to give extensive testimony regarding his subjective impressions of this type (JA1383-89). The extent to which Norman's "healthy fear" testimony was subjective and personal to him was underscored his testimony he had "a horrible fear of heights[.]" (JA1364).

This testimony was not factual testimony regarding the operation of the Mooney airplane. Instead, the foregoing testimony concerned Norman's subjective feelings about his own operation of the Mooney (and of another airplane that was not even involved). Norman had an entirely different level of experience and qualifications than Grana with respect to the Mooney airplane. Norman admitted:

> Q Now, how much experience
> did you gain flying the Mooney, Mr. Norman?
> **A Not much.**

(JA1380). Norman had never flown the Mooney solo in any conditions (*Id.*). While Grana had all licensing and endorsements that were required to fly the Mooney in both Visual Flight Rule conditions and in IMC conditions, it was undisputed that Norman was not qualified to fly in IMC conditions (JA758). In fact, Norman did not have any endorsement to fly the Mooney plane in any conditions:

> Q At any time, sir, while you were owner of the Mooney
> airplane, did you receive any type of endorsement from Mr.
> Abel or any other flight instructor to operate the airplane?
> A The Mooney?
> Q Yes.
> A No. (JA1394)).

Norman even admitted, "I hadn't spent much time in the Mooney" (JA1383)). Norman also conceded he could not recall ever using the autopilot device to assist in making turns (JA1387). Undisputed evidence showed the airplane was engaged in making a turn shortly after takeoff (JA991-992).

The Administrators' counsel vigorously objected to this entire line of testimony on numerous grounds, which included:

> . . . [O]bjection, Your Honor, . . . this witness's healthy fear,
> and that's a quote, and inexperience in the subject aircraft
> has no bearing on any dispute at issue in this case and

> should be deleted. His inexperience is prejudicial, it has nothing to do with the deceased experience whatsoever, it's simply his own experience and inexperience[.] . . .
>
> . . . Your Honor, he [Honeywell's counsel] just admitted, this man doesn't even have an IFR rating. It is a totally separate category of flight qualification and certification, and he's not even trained in this area. (JA757-758)

The trial court overruled these and other objections to Norman's testimony (JA756-783). Obviously amazed that the trial court was allowing this kind of testimony, the Administrators' counsel asked:

> THE COURT: Overrule the objection. You may proceed. Note your objection.
> MR. ROBB: Does that apply to his saying that he has a healthy fear of the aircraft, Your Honor?
> THE COURT: Whatever. . . . . (JA759).

The Administrators specifically objected to extensive additional testimony of the same type by Norman on the basis that the qualifications and experiences of Norman in the Mooney were not substantially the same as [but in fact were very different from] the qualifications and experiences of Grana. *See, e.g.,* JA759-761) (objecting to page 29, line 20, through page 39 line 25 of Norman's Deposition testimony).

Norman was also improperly allowed to testify regarding what he thought Abel 'meant' by his endorsements of Grana's flight capabilities and what the plane owners had allegedly decided about whether Grana could fly the plane in IMC conditions. Over objection, Norman testified:

> Q . . . So even though he got the sign-off or even if you had gotten that sign-off, that doesn't mean he finds you competent and sufficiently trained to take off into IFR conditions in that airplane. Is that true?
> A Yeah. The -- actually, the instrument sign-off comes earlier on in a person's career. You get your instrument rating. . . . [B]ut just because I can fly, again, that Skyhawk I spoke about earlier, that you push the throttle in, you fly it up and you pull the throttle out and it lands, in the cloud, doesn't necessarily mean that I would take a complex airplane into a cloud. . . . Being able to exhibit the controls of an aircraft is -- is a talent you can do, and you can test for it all you want, but nobody knows what's going to happen once you hit that wall. (JA1407-08).

The Administrators objected to this and similar testimony as speculative, irrelevant, lacking a sufficient factual basis, and improper opinion testimony from a lay witness (JA756-783). The objections were overruled (*e.g.* JA756-783).

Armed with the trial court's pretrial rulings pre-approving this testimony, Honeywell made Norman's testimony another centerpiece of the defense. Norman's improper testimony was played during trial (JA1363-1409); in closing argument Honeywell played the entire 'healthy-fear-a-thousand-mistakes-you-could-make' videotape excerpt again (JA1593-94); and in closing Honeywell emphasized Norman's testimony repeatedly (*Id.*, JA1598).

Argument[11]

A. Hearsay opinions in the 'Mooney Report,' and the hearsay report itself, were erroneously introduced in evidence under the 'authoritative treatise' statute even though there was no testimony which brought the report within the requirements of that statute. (AOE 1).

"Hearsay is not admissible except as provided by these Rules, other Rules of the Supreme Court of Virginia, or by Virginia statutes or case law." *Va. R. Evid.* 2:802. A trial court has no discretion to admit inadmissible evidence because "'admissibility of evidence depends not upon the discretion of the court but upon sound legal principles.'" *Norfolk & W. Ry. v. Puryear*, 250 Va. 559 (1995); *Walker v. Commonwealth*, 281 Va. 227, 230 (2011)("[b]ecause Walker's appeal presents a question of law as to the admissibility of evidence, we apply a de novo standard of review").[12] The Court has explained in the clearest terms that the erroneous admission of hearsay is overwhelmingly unfair and interferes with the truth-seeking process:

---

[11] The standards of review are set forth in each section of the Argument.

[12] Evidentiary issues sometimes involve determinations that are subject to the trial court's discretion and may be reviewed for abuse of discretion. But here, the determinations of what the 'authoritative treatise' statute required and whether the Mooney Report was within those requirements are issues of law which the Supreme Court of Virginia reviews de novo. Moreover, even when an issue is deemed to be one involving the discretion of the trial court, an erroneous understanding and application of the law by a trial court involves an abuse of discretion. *See Landrum v. Chippenham & Johnston-Willis Hosps., Inc*., 282 Va. 346, 352 (2011).

> The admission of hearsay expert opinion without the testing safeguard of cross-examination is fraught with overwhelming unfairness to the opposing party. No litigant in our judicial system is required to contend with the opinions of absent 'experts' whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and whose pronouncements are immune from cross-examination.

McMunn v. Tatum, 237 Va. 558, 566 (1989). In *Commonwealth v. Wynn,* 277 Va. 92 (2009), the Supreme Court made clear that these principles apply both to 'hearsay opinions' and to 'hearsay facts.' The Mooney Report (and all statements therein) were hearsay on crucial disputed issues in the case.

Honeywell's sole argument was that the hearsay statements could be admitted under the 'authoritative treatise' statute, which provides:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. . . . . [*Va. Code* § 8.01-401.1].

This statute creates a narrow exception to the rule against hearsay. The statute is in derogation of the common law and thus must be "strictly construed" and is "not to be enlarged beyond . . . [its] express terms." *Bostic v. About Women OB/GYN, P.C.*, 275 Va. 567, 577 (2008). In order for the statutory exception to apply, the expert must testify that he relied

upon the statements and it must be proved that the statements are a) "contained in published treatises, periodicals or pamphlets" b) "on a subject of history, medicine or other science or art," and c) established as a reliable authority by testimony or by stipulation[.]" The proponent of the evidence must prove all these requirements are met since "[a]ny enlargement of the statutory limitations leads to the evils mentioned in *McMunn* and *Weinberg*, which the General Assembly clearly sought to avoid." *Bostic*, 275 Va. at 577. Here, there was no testimony establishing the Mooney hearsay document met the statutory requirements (JA1520-25). The Mooney hearsay document was not a published treatise, periodical or pamphlet; there was no testimony establishing it was a reliable authority; and it did not concern a "subject of history, medicine or other science or art." Instead it was a self-serving, biased hearsay report issued by an employee of the company that manufactured the airplane that crashed. The trial court erred in allowing Honeywell's expert to read and display the report to the jury and to introduce the entire hearsay report into evidence to support their contentions that the trim setting was entirely normal and Honeywell's autopilot system did not make the airplane uncontrollable. The introduction of this hearsay on key issues in the case was reversible error.

B. The trial court erred in overruling the Administrators' objections to Honeywell's closing arguments which violated Virginia law and the pretrial rulings excluding any "evidence or argument" regarding the purported safety history of Honeywell's product.
(AOE 2).

The Administrators' pretrial Motion in Limine X moved the court to exclude any "evidence or argument" regarding the "safety history" of Honeywell's product. The Administrator's Motion specifically stated:

> The Virginia Supreme Court has long held that evidence of the absence of other injuries is not admissible when timely objections to that evidence is made. Goins v. Wendy's International, Inc., 242 Va. 333, 335, 410 S.E.2d 635 (1991). <u>This rule applies equally "whether the action lies in negligence or in implied warranty."</u> Id. The rationale for this rule is that "[s]uch evidence introduces into the trial collateral issues, remote to the issue at trial, which would tend to distract, mislead, and confuse the jury." Id. (citing City of Radford v. Calhoun, 165 Va. 24, 36, 181 S.E. 345,350 (1935); Moore v. City of Richmond, 85 Va. 538, 539, 8 S.E. 387, 388 (1888).
>
> . . .
>
> Furthermore, . . . proof of the absence of accidents shows only that none have been reported or discovered, not that they did not occur. Wood v. Woolfolk Properties, Inc., 258 Va. 133, 138, 515 S.E. 2d 304, 306 (Va. 1999) (quoting Goins, 242 Va. at 335-336, 410 S.E.2d at 636)("[A] departure from the rule [that the absence of prior accidents is inadmissible] would interject evidence so problematic, due to the potential for a lack of reporting and the variables of circumstances and conditions, that such evidence would have slight, if any, relevancy or probative value."

(JA56-57). The trial court granted the Administrators' Motion in Limine at the hearing and issued a letter opinion and Order sustaining the Motion. Honeywell has not assigned cross-error to the trial court's granting of Motion in Limine X. Thus, the law of this case was and is that evidence or argument regarding the safety history of Honeywell's product was not permissible at the trial of this case. See, *e.g., Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 590 (2000).

Despite the clear exclusionary ruling and Virginia case law, during closing argument Honeywell's counsel directly violated the Court's ruling and pretrial Order by arguing to the jurors that they should find that it's product was not defective because "[t]here is no evidence this has ever happened anywhere any time" (JA1584). The Administrators' counsel immediately objected that the argument violated the court's ruling on the motion in limine, but the trial court overruled the objection and directed Honeywell's counsel to "please proceed." After the trial court overruled the Administrators' objection to this improper argument, Honeywell's counsel hammered its improper argument home repeatedly. *See Statement of Facts, supra,* at page 24.

Honeywell's improper arguments were not mild or limited statements. To the contrary, Honeywell's closing arguments were unlimited, persistent,

sustained, no-holds-barred, and obviously very effective efforts to win this case on the basis of improper arguments that the precedents of the Supreme Court of Virginia and the pretrial limine ruling explicitly prohibited. The Administrators objected repeatedly and specifically moved the court to instruct the jury to disregard the arguments.[13] The trial court overruled the objections and refused to grant a curative instruction.

The trial court's overruling of the objections was error, and it compounded the serious prejudice caused by Honeywell's improper arguments, since the court's rulings effectively approved of them:

> Plaintiff's improper jury argument was designed to influence the jury's decision regarding . . . [an important issue in the case]. The circuit court refused to take any corrective action to eliminate the adverse prejudicial effect on the jury of plaintiff's improper argument. . . . [T]he prejudice was increased by the apparent approval given by the circuit court because of that court's refusal to take corrective action.

Velocity Express Mid-Atlantic v. Hugen, 266 Va. 188, 201 (2003) (granting new trial). *See Reid v. Baumgardner*, 217 Va. 769, 774 (1977) (same).

---

[13] A motion for mistrial is <u>not</u> required to preserve the issue for appeal. In objecting to improper closing argument, "the approved procedure for counsel to follow is to object to improper argument at the time, giving reasons for the objection, and to move for a mistrial <u>or for a cautionary instruction to the jury</u> to disregard the improper remarks." *Reid v. Baumgardner*, 217 Va. 769, 773 (1977) (objection was made and a curative instruction was sought; a new trial was granted on appeal due to the improper arguments).

When an objection to improper argument is sustained, and a curative instruction is given, trial courts may have some discretion regarding whether any further relief is required. But this case is a very different type of case—here the objections were overruled and curative relief was denied. A trial court has no discretion to overrule (and thereby allow and implicitly approve) closing arguments which violate settled Virginia law and a limine ruling. As *Reid* and *Velocity Express* show, overruling the objections involved an error of law which is not entitled to deference, should be reviewed de novo (and constitutes an abuse of discretion even if that standard were applicable). *See* fn. 12 *supra*.

Because Honeywell's improper arguments were so profoundly prejudicial, the Administrators renewed the issue in their post-trial motion. The trial court attempted to justify its allowance of the improper arguments:

> Defense's comments were not argument that the autopilot had a history of safety, but, rather, given the context, they were a comment on Plaintiff s failure to prove a defective design. In fact, the proceeding sentence to the objectionable language reads "[i]f they have the burden of proof here to prove this happened, why didn't they show you this stuff?" Finally, the Court, in overruling the motion reminded the parties "I had previously told the jury that what you-all tell them is not evidence, and they should not consider it as such, we'll leave it at that. (JA428 (footnote omitted)).

The previous instruction which the trial judge claimed was a sufficient cure for the arguments was the general preliminary instruction given at the beginning of the case, fifteen days before Honeywell's improper closing arguments were made (JA787). That general instruction given over two weeks earlier obviously did not cure the effect of the trial court overruling objections to and thereby implicitly approving Honeywell's improper and powerfully prejudicial closing arguments.[14]

Furthermore, the Administrators respectfully but vigorously contend that the words actually spoken by Honeywell's counsel were impermissible arguments that the absence of evidence of previous incidents established that Honeywell's autopilot had a history of safety and thus was not defective. The trial court erroneously thought that an absence of proof of previous incidents could be used to show Honeywell's product was not defective. But this reasoning was directly contrary not only to the general doctrine barring references to an absence of previous incidents, it was contrary to this Court's holdings that evidence regarding similar previous incidents is not relevant to whether the product was defective and caused the injury in the manner claimed. *See, e.g., Jones v. Ford Motor Co.*, 263

[14] The same general instruction was given at the beginning of trial in *Velocity Express*, but it was not sufficient to cure the error; because of the improper arguments the Supreme Court of Virginia granted a new trial. *Velocity Express Mid-Atlantic*, *supra*, Record No. 022877, Appendix at 98.

Va. 237, 255 (2002) (Virginia law "does not authorize admission of the evidence substantively as 'corroboration'"). Indeed, Honeywell itself conceded that evidence of previous incidents "is inadmissible to corroborate the plaintiff's version of how the accident happened." (JA82).[15] Since Virginia law does not allow the introduction of evidence of previous incidents to prove that a product was defective and caused harm as alleged, it was grossly improper and unfair for the trial court to allow Honeywell to argue that the failure of the Administrators to introduce such evidence (evidence the law does not allow) proved its product was not defective. The trial court's rulings constitute reversible error.

[15] Evidence of previous incidents is sometimes admissible in a negligence action to show the manufacturer had notice or knowledge of a dangerous condition. But in this warranty action notice and/or knowledge of the defect were not required elements of the claim. The jury instructions, as to which Honeywell has not assigned any cross-error, did not even mention the words, "notice" or "knowledge." (JA1569-76). In their Motion in Limine X, the Administrators had made exactly this point in support of their argument to exclude evidence or argument regarding the autopilot's safety history (JA57). The trial court granted the Administrators' Motion, but then permitted Honeywell to make exactly the kind of argument that the court had ruled would not be allowed.

C. In view of the evidence of multiple proximate causes, it was critically important that the jury be instructed that "there may be one or more proximate causes" and "proximate cause need not be proved with such certainty as to exclude all other possible causes" (AOE 3).

"A litigant is entitled to jury instructions supporting his or her theory of the case if sufficient evidence is introduced to support that theory and if the instructions correctly state the law." *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 78 (2004). "If a proffered instruction finds <u>any support</u> in credible evidence, its refusal is reversible error." *McClung v. Commonwealth*, 215 Va. 654, 657 (1975). Whether an instruction correctly states the law and whether it finds any support in credible evidence are issues of law which are determined de novo and without deference to the trial court. *Lawlor v. Commonwealth*, 285 Va. 187, 228-229 (2013). "'When reviewing a trial court's refusal to give a proffered jury instruction, we view the evidence in the light most favorable to the proponent of the instruction.'" *Id.*

The Administrators requested Instruction Number 11 which stated:

> A proximate cause of an accident, injury, or damage is a cause which in natural and continuous sequence produces the accident, injury, or damage. It is a cause without which the accident, injury, or damage would not have occurred. **There may be one or more proximate causes. Proximate cause need not be established with such certainty so as to exclude every other possible conclusion.**

(JA352). Honeywell merely argued that the instruction was not a Model Jury Instruction, but that was no ground to refuse to grant it. *See Va. Code* Section 8.01-379.2. The trial court nevertheless refused to grant the last two sentences of this instruction (shown in bold above) (JA1545-47). This was error. In *Holmes v. Levine*, 273 Va. 150 (2007), the administrator of the estate of a decedent requested that the following sentence be included in the jury instruction on proximate cause: "There may be more than one proximate cause of an event." The trial court refused to include that sentence. The jury returned a verdict in favor of the defendant. The Supreme Court reversed:

> "<u>If a proffered instruction finds any support in credible evidence, its refusal is reversible error</u>."

273 Va. at 159-160 (quoting previous opinions).

The third sentence requested here was the same kind of language that was requested in *Holmes* and it was requested here for the same kind of reason involved in *Holmes*. Even though the Administrators contended Grana did nothing to cause the crash, there was nevertheless evidence to support the instruction on multiple proximate causes.[16] Honeywell cannot

---

[16] In *Holmes*, the plaintiff's theory of the case was that there were two causes of the death, i.e., the cancer itself and the doctor's negligent delay in diagnosis. But the evidence which supports a requested jury instruction does <u>not</u> have to be evidence introduced by the proponent of the

claim there was no evidence to support Instruction 11 since Honeywell itself claimed it had introduced evidence of other proximate causes of the crash (i.e., Honeywell contended the pilot failed to disconnect the autopilot, the pilot failed to override the autopilot, the pilot lost control of the plane because he became "spatially disoriented").

Especially in a product liability case, it is critically important that the jury be fully instructed regarding proximate cause. *See, e.g., Ford Motor Co. v. Boomer*, 285 Va. 141, 151 (2013). One of the aspects of proximate cause that is the least obvious to jurors is the fact that there can be more than one proximate cause of an event or injury. Where (as here) evidence of more than one cause is introduced, it is critically important that the jury be expressly told that they are <u>not</u> limited to deciding that there was one proximate cause but instead they can decide that there can be "one or

---

instruction. In *McClung v. Commonwealth*, 215 Va. 654 (1975), the defendant was charged with murder. The Supreme Court held that the trial court erred in refusing to grant an instruction on voluntary manslaughter requested by the defendant. Even though the defendant obviously contended that she was not guilty of any crime, the refusal to grant the voluntary manslaughter instruction was reversible error <u>because there was evidence to support it</u>. 215 Va. at 657. Moreover, here the Administrators' theory of the case <u>did</u> include the contention that Honeywell would be liable for its defective product even if there were multiple proximate causes (JA1577). The Administrators were fundamentally undercut, however, in making this argument by the trial court's refusal to give an instruction correctly informing the jurors that there can be more than one proximate cause and proximate cause need not be proved with such certainty as to exclude every other possible conclusion.

more proximate causes." Instruction 11 was necessary to enable the jurors to understand (and to enable counsel to explain and argue, with the aid of a clear, correct jury instruction) that a manufacturer should be held liable if its product was "a proximate cause" of the injury or death even though there was also evidence of another cause that was also "a proximate cause." *See Ford Motor Co. v. Boomer*, 285 Va. at 151 (citing and quoting *Carolina, Clinchfield & Ohio Railway Co. v. Hill*, 119 Va. 416, 421 (1916) ("[t]o show that other causes concurred in producing, or contributed to the result is no defense").

Proper instruction that there can be multiple proximate causes was doubly important in this product liability case for breach of warranty since contributory negligence, assumption of the risk, misuse, and superseding cause were not available defenses. The trial court so held and no cross-error has been assigned to these rulings. When contributory negligence and assumption of the risk can be asserted as defenses, if the plaintiff did anything wrong that caused his injury or assumed the risk he is completely barred from recovery even if the defendant's wrongdoing was also a proximate cause of his injury. In such a case, proximate cause often may be an "either-or" choice. But here, even if Grana may have done something that was "a proximate cause" of the crash and/or even if he

could (in a negligence action, not here) have been viewed as having assumed the risk, Honeywell would still be liable if its autopilot was also "a proximate cause."

The multiple-proximate-causes instruction was critically important to dispel and erroneous impression there could be only one proximate cause of the crash, and that the jurors had to decide whether "the cause" was **either** the autopilot "**or"** pilot error. Virginia law, of course, recognizes yet another possibility – that the jury could find the autopilot was a proximate cause of the crash and that some mistake by the pilot was also a proximate cause of the crash.

The jury needed to understand that if they found that a defect of the autopilot and something the pilot did each was a proximate cause of the crash Honeywell would still be fully liable. The third sentence was a correct statement and fundamentally important statement of Virginia law. The fourth sentence was also correct statement of Virginia law. *See, e.g., White Consol. Industry, Inc. v. Swiney*, 237 Va. 23, 28 (1989). No other instructions sufficiently covered these important points of law, they were supported by evidence, and the trial court erred in refusing to include these two sentences in the instruction.

D. The trial court erred in overruling the Administrators' objections to testimony from Abel that was inadmissible because it lacked a sufficient foundation, was tainted by missing variables, was speculative, was irrelevant and invaded the province of the jury. (AOE 4).

Abel was permitted to testify that he "had some concerns" with Grana flying in the conditions at the Chesterfield airport and he felt it "wasn't the best of judgment to take off in those conditions." Undisputed testimony established that Grana was fully licensed to fly and had extensive experience in IMC conditions. Whether Abel claimed to have "concerns" about Grana flying at the Chesterfield Airport in the conditions that reportedly existed was an irrelevant, prejudicial, subjective, speculative, unreliable, unfounded (based on hearsay), inadmissible opinion, especially since Abel had no personal knowledge of the conditions at the airport on April 27, 2008 and in fact Abel was never present at the airport at any time. *See, e.g., Doe v. Dewhirst*, 240 Va. 266 (1990) (witness's opinion must be based on personal knowledge).[17]

Further, whether Grana's "judgment" in taking off was good or not was not proper opinion testimony. Abel's testimony invited the jury to find against the Administrators not because the pilot actually caused the crash

[17] Honeywell's counsel told the trial court Abel was not offering opinions as an expert. JA677 ("I never asked him are you a reconstructionist, did you reconstruct the accident . . . . so this notion that he is being offered for all of these expert opinions is just not accurate."

but because he used bad "judgment" in deciding to fly at all. Abel's non-opinion opinion about his "concerns" about Grana's "judgment" in deciding to use the product was especially irrelevant in this product liability case since even a misuse is not a defense to a warranty claim if the misuse was foreseeable. *Featherall v. Firestone Tire & Rubber Co.,* 219 Va. 949, 964 (1979). Honeywell admitted to the trial court there was no evidence of misuse (JA 1548). This airplane was designed to be flown in instrument conditions.

Further, Abel even admitted that he did not actually have an opinion about what happened in the flight in question. Honeywell's counsel told the trial judge: "I asked him do you have an opinion on the cause and he wouldn't touch it [i.e., had no opinion]" (JA677). Abel should not have been allowed to offer mere subjective commentary. In *Pettus v. Gottfried*, 269 Va. 69 (2005), a cardiologist who did not actually have an opinion regarding the cause of death was erroneously allowed to offer additional comments. The testimony was as follows:

> Q: Do you have an opinion within the reasonable degree of medical certainty what the cause of Mr. Pettus' death was?
>
> A: No. In fact, that's the reason why many times we feel that unless an autopsy is done, it's really difficult to know what may have happened.

Pettus v. Gottfried, 269 Va. at 73. This Court held the admission of these innuendo comments was error, and this Court remanded for a new trial. The situation here is highly similar. Abel admitted that he did not actually have an opinion but he was nevertheless allowed to give his damaging innuendo testimony disparaging Grana's "judgment." This testimony was not only irrelevant and improper invaded the jury's role in deciding how and why the crash occurred, it was highly prejudicial because it invited the jurors to decide against the Administrators on the theory that the crash would have been avoided if Grana had simply not flown the plane. Abel's testimony was irrelevant, unfounded, inadmissible, and grossly prejudicial; the issue was what happened that caused the crash and Abel admitted he had no opinion on that issue.[18]

---

[18] Regarding the standard of review applicable to AOEs 4 and 5, the Administrators state as follows. Although a trial court in some instances has some discretion in determining whether evidence is relevant or prejudicial, it has no discretion to admit clearly inadmissible evidence; a ruling allowing the introduction of such evidence is reviewed de novo since it presents an issue of law. *Norfolk & W. Ry. v. Puryear, supra.* When testimony lacks a proper foundation, is speculative, invades the province of the jury, is improper opinion testimony, or is otherwise improper testimony it is inadmissible as a matter of law. *See, e.g., Keesee v. Donigan*, 259 Va. 157 (2000); *Tittsworth v. Robinson*, 252 Va. 151, 154-55 (1996). Moreover, to the extent that the issues presented by AOEs 4 and 5 might be viewed in some regards as having involved some discretion, the Administrators submit that the testimony of Abel and Norman so fundamentally invaded the jury's role, and was so clearly without proper foundation, prejudicial, irrelevant, improper, and inadmissible for the reasons stated herein that its

E. The trial court erred in allowing Norman to give testimony about his subjective feelings and experiences in flying the Mooney airplane and his subjective comparison of flying it to flying a Skyhawk. (AOE 5).

A co-owner of the airplane, Robert Norman, who had an entirely different level of expertise and experience than Grana, was allowed to testify at length regarding his own subjective impressions and experiences, and even his emotional feelings, about his own operation of the airplane under different circumstances (not Grana's operation of it) and also his operation of another airplane [the Cessna Skyhawk]. Although a trial court has some discretion in determining whether evidence is relevant, it has no discretion to admit clearly inadmissible evidence; a ruling allowing the introduction of such evidence is reviewed de novo since it presents an issue of law. *Norfolk & W. Ry. v. Puryear, supra. See also* fn.18 *supra*. Furthermore, when testimony lacks a proper foundation or is otherwise improper opinion testimony it is inadmissible as a matter of law. *See, e.g., Keesee v. Donigan*, *supra*. Norman's conclusory, subjective, emotional "fear" of the airplane and his personal experiences in flying it and the Cessna were not relevant to Grana's flight on the day in question, and were not admissible. This was not any type of factual or scientific testimony as

---

admission constituted an abuse of discretion even if that standard is deemed applicable.

to the operation of the airplane by a pilot with Grana's much higher qualifications under the conditions involved on the day of the crash. Instead, it was Norman's purely subjective statement that he, Norman, was afraid of flying the airplane. This was not relevant evidence, and it was improperly prejudicial. Norman's testimony that the controls functioned properly on his flights was inadmissible since his flights did not involve substantially the same conditions as Grana's flight. *See, e.g., Featherall v. Firestone Tire & Rubber Co*., 219 Va. 949, 959 (1979) (testimony was properly excluded because the testimony did not involve "conditions which were the same or substantially similar in essential particulars to those existing at the time of the accident"). Norman's testimony improperly invited the jurors to find against the Administrators not because there was evidence the pilot did anything that caused the crash but because he should have been "afraid" (like Norman) to fly the airplane. Every driver could avoid all collisions merely by being too "afraid" of the automobile to drive. No witness would be allowed, however, to give the kind of testimony Norman gave in order to show that some other driver actually did something that caused a collision at the particular time in question. Norman's experiences regarding his use of the Mooney and of Honeywell's autopilot product were not relevant and admissible since there was no

showing that the conditions involved were substantially identical to the experience of Grana and the applicable conditions. As previously noted, Norman admitted he could not recall ever asking the autopilot device to assist in making turns (JA1387). He had no basis to offer any testimony regarding the operation of the autopilot device during turns (the kind of flight at issue here, which involved numerous turns). The trial court also erroneously allowed Norman to give testimony and offer his pseudo-scientific opinions that the Mooney airplane was dangerous and difficult to fly in comparison to the Cessna Skyhawk which Norman said would virtually fly itself. This testimony prejudicially invited the jury to speculate that Grana caused the crash because Norman (with different qualifications and experience) felt it was more difficult to operate the Mooney than the Skyhawk. Moreover, even if some type of purely factual testimony from Norman about details of the flight controls of the Mooney might have been admissible (which is denied), his subjective, conclusory views, involving his different experiences and different level of training, that the Skyhawk was essentially impossible to crash and the Mooney was the opposite, were irrelevant, improper, and prejudicial.[19]

[19] See footnote 18 regarding the standard of review on AOE 5.

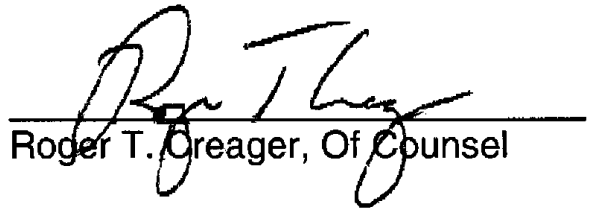
What mattered was what occurred at the time of the crash, not how Norman felt about flying the Mooney and not whether Norman felt the Cessna was easier to fly.

Conclusion

For all the aforesaid reasons and the reasons to be stated at oral argument on this appeal, the Administrators respectfully submit that the errors set forth herein, both individually and cumulatively, require that the verdict and judgment be set aside, and that a new trial be granted in both cases. The Administrators, by counsel, respectfully request the Court to enter its Order setting aside the verdict and Judgment in both cases, and granting the Administrators a new trial in both cases on liability and damages.

Respectfully submitted,

MICHELLE C. HARMAN, Administratrix of the Estate of JOSEPH A. GRANA, III, Deceased and STEPHANIE E. GRANA BEMBERIS, Administrator of the Estate of JOSEPH A. GRANA, SR., Deceased

By: 

Roger T. Creager, Of Counsel

Roger T. Creager (VSB No. 21906)
The Creager Law Firm, PLLC
1500 Forest Avenue, Suite 120
Richmond, Virginia 23229
Telephone: (804) 747-6444
Facsimile: (804) 747-6477
E-Mail: rcreager@creagerlawfirm.com

John C. Shea (VSB No. 17436)
Mark S. Lindensmith (VSB No. 20452)
MARKS & HARRISON, P.C.
1500 Forest Avenue
Richmond, VA 23229
Telephone: (804) 282-0999
Facsimile: (804) 288-1853

Anita Porte Robb (pro hac vice)
Gary C. Robb (pro hac vice)
ROBB & ROBB LLC
One Kansas City Place - Suite 3900
1200 Main Street
Kansas City, MO 64105
Telephone: (816) 474-8080
Facsimile: (816) 474-8081

CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of January, 2014, that this Opening Brief of Appellants complies with Rule 5:26 of the *Rules of Supreme Court of Virginia*, and that 15 copies of the brief, along with an electronic copy via email, have been timely filed with the Clerk's Office of the Supreme Court of Virginia in accordance with Rule 5:5(c) of the *Rules of Supreme Court of Virginia* by mailing (by certified mail in the manner specified in Rule 5:5(c)) on this date said 15 copies of the Brief to the Clerk's Office . On this same day, three copies of this brief have been mailed to opposing counsel and an electronic copy delivered via email in accordance with the *Rules of Supreme Court of Virginia*.

Roger T. Creager