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.

BRIEF *AMICUS CURIAE*
OF VIRGINIA TRIAL LAWYERS' ASSOCIATION
IN SUPPORT OF APPELLANTS

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1. (1/21/14) Letter of Roger T. Creager, Esq. [Appellants' Counsel]

2. (1/21/14) Email of Patrick Hanes, Esq. [Appellee's Co-Counsel]

3. (1/21/14) Email of Austin W. Bartlett, Esq. [Appellee's Co-Counsel]

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***AMICUS* STATEMENT OF INTEREST**[1]

The Virginia Trial Lawyers Association ("VTLA") is an organization of over 2,000 Virginia attorneys dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, protecting and preserving individual liberties and access to justice, and supporting an efficient and constitutionally sound judicial system. Pursuant to Rule 5:30 of the *Rules of the Supreme Court of Virginia*, VTLA has obtained the written consent of all counsel for the filing of this Brief *Amicus Curiae*. *See*, Addendum (attached).

This appeal presents issues that are important to Virginia law and trial practice in Virginia courts. The appeal concerns not only the rights of the parties to this case, but also the rights of litigants and the nature of trial practice throughout the Commonwealth.

Assignment of Error 1 implicates Virginia's well-settled rule against hearsay in general and its limited statutory exception for "reliable authority" in particular. Assignment of Error 2 implicates Virginia's well-settled rule against "absence of other incidents" evidence and, by implication, Virginia's

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person or entity made a monetary contribution to its preparation or submission.

mirror-image rule against "fact of other incidents" evidence. Assignment of Error 3 implicates litigant and jury entitlement to clear complete correct instructions under Virginia law, including particularly on the issue of multiple proximate causes. Companion Assignments of Error 4 and 5 implicate Virginia's longstanding limits of lay and expert opinions and subjective impressions.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

VTLA adopts Administrators' Nature of the Case and Material Proceedings Below.

STATEMENT OF FACTS

VTLA adopts Administrators' Statement of Facts. However, it emphasizes the following testimony, exhibits, and incidents of trial.

0. CLARIFICATION OF OPINIONS

Administrators' experts agreed with Honeywell's experts that at takeoff the trim setting was in the normal position. JA1074-1075.[2] However, Administrators' expert (Dr. Sommers) opined that during flight the trim setting got out of normal position and into "nose low" position, because of runaway trim caused by Honeywell's autopilot. *Id*.

[2] Joint Appendix is "JA". Trial Transcript is "TT". Record is "R".

1. ASSIGNMENT OF ERROR 1

Among other hearsay fact and hearsay opinion, the 5-page hearsay Mooney Report introduced in evidence by Honeywell as Exhibit 11 under *Virginia Code* §8.01-401.1 marqueed this crucial hearsay expert opinion:

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

JA463 (emphasis added). This "absent expert" opinion: (A) was the core issue of the case, *i.e.*, defective autopilot; and (B) was <u>not</u> part of the National Transportation Safety Board ("NTSB") report admitted. JA447-458.

2. ASSIGNMENT OF ERROR 2

Contrary to pretrial Order, five (5) times in closing Honeywell argued "absence of other incidents" as proof of no product defect or causation. JA1584, 1591-1592, and 1603. Despite Administrators repeatedly objecting and requesting a curative instruction, JA1584 and 1605-1606; judge overruled Administrators and condoned Honeywell. JA1584 and 1605-1607.

3. ASSIGNMENT OF ERROR 3

Administrators requested Jury Instruction 11, which was clear, complete and correct on the core issue of multiple proximate cause, JA352;

and which was not covered by any other instructions. But Honeywell objected solely on the basis that it was not the Model Jury Instruction, and the judge sustained Honeywell's objection on that ground. JA1545-1547.

4. ASSIGNMENT OF ERROR 4

Honeywell considered William Abel a "pretty critical witness" for the defense. JA657. But the judge only made a "quasi-determination" that Abel was a "quasi-expert," TT 349; yet permitted him over Administrators' half-dozen different objections to render multiple critical opinions not based on personal knowledge, and Honeywell highlighted Abel's videotape testimony five (5) times: opening, direct witness testimony, expert cross-examination, and closing. JA792, 1352, 1354, and 1594-1595.

5. ASSIGNMENT OF ERROR 5

Robert Norman is a new inexperienced pilot, who as a layman was permitted over Administrators' several objections to opine about his personal "fear" of the Mooney plane, "a thousand mistakes you can make" in the Mooney, and his limited operation of the Mooney under different circumstances, plus various hearsay. JA756-783, 1380-1381, and 1383-1389. Honeywell highlighted his videotape testimony in direct examination and repeatedly in closing, in tandem with Abel. JA1363-1411, 1593-1594, and 1598.

ARGUMENT

Re Assignment of Error 1, sound public policy mandates upholding Virginia's rule against hearsay and, concomitantly, construing its statutory "reliable authority" exception strictly, narrowly. Yet the trial court construed Virginia Code §8.01-401.1 liberally to cover a biased case-related report and, moreover, did not even require Honeywell to honor the statute's express requirements in admitting the hearsay Mooney Report in testimony and its absent expert Conclusions on the core issue as an exhibit.

Re Assignment of Error 2, sound public policy mandates upholding Virginia's rule against "absence of prior incidents". Yet the trial court expressly condoned Honeywell violating not only settled Virginia law, but also its own pretrial Order, with repeated closing argument about its product safety history that in decades of use there allegedly never had been another incident before.

Re Assignment of Error 3, sound public policy mandates upholding Virginia's rule of litigant and jury entitlement to clear complete instructions stating the correct law. Yet the trial court refused Administrators' correct clear complete one on the oft-confusing pivotal issue of multiple proximate causes.

Re companion Assignments of Error 4 and 5, sound public policy mandates upholding Virginia's rules limiting lay and expert testimony and opinions. Yet the trial court admitted numerous subjective opinions by unqualified witnesses - one that Defendant conceded was a "pretty critical witness" - that lacked foundation; that were speculative, hearsay, and irrelevant; and that invaded the jury's province.

All of these errors were prejudicial in fact and under Virginia law. "Well established principles require that error be presumed prejudicial unless the record clearly shows that the error could not have affected the result." *Dandridge v. Marshall*, 267 Va. 591, 597 (2004)(evidentiary errors mandated reversal and remand for retrial). An "erroneous admission of evidence, which may have 'tipped the scales'," is presumed prejudicial. *Hale v. Maersk Line Ltd.*, 284 Va. 358, 377 (2012)(reversed and remanded). In particular, erroneous admission of defense expert testimony may be prejudicial even if another defense expert testifies about the identical topic. *Hinkley v. Koehler*, 269 Va. 82, 91-92 (2005)(reversed and remanded). Individually and certainly collectively, the erroneous admission

of expert and other evidence in favor of Honeywell presumably "tipped the scales" impermissibly.[3]

A. THE TRIAL COURT ADMITTING THE HEARSAY MOONEY REPORT IS PREJUDICIAL ERROR.

The Mooney Report is hearsay.[4] JA459-463. "Evidence that is hearsay and does not fall under an exception is clearly inadmissible," *Commonwealth v. Wynn*, 277 Va. 92, 98 (2009); regardless whether it is opinion hearsay and/or fact hearsay. *Id*. at 100.

Honeywell asserted, and the judge accepted, that the Mooney Report came within the exception of Va. Code Ann. §8.01-401.1. But Administrators repeatedly objected for hearsay and "lack of foundation," JA1520-1525; as it clearly failed to meet that statute's strictures.

1. <u>Public policy opposes the hearsay Mooney Report</u>.

Since at least 1795, this Court has barred hearsay evidence absent an exception. *Claiborne v. Parrish*, 2 Va. (2 Wash.) 146 (1795). The

[3] As a matter of law on the facts of the case, each Assignment of Error constitutes manifest error. Re Assignment of Error 1, 4 and 5, the trial court had "no discretion to admit clearly 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, 563 (1995).

[4] "Mooney Report" refers to the whole document and to its individual constituent statements of facts and of opinions that were admitted.

continuing wisdom and vitality of its bar is evinced by recent *Virginia Rules of Evidence* 2:801 and 2:802.

Surveying Virginia law, Friend articulates the most common reasons for this Court's rule against hearsay evidence:

1. "The out-of-court declarations were not made under oath.

2. The use of such declarations denies to the opponent the right to confront the witness against him

3. The out-of-court declarant cannot be cross-examined.

4. The trier of fact has no opportunity to observe the demeanor of the declarant on the stand.

5. Such evidence is inherently weak.

6. The jury will tend to give it too much weight.

7. The more often a story is repeated, the more likely it is to become distorted.

8. There is too much danger of fraud or perjury."

CHARLES E. FRIEND & SINCLAIR, THE LAW OF EVIDENCE IN VIRGINIA, §15.1[c] at 902-903 (7th ed. 2013 supp.). Perhaps the strongest justification for the hearsay rule is "lack of opportunity for cross-examination of the absent declarant". *Id*. at 904.

"Our system of justice places great faith in the value of cross-examination in testing the perception, memory, narrative ability, and

veracity of witnesses [and] it is undeniable that cross-examination can be an effective tool in exposing false testimony, putting misleading testimony into perspective, and bringing out omitted material details." *Id*. This Court has underscored the importance of testing trustworthiness in general and of cross-examination in particular: "The reason hearsay evidence is excluded is that it is not subject to the tests which help the trier of fact ascertain the truth of testimony," *i.e.*, it "lacks any guarantee of trustworthiness and must be excluded." *Chesapeake & Potomac Tel. v. Sisson & Ryan*, 234 Va. 492, 499 (1987)(hearsay forecloses its declarant being "cross-examined").

Va. Code §8.01-401.1 as amended in 1994 is a hearsay exception. In derogation of Virginia's longstanding common law against hearsay, it must be "strictly construed". *Bostic v. About Women OB/GYN, P.C.*, 275 Va. 567, 576 (2008).

§8.01-401.1 features evidentiary preconditions so that the "test of cross-examination" is "insured," *id.*; plus hearsay qualifying under it only may be read into evidence, not introduced as a documentary trial exhibit, so not to give it undue emphasis. Otherwise, "the opposing party is subjected to the 'overwhelming unfairness'" of admitting absent opinion. *Id*.

Further, the General Assembly recently codified §8.01-401.1 as expert witness law, *Virginia Rule of Evidence* 2:706(a). Expert opinion

warrants greater judicial scrutiny and litigant protection, heightening the court's function as "gatekeeper".

Finally, §8.01-401.1 is commonly referred as the "learned treatise" exception, since it was created "to permit the introduction of authoritative literature as substantive evidence," Friend, §15-27 at 1063-1064; in lieu of traditional practice of testing an expert "on cross-examination by reading to him from scientific articles or treatises". *Id*., §13-11[6] at 809-810. That is to say, §8.01-401.1 does not contemplate just anything that is printed.

Well-settled Virginia law and sound public policy demand the hearsay rule and its §8.01-401.1 exception be respected and applied to their letter. But admission of the hearsay Mooney Report, including its absent expert Conclusions, contravened the rule and the statute in multiple ways.

Admission of the hearsay Mooney Report ignored §8.01-401.1's safeguarding preconditions, allowed printed material not of the character contemplated, and even introduced the document itself instead of only testimony. *See*, A(2-3), *infra*. Predictably, it necessarily engendered the "overwhelming unfairness" and other prejudice that the rule, the statute, and public policy require to be avoided. *See*, A(4), *infra*.

2. **The Mooney Report is not admissible as "reliable authority" under §8.01-401.1.**

The "reliable authority" exception of §8.01-401.1 mandates:

> To the extent…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…, shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits.

"Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms." *Bostic,* 275 Va. at 576 (emphasis added). As such, this "1994 amendment to Code §8.01-401.1 [is] a relaxation of the common-law rules against hearsay only to the limited extent provided by the express statutory terms." *Id*. at 577.

Specifically, the General Assembly inserted in the 1994 amendment "two preconditions to the admission of hearsay expert opinions as substantive evidence on direct examination: First, the testifying witness must have 'relied upon' the statements contained in the published treatises; second, the statements must be established as 'a reliable authority' by testimony…." *Id*. at 576 (emphasis added). But Honeywell did not satisfy either precondition.

a. Honeywell's expert did not testify he relied on the whole Mooney Report in forming his opinion.

"The [first precondition] means that the witness must testify that he relied on the article in forming his opinion, which is consistent with the views expressed by the absent author." *Id*. at 577. "The statutory standard is not met by an expert's testimony that he relied upon it only to use it 'to talk to this jury'." *Id*.

Honeywell's expert, Dr. Clarke, testified that he relied upon only two (2) sentences in the Mooney Report - lines 28-29 and 32 of its page 3. JA1524-1525. But ultimately the whole report, including its hearsay expert Conclusions, was admitted as Exhibit 11.[5]

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[5] At Honeywell counsel's request, Dr. Clarke read the so-called "last sentence" pointed out to him, lines 28-29 of page 3 of the Mooney Report: "This indicates an approximate takeoff position trim setting." JA1524 at Lines 3-8. Honeywell's counsel requested and received leave to publish "what he just testified". *Id*. at Lines 9-13; and Dr. Clarke showed "that page" as requested, and explained "this was the part that I just read," reading it aloud again. *Id*. at Lines 15-20. Dr. Clarke then continued his answer, by correlating and quoting nearby line 32 of page 3 of the Mooney Report: "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." *Id*. at Lines 20-23. Honeywell's counsel then changed to a "new topic" - without having asked Dr. Clarke whether he relied on lines 28-29 and 32 of the Mooney Report. *Id*. at Line 24. So the Judge interjected, inquiring whether Dr. Clarke relied

b. Honeywell's expert did not establish any of the Mooney Report is reliable authority.

The second precondition means that the expert witness himself must attest that the article is accepted as reliable authority by other similarly situated experts, *i.e.*, is of a type normally relied upon by others in the particular field of expertise. In a sidebar, Honeywell's attorney told the judge the Mooney Report "is a document that's normally relied upon by experts," JA1523; but Honeywell's expert, Dr. Clarke, did not offer the required testimony for any part of the Mooney Report. JA1520-1525.

c. The Mooney Report inherently is not, and cannot be, reliable authority.

More fundamentally, §8.01-401.1 expressly is limited to only "published treatises, periodicals or pamphlets". This Court's examples of such published literature are "periodicals which are deemed to be reliable and authoritative," *Weinberg v. Given*, 252 Va. 221, 222 (1996); "published and authoritative literature," *May v. Caruso*, 264 Va. 358, 362 (2002); and "learned treatises". *Bostic*, 275 Va. at 575.

Strictly construed, "published treatises, periodicals or pamphlets" connotes independent authoritative if not scholarly literature. It inherently

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upon this, thereby prompting Honeywell's counsel to ask and Dr. Clarke to affirm belatedly. JA1524 at Line 25 to JA1525 at Line 5.

does not connote private disputed contemporaneous biased case-related material like the Mooney Report by the crashed plane's manufacturer.

Otherwise, construed liberally contrary to this Court's statutory construction jurisprudence, mere "pamphlet" (as declared summarily by the judge, JA1523) embraces essentially any unbound printing, including biased case-related materials elevated to authoritative literature. Such a liberal construction predictably and inequitably would allow retained experts like Honeywell's Dr. Clarke to anoint disputed self-interested case materials as "reliable authority;" to read "them into the record as holy writ," *id*. at 576; and to shield their (dubious) authors, opinions, and facts from the crucible of cross-examination.

Parties transmogrifying disputed biased case-related material into "learned treatise" by hiring an expert to proclaim it so is not the intention of §8.01-401.1. That is a perversion and an abuse of the statute with far-reaching negative implications in all future Virginia litigation, contrary to sound public policy.

Upon retrial of this cause, Honeywell properly is barred from having Dr. Clarke or any other retained expert offer that the Mooney Report is "reliable authority." The Mooney Report author, IIC, and Lycoming representative need to justify their own disputed case facts, opinions, and

Conclusions - if they are qualified to do so, and if the IIC and Lycoming representative truly concur with the Conclusions. *Cf., Burns v. Gagnon*, 283 Va. 657, 678 (2012)(Court addresses objections that "may arise again on retrial").

d. The Mooney Report is not admissible as an exhibit.

§8.01-401.1 explicitly is a testimonial, not a documentary, exception. The statute states expressly that "<u>the statements may be read into evidence but may not be received as exhibits</u>" (emphasis added).

It could not be any more literal, unambiguous, plain, and clear. Admission of the Mooney Report as a defense trial exhibit is manifest error, particularly since the required foundation for any of it even to be read was not laid, and Administrators consistently maintained their hearsay and "lack of foundation" objections. JA1520-1525.

3. <u>The Mooney Report is not admissible as "facts, circumstances and data" under §8.01-401.1</u>.

"[P]ursuant to Code §8.01-401.1, an expert witness may rely upon 'facts, circumstances or data made known to…such witness' in formulating an opinion; those 'facts, circumstances or data…, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences need not be admissible in evidence."

Commonwealth v. Wynn, 277 Va. 92, 100 (2009). However, this clause of §8.01-401.1 does not allow for the "introduction of otherwise inadmissible hearsay evidence during direct examination of an expert witness merely because the expert relied on the hearsay information in formulating an opinion." *Id*. (emphasis added).

§8.01-401.1's "facts, circumstances or data" clause is separate from the subsequent "reliable authority" clause, so is not read in conjunction with it. Hence, the hearsay Mooney Report clearly was inadmissible on direct examination of Honeywell's expert, Dr. Clarke. JA1520-1525.

4. The Mooney Report being admitted, especially by exhibit, and emphasized in closing is prejudicial.

This Court has reiterated the "overwhelming unfairness" of admitting absent expert opinion without cross-examination:

> 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.

Bostic, 275 Va. at 575 (quoting *Weinberg*, 252 Va. at 225 quoting *McMunn v. Tatum*, 237 Va. 558, 566 (1989)). Moreover, the Court observed that the General Assembly "insured" the "test of cross-examination" by inserting the

1994 preconditions in §8.01-401.1, and that by a proponent's non-compliance "the opposing party is subjected to the 'overwhelming unfairness' we discussed in *McMunn*". *Bostic*, 275 Va. at 576.

When Defendant's expert in *Bostic* failed simply to satisfy the first precondition of §8.01-401.1, this Court concluded the trial court "erred in admitting the opinions contained in published medical literature without an adequate foundation as required by Code §8.01-401.1." *Id*. at 578. Further, because the Court could not "determine to what extent the erroneous admission of hearsay opinions stated in the published articles may have affected the verdict" for Defendant, it reversed the judgment and remanded for new trial. *Id*.

Admission of the Mooney Report was more egregious than in *Bostic*. Honeywell satisfied the first precondition only re two (2) sentences of five (5) pages; did not satisfy the second precondition at all; admitted as an ostensibly authoritative "pamphlet" a private disputed contemporaneous self-interested case-related creation of the crashed plane manufacturer; even introduced all of it, including its expert Conclusions on the ultimate issue, as a trial exhibit; and emphasized it twice in closing. JA1582-1583.

The General Assembly in §8.01-401.1 expressly forbidding even admissible "reliable authority" as a trial exhibit acknowledges the extra

impact - the undue emphasis - of an exhibit in the jury room atop testimony in the courtroom. The entire 5-page Mooney Report going to the jury for its deliberations - and its speculations - must be presumed damaging.

The Mooney Report went to the pivotal liability issue of the trial - seemingly with NTSB siding with Honeywell. In addition to numerous inadmissible hearsay facts and other hearsay opinions, it marqueed the following unique hearsay expert opinion: **"Conclusions: The IIC ["NTSB"], 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."** Honeywell Exhibit 11, JA459-463 at JA463 (emphasis added).

That singular inadmissible hearsay opinion was a highly prejudicial trial exhibit because: (1) it reached the ultimate issue of the case, product defect and cause; and (2) it is not in the NTSB report admitted in evidence. Further, because it spoke on behalf of "The IIC ['NTSB']," it carried the implied imprimatur of the NTSB, the Federal agency responsible for official investigation, even though the NTSB report itself never stated those expert Conclusions adverse to Administrators. JA447-458.

The Mooney Report was a unique piece of expert testimonial and documentary evidence, not merely some inconsequential cumulative facts.

It buttressed Honeywell's defense in general and its experts in particular, while it foreclosed Administrators' truth-seeking cross-examination of the Mooney Report's author, the IIC, and the Lycoming representative.

B. THE TRIAL COURT CONDONING "ABSENCE OF OTHER INCIDENTS" ARGUMENT IS PREJUDICIAL ERROR.

"Plaintiffs' Motion *in Limine* X, the Court GRANTS this Motion." 11/21/12 Order (emphasis in original). JA401. "[A]ny evidence or argument as to the 'safety history' of Honeywell's autopilot is to be excluded." *Id*.

1. Public policy opposes Honeywell's absence of other incidents argument.

This Court long has prohibited all use of "absence of other incidents" evidence. "It is firmly established that evidence of the *absence* of other injuries is not admissible…when timely objection is made," regardless "whether the action lies in negligence or implied warranty." *Goins v. Wendy's Int'l, Inc.*, 242 Va. 333, 335 (1991)(emphasis in original). *Wood v. Woolfolk Properties, Inc.*, 258 Va. 133, 138 (1999); *Sanitary Grocery Co., Inc. v. Steinbrecher*, 183 Va. 495, 499-500 (1945).

Virginia's doctrine recognizes that other incidents may go undiscovered, unreported, unrecorded, misattributed, unacknowledged, etc.; and thereby are problematical, irrelevant, prejudicial. "Indeed, a departure from the rule would interject evidence so problematical, due to

the potential for lack of reporting, and the variables of circumstances and conditions, that such evidence would have slight, if any, relevancy or probative value." *Goins*, 242 Va. at 335-336. *Wood*, 258 Va. at 138.

This Court's salutary rule against Defendants admitting "absence of prior incidents" is the mirror-image of its rule against Plaintiffs admitting "fact of prior incidents" as evidence substantively to prove or corroborate negligence, breach of warranty and/or causation in a product liability case. *E.g.*, *Stottlemyer v. Ghramm*, 268 Va. 7, 12 (2004); *Jones v. Ford Motor Co.*, 263 Va. 237, 255 (2002). Thus, the public policy ends of fundamental fairness and consistency mandate that Defendants like Honeywell cannot disprove breach and/or causation by "absence of prior incidents" evidence, since Administrators cannot prove either with "facts of prior incidents".

In addition to litigation practicalities and equities, public policy in the interest of safety also demands that Plaintiffs not have to disprove defense claims of "absence of prior incidents," and that the public at large not have to suffer multiple widely-known injuries and deaths under substantially similar circumstances before a product unreasonably dangerous to normal use in fact can be found dangerous. There always must be a "first case;" Plaintiffs having to disprove the manufacturers' claimed negatives is too expensive, time-consuming, and otherwise burdensome and possibly futile;

and there is no minimum quantum of public casualties required to reach a critical evidentiary mass to maintain a product defect case.

When Defendants violate the rule against absence of other incidents evidence, Virginia law and public policy hold that the judge must take corrective action, such as a curative instruction; instead of increasing the prejudicial impact by condonation and apparent judicial approval. *Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 201 (2003). It is unsound, inequitable, and insufficient that victim Plaintiffs by their mere protests be expected to overcome, or (worse) even be deemed to have waived, the prejudice of Defendants and the weight of judiciary.

Although Honeywell's "safety history" re prior incidents properly was excluded at pretrial, *see*, B(2), *infra*; Honeywell patently violated the pretrial Order, Virginia law, and public policy by arguing in closing five (5) times about the total absence of prior incidents. *See*, B(3), *infra*. That obvious prejudice to Administrators was exacerbated irreparably when the judge condoned it by overruling Administrators' objections and their request for curative instruction and, moreover, by directing Honeywell to "proceed" - which it did again and again and again and again. *See*, B(4), *infra*.

2. **Evidence and argument of Honeywell's "safety history" properly was excluded at pretrial.**

Pursuant to Virginia law, Administrators moved *in limine* to exclude all evidence and argument by Honeywell of its purported product safety history. JA56-57. Urging various federal decisions, however, Honeywell vigorously opposed exclusion on brief and at pretrial hearing: for example Honeywell argued it "definitely relevant" that the autopilot "has over a 30-year history out in the field, hundreds of thousands of flight hours, not one incident reported with the type of allegation that they're claiming here, that debris got in here, caused it to jam and caused a runaway trim". JA66.

The trial court correctly rejected Honeywell's arguments, ruled for Administrators, JA610; issued a letter opinion, JA338; and entered 11/21/12 Order. JA401. Re "Plaintiffs' Motion *in Limine* X the Court GRANTS this Motion and any evidence or argument as to the 'safety history' of Honeywell's autopilot is to be excluded". *Id*. (underlining added).

3. **Honeywell violating Virginia law and pretrial Order in closing over objection improperly was condoned at trial.**

Despite clear Virginia law and explicit pretrial Order, in closing Honeywell improperly did exactly what it wanted to do anyway, and told the jury as a matter of fact that there was an absence of prior binding or jamming of the gears in its autopilot due to foreign matter: "It's never

happened before. There is no evidence this has ever happened anywhere any time." JA1584 (underlining added).

Administrators objected, to no avail. The trial court "Overruled," and directed Honeywell: "Please proceed." JA1584 (underlining added).

And proceed Honeywell did - with four (4) more violations of Virginia law and pretrial Order. Honeywell represented to the jury as additional fact:

1. "Safe design for 35 years, and no complaints", JA1591;

2. "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 unreasonably dangerous design", JA1591-1592;

3. "It can't do that and has never happened before", JA1603; and

4. "No evidence of a prior problem at all ever". JA1603.[6]

Administrators delayed their rebuttal argument, objected a second time, and requested a curative instruction.[7] JA1605-1607. But the trial court

[6] At and after trial, Honeywell claimed its closing arguments simply recount Administrators' experts not knowing of any other incidents. First, that is not what Honeywell stated in closing any of the five (5) times. Its "absence of other incidents" arguments simply are not particularized to Administrators' expert lack of familiarity, but rather are general sweeping all-encompassing proclamations. Second, even if Honeywell's arguments were limited to Administrators' experts, they still are not permissible. They still refer to "absence of other incidents" in the context "proof" of no defect or causation. Third, Administrators' experts personally not being familiar with any "other incidents" does not prove that there are no other incidents. So Honeywell cannot claim the total absence of other incidents that it did.

again condoned the Honeywell's multiple violations: "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. Overrule the motion." JA1607 (underlining added).

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[7] Administrators' timely objections and request for curative instruction preserved the issue. Moving for an instruction or for a mistrial suffices. *E.g.*, *Cheng v. Commonwealth*, 240 Va. 26, 38 (1990). "[J]uries are presumed to follow prompt, explicit, and curative instruction." *Beavers v. Commonwealth*, 245 Va. 268, 280 (1993). But the trial court refused to grant Administrators' motion for a curative instruction. Moreover, since the trial court repeatedly overruled Administrators' objections and their request for a curative instruction, under the circumstances Administrators requesting a mistrial obviously would have been an unnecessary "vain and useless undertaking". *Virginia Passenger & Power Co. v. Fisher*, 104 Va. 121, 129 (1905)("sufficient reason, we think, for not applying…for action to redress the wrongs complained of"). The pretrial Motion *in Limine* X, the arguments at 10/11/12 hearing, the pretrial Order, the repeated trial objections, and the request for curative instruction were amply sufficient to raise and preserve the issue. Further, Administrators' protests in closing about the falsity of Honeywell's "safety history" arguments are no substitute for curative instruction, particularly not where the trial court "overruled" Administrators' objections and authorized Honeywell to "proceed," *i.e.*, approved judicially. Inequitably and insufficiently, Administrators' protests simply left the jury to speculate which party was telling the truth about Honeywell's claimed "safety history" - with its nod likely going to Honeywell (since the judge twice overruled Administrators' objections, refused curative instruction requested by Administrators, and had excluded Administrators' would-be evidence in the first place).

Since the judge overruled Administrators' motion for curative instruction, his phrase "what you-all tell them is not evidence" is not curative. That ruling is akin a sports referee seeing personal fouls and, instead of calling penalties on the offender, simply telling the competitors to "play on" - thereby condoning the inappropriate harmful rough play.

4. <u>Honeywell's violations and judge's condonations were prejudicial</u>.

Honeywell arguing its safety history - the absence of other incidents over 35 years - five (5) distinct times in closing necessarily was prejudicial. "Such evidence introduces into the trial collateral issues, remote to the issue at trial, which would tend to distract, mislead, and confuse the jury." *Goins*, 242 Va. at 335. *Wood*, 258 Va. at 138 ("we are unable to say that it did not confuse or mislead the jury").[8]

Further, the "probably prejudicial impact of this argument is significant because the improper argument focused on the central dispute". *Velocity Express,* 266 Va. at 201. Moreover, the judge repeatedly condoning Honeywell's five (5) violations magnifies the prejudice, leading the jury to

[8] Technically, of course, Honeywell's closing argument was not "evidence". However, the legal principle and public policy are the same re "argument".

infer judicial approval of its impropriety - ultimate unfairness to Administrators.

"The circuit court refused to take any corrective action to eliminate the adverse prejudicial effect on the jury of [Defendant's] improper argument. Based on the record before the Court, we conclude that the probability of prejudice upon the jury…was increased by the apparent approval given by the circuit court because of that court's refusal to take corrective action." *Id*. (underlining added)(remand for new trial). *Reid v. Baumgardner*, 217 Va. 769, 774 (1977)(same).

C. THE TRIAL COURT REFUSING TO GIVE ADMINISTRATORS' CLEAR COMPLETE CORRECT MULTIPLE PROXIMATE CAUSE INSTRUCTION IS PREJUDICIAL ERROR.

Virginia's law of proximate cause provides:

> 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 condition.

That is Administrators' Instruction 11 that was rejected. JA352

1. Public policy demands the jury be instructed fully.

"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." *Holmes v. Levine*, 273 Va. 150, 159. Significantly, the evidence introduced to support a requested instruction must only be "more than a scintilla;" and where "a proffered instruction finds any support in credible evidence, its refusal is reversible error." *Id*. (emphasis added).

Although *Holmes* frames correct jury instructions as a litigant entitlement, as a matter of public policy they are a jury entitlement too. As triers of fact, juror must understand their charge; if they are unclear - even in part on one pivotal point - then the wrong decision and unnecessary injustice may result.

Proximate cause often is a subtle confusing point among lawyers, let alone jurors. Public policy requires that the jury be instructed clearly, completely and correctly on that, particularly where as here the theory of two (2) proximate causes is at the core.

Administrators' Instruction 11 about "one or more proximate cause" is particularly important in light of there being no "concurrent negligence" instruction (because it was a "breach of warranty" product liability case), which would have indicated one or more proximate causes were possible. *Holmes* does not indicate whether a concurrent negligence instruction was used in that case.

Also, Administrators' multiple-cause instruction is especially important because contributory negligence, assumption of risk, superseding cause, and even product misuses were not issues/defenses in this particular "warranty" case. Thus, even a jury finding there was some pilot error that was a proximate cause would not require a defense verdict, but rather still would have required the jury to decide whether product defect was a proximate cause too.

Contrary to Virginia law and public policy, Administrators' clear complete correct jury instruction on proximate cause was rejected solely because it was not the Model Jury Instruction, *see*, C(2), *infra*; despite there being ample credible evidence in the case as a whole to support two proximate causes. *See*, C(3), *infra*. The resulting prejudice was manifest. *See*, C(4), *infra*.

2. There may be more than one proximate cause, and other proximate causes need not be excluded with certainty; and Administrators' jury instruction so informed the jury, but it was refused for not being a Model Jury Instruction.

Virginia law holds there may be "more than one proximate cause of an event". *Id*.[9] Further, Virginia law also holds it is not necessary to

[9] In product liability cases, under Virginia law, the manufacturer is liable if its product simply is "a" proximate cause: "our law provides a means of holding a defendant liable if his or her negligence is one of multiple

establish "proximate cause with such certainty as to exclude every other possible conclusion". *White Consolidated Indus., Inc. v. Swiney*, 237 Va. 23, 28 (1989).

Administrators' Instruction 11 stated re proximate causation:

> 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. <u>There may be one or more proximate cause</u>. <u>Proximate cause need not be established with such certainty so as to exclude every other possible condition</u>.

JA352 (emphasis added). Hence, the two sentences underlined to which Honeywell objected simply state Virginia law correctly.

Honeywell objected to Administrators' multiple-cause instruction <u>solely</u> on the basis that it was <u>not</u> the "Model Jury Instruction," and the trial court improperly sustained on that ground, JA1545-1547; contrary to Virginia statute and public policy. "A proposed instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with the model jury instructions." *Va. Code* §8.01-379.2.

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concurrent causes which proximately caused an injury, when any of the multiple causes would have each have been a sufficient cause." *Ford Motor Co. v. Boomer*, 285 Va. 141, 151 (2013).

3. **Administrators are entitled to correct jury instructions supporting their theory, regardless whether scintilla-plus of credible evidence is in their and/or Honeywell's case.**

In *Holmes* too there were two potential proximate causes of death. *Id*. at 159. Despite its verdict form specifically stating the jury "did not find that [Defendant's] failure was a proximate cause of Holmes death," *Holmes* reversed and remanded for the trial court refusing Plaintiff's following proximate cause instruction, which is virtually identical to Administrators' first underlined sentence that was rejected: "There may be more than one proximate cause of an event." 273 Va. at 157-160 (emphasis added).

In *Holmes*, Plaintiff's own evidence happened to show both potential causes of death. *Id*. But it is not necessary that only Plaintiff's case-in-chief prove all proximate causes, and *Holmes* did not so hold.

Instead, the jury fairly may find more than one proximate cause based on the evidence as a whole: Plaintiff's evidence, Defendant's evidence, or both parties' evidence. Thus, although Administrators only introduced evidence of product defect as proximate cause, since Honeywell introduced evidence of pilot error as proximate cause, the jury was entitled to consider and to find both pilot error and product defect as proximate causes. *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."); *McClung v. Commonwealth*, 215 Va. 654, 657 (1975).

In *McClung*, the murder Defendant steadfastly maintained that she was "not guilty" by reason of self-defense, but was convicted of murder in the second degree. *Id*. at 654. However, this Court reversed and remanded in *McClung* when the trial court refused Defendant's request for a "voluntary manslaughter" instruction on the grounds that "the [whole] evidence was also sufficient to support an instruction on voluntary manslaughter" (if viewed most favorably to her), even though it concededly was sufficient to support murder in the second degree (when viewed most favorably for Commonwealth). *Id*. at 656-657.

Correspondingly, since "more than a scintilla" of "credible evidence" had been admitted to support two proximate causes, *Holmes*, 273 Va. at 159; Administrators were entitled their requested instruction that "there may be one or more proximate cause". Administrators so argued to the judge in support, JA1545-1547; and addressed multiple causation theory in closing. TT 3222-3223.

4. Refusal of Administrators' multiple-cause instruction is prejudicial.

The trial court refused Administrators' multiple-cause instruction contrary to statute. That refusal possibly if not probably left the jury with the misimpression that it must or at least could weigh and find only one proximate cause, particularly in light of there being no concurrent negligence instruction. The jury reasonably could have found pilot error and product defect each were a proximate cause, especially since contributory negligence, assumption of risk, superseding cause, and product misuses were not issues/defenses; and the jury should have understood that unequivocally by Court instruction (which Administrators could and would have emphasized in closing).

D. THE TRIAL COURT ADMITTING ABEL'S EXPERT "CRITICAL WITNESS" OPINIONS IS PREJUDICIAL ERROR.

William Abel is a former flight instructor whom Honeywell lionized as a "pretty critical witness". JA657 (emphasis added). He provided training to Grana, and opined on Honeywell's direct examination:

1. "A: [T]he fact that [Mr. Grana] took off on this day makes - makes me have some concerns about the judgment, taking off into conditions on the weather that - that was reported to me." JA1350 (emphasis added).

2. "Q: So with respect to judgment, do you believe that Mr. Grana exercised good judgment, based on your understanding of

his qualifications and training, in departing into 800-foot overcast ceiling on the day of the accident?

A: Based on the - all the flying I've done with Joe [Grana] and the conversations that we had, I had concerns about why he would take off into those conditions on that day." JA1351-1352.

3. "Q: With respect to Mr. Grana's lack of experience in the airplane in actual IFR 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 (emphasis added).

But Abel had no "person knowledge" of the crash, the takeoff, or even the airport weather conditions, JA1334-35; his weather report was from the internet - 3 days before the crash. *Id*.

Administrators objected to Abel's testimony as lacking sufficient foundation, improper opinion testimony, speculative, based on hearsay, irrelevant, and invading the jury's province. JA723-741. The trial court overruled all objections. *Id*.

1. Public policy opposes Abel's opinions.

Acceptance and rejection of expert testimony is a quintessential "gatekeeper" function of the courts. Given the unique elevated status of

experts, particularly to jurors, public policy mandates would-be experts be scrutinized closely.

A witness either is qualified as an expert, or not: there is no half-measure. There are no “quasi-experts” under Virginia law.

As a corollary, courts’ expert “gatekeeper” function necessarily extends to precluding witnesses not deemed to be experts from rendering opinions that are the province of experts. As a matter of public policy, a witness should not be able to introduce *de facto* expert opinion through the back door as a layman when unauthorized to admit it through the front door as an expert.

Honeywell’s “pretty critical witness,” JA657, William Abel, never was qualified as an expert by the judge. *See*, D(2), *infra*. Consequently all of his harmful *de facto* expert opinions are inadmissible for his lack of qualification, as well as for multiple other independent grounds, *see*, D(3-6), *infra*; and their admission was highly prejudicial to Administrators, particularly as marqueed by Honeywell repeatedly by videotape excerpts.

2. Abel’s opinions are unfounded and improper.

Whether Honeywell claims Abel to be an expert witness, or admits him to be a lay witness, his testimony is clearly inadmissible:

a. It is unfounded as an expert.

Abel never was accepted by the Court as an expert. The judge stated "Abel is a quasi-expert, and we've made that quasi-determination," TT 349 (emphasis added) - a netherworld status and an incomplete acceptance unrecognized in Virginia law.

At pretrial hearing, Honeywell conceded that Abel was "not a retained expert," TT 462; and was a mere "percipient" with "percipient observations" of fact "based on his perceptions," TT467-468 and 478-479; except possibly for his "spatial disorientation" opinions. TT 468-470; and that "99 percent of what he says is factual". JA671. Moreover, even if Abel arguably could be qualified as an expert on a matter (which is disputed), an area of expertise never was identified for him; remained open to speculation by the jury; and ultimately would limit the nature, topic and scope of his opinions. *Combs v. Norfolk and Western Ry. Co.*, 256 Va. 490, 496 (1998).

Further, there was no showing that Abel did or even could consider all of the "variables" as foundation for his opinions. *Cf., Keesee v. Donigan*, 259 Va. 157, 161-162 (2000)("requirement that the evidence be based on an adequate foundation"). Hence Abel could not opine as an expert.

On retrial, however, Honeywell may try to qualify Abel as an expert and to elicit some of the same testimony from him. So alternatively this

Court still should scrutinize him and his "credentials" as an expert under D(3-5), *infra*, and bar his opinion testimony on retrial. *Burns, supra*.

b. It is improper as a layman.

"Opinion testimony by a lay witness is admissible if it is reasonably based upon the personal experience or observations of the witness and will aid the trier of fact in understanding the witness' perceptions." *Virginia Rule of Evidence* 2:701 (emphasis added). *Cf.*, *Doe v. Dewhirst*, 240 Va. 266, 270 (1990)("In order to be competent to testify on the subject the witness must have had a reasonable opportunity to judge," and even "momentary observations" at impact and "later glimpse" post-impact "did not demonstrate that he had a reasonable opportunity to form an opinion"). Since Abel has no "personal knowledge" of the crash, the take-off, the weather, or anything; as a layman he cannot opine about any of it, including particularly without limitation "judgment" and "causation".

3. Abel's opinions are speculative.

Despite his repeated "concerns," bottom line is that when Honeywell asked his opinion about "cause," Abel had none, JA677: he admitted "I don't know what happened up there". JA1357 (emphasis added). That core concession renders all other testimony by Abel speculative and inadmissible as such, even if he were qualified as an expert.

For example, in *Pettus v. Gottfried*, 269 Va. 69, 73 (2005)(reversed and remanded for retrial), Defendant's expert had "no" opinion re cause of death, yet gratuitously opined for the defense further "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". This Court held that gratuitous opinion was "speculative in nature". *Id*. at 78.

Further, Abel expressing only "concerns" about Grana's "judgment" is so indefinite as to be impermissibly speculative too. JA1349-1352. And Abel opining "it wasn't the best judgment" still is indefinite. JA1357.

4. <u>Abel's opinions are hearsay</u>.

Abel testified based on - indeed, testified about - hearsay weather conditions on Honeywell's direct examination. Even an expert attesting hearsay facts on direct examination is inadmissible and reversible error. *Commonwealth v. Wynn*, 277 Va. 92, 100 (2009).

5. <u>Abel's opinions are irrelevant</u>.

Abel only expressed general "concerns about the judgment, taking off into conditions on the weather," and that it was not "best judgment". JA1349-1352 and 1357. Abel did <u>not</u> opine at all about what, if anything, Grana supposedly did or did not do while actually flying to cause or

contribute to causing the crash: "I don't know what happened in that airplane." JA1357 (emphasis added).

Whether or not Grana showed "good judgment" let alone "great judgment" in deciding to fly in weather conditions (never seen by Abel), however, simply is not relevant. Re Grana, the sole causation issue is whether, once flying, any (in)action by Grana proximately caused the crash - not whether his decision to fly in the first place was "great" or even "good".

This Court countenancing Abel's testimony as relevant opens the floodgates to like testimony in garden variety motor vehicle accident ("MVA") and other cases. In any MVA involving inclement weather - or late/wee hours, etc. - expert and/or lay witnesses could opine "concerns" about motorists' threshold judgment in deciding to drive in the weather, at the hour, etc. as ostensibly relevant to the actual cause of the MVA literally minutes and miles down the road.

6. Abel's opinions invade the jury's province.

Abel summarily opined "concerns about the judgment" and "it wasn't the best judgment". JA1349-1352 and 1357. While that testimony is indefinite unto speculative, it also conclusorily and impermissibly goes to the ultimate issue to be decided by the jury alone, *i.e.*, whether Grana's conduct was a cause of the crash.

7. **Abel's opinions are prejudicial.**

As intended by Honeywell, the opinions of its "pretty critical witness," Abel, sullied Grana. Abel's repeated "concerns" about (bad) "judgment" bespoke incompetence or at least carelessness if not recklessness - despite contributory negligence, assumption of risk, and product misuse not being issues - indicating predicate "fault" and inviting speculation, assumption and/or presumption of Grana's (continuing) incompetence and/or wrongdoing while flying.

Moreover, Honeywell maximized the prejudicial impact of "pretty critical witness" Abel's repeated "concerns" about Grana's "judgment" at four (4) different junctures during trial:

1. Opening statement [by videotape], JA792;
2. Direct examination [by videotape], JA1352 and 1354;
3. Expert cross-examination [by reference], JA1645; and
4. Closing argument [by videotape], JA1594-1595.

Since Abel testified by videotape deposition, for maximum impact Honeywell played videotape excerpts focusing on his "concerns" about "judgment" during opening, JA792; and replayed in closing. JA1594-1595.

With synergistic effect, Honeywell also coupled its broadcasts of "pretty critical witness" Abel's testimony with its broadcasts of similar

negative opinion/feelings testimony of another plane co-owner, Robert Norman. *See*, E, *infra*. As intended, the reinforcing testimony of its co-owner duo was very damaging to Administrators.

E. THE TRIAL COURT ADMITTING NORMAN'S LAY OPINIONS AND HEARSAY IS PREJUDICIAL ERROR.

Unlike Grana, Robert Norman is a Mooney plane co-owner who was unlicensed, unendorsed, and inexperienced to fly the Mooney solo in <u>any</u> conditions, let alone under Visual Flight Rules and Instrument Meteorological Conditions like Grana. JA1381-1383 and 1394. Moreover, Norman never used Honeywell's autopilot in question to assist with turning, TT 2364; and the Mooney indisputably was turning after takeoff when Grana used it. JA991-992.

Nonetheless, on Honeywell's direct examination, Norman as <u>layman</u> repeatedly was allowed to share his subjective opinions about the Mooney:

1. "A: <u>I still to this day am afraid of that Mooney</u>.

2. A: <u>I have a healthy fear of [the Mooney]</u>.

3. A: It was not something that I would ever want to fly solo until I could do that instantly….<u>The Mooney, there are a thousand different mistakes you could make that would lead you to have something bad happen</u>.

4. A: I was told you'd have to be retarded to crash a [Cessna] Skyhawk.*** <u>The Mooney, totally opposite</u>. <u>The Mooney,</u>

> there are a thousand different mistakes you can make that would lead you to have something bad happen."

JA380-382 (emphasis added). Norman also attested his subjective opinions about his operation of the Mooney under supervision and different circumstances than Grana, including that the autopilot seemed to work alright, JA1383-1389; and attested hearsay about what Abel "meant," and what other Mooney co-owners wanted re Grana flying. JA1405-1409.

1. Public policy opposes Norman's lay opinions.

As indicated regarding William Abel, *see*, D(1), *supra*, a classic "gatekeeper" function of the courts is precluding lay witnesses from foraying into *de facto* expert opinion. Of course, lay testimony also is inadmissible independently for lack of foundation, irrelevance, speculativeness, and hearsay.

The testimony of Robert Norman, which dovetailed with that of William Abel as a matter of content and presentation by Honeywell, suffered from all those unfair ills. *See*, E(2-5), *infra*. Their effects were prejudicial, particularly with the repeated combined videotape excerpts of Abel and Norman, *see*, E(6); and public policy dictates such multi-prong injustice not be countenanced.

2. **Norman's lay opinions are unfounded.**

Lacking qualifications, Norman testified as a layman. But his testimony about fearing the Mooney plane, JA1380-1381; about the "thousand different mistakes you can make" with it, JA1381-1382; and its operation were unfounded. JA1405-1409.

His testimony about operating the Mooney plane under different circumstances than Grana also was unfounded and impermissible (even for an expert), because Norman did not know and thereby could not and did not consider all of the variables. JA1334-1335. Administrators repeatedly objected, but were overruled. JA756-783.

3. **Norman's lay opinions were irrelevant.**

Obviously, Norman's lay personal fears about the Mooney, including the "thousand" bad mistakes a pilot could make with it, are not relevant to the issues whether Grana and/or product defect was a cause of the crash. Likewise, Norman's opinions about how Honeywell's autopilot operated under limited different circumstances, about what Abel meant and/or about what other co-owners intended re Grana simply are not relevant either.

Administrators objected on grounds of relevance. JA756-760. But the judge overruled. *Id*.

4. <u>Norman's lay opinions were speculative</u>.

Norman opining about how the Mooney plane operated in his limited experience under circumstances that were not substantially similar also were speculative. JA1383-1389. Administrators so objected, and were overruled. JA758-760.

5. <u>Norman's testimony is hearsay</u>.

Norman's opinions about what Abel meant and what various partners supposedly stated and agreed about Grana flying are hearsay. JA1383-1389. *Wright v. Kaye*, 267 Va. 510, 530 (2004)("state of mind" statements were inadmissible hearsay). Administrators objected, and the judge overruled. JA769-773.

6. <u>Norman's lay opinions and hearsay are prejudicial</u>.

Norman's opinions unfairly indicated there was no defect with Honeywell's autopilot. Yet he lacked sufficient expertise, had limited exposure to the Mooney plane, and used it under different circumstances.

Norman's opinions repeatedly suggested that pilot mistake was the cause of something bad happening, *i.e.*, the crash. They did so in heightened unto exaggerated emotional terms, *i.e.*, "afraid," "fear," and a "thousand different mistakes".

As with Abel's testimony, Honeywell maximized the prejudicial impact of Norman's subjective lay impressions at three (3) trial junctures:

1. Direct examination [by videotape], JA1380-1389;
2. Closing argument [by videotape], JA1593-1594; and
3. Closing argument [by reference], JA1598.

Since Norman too testified by videotape deposition, for maximum impact Honeywell replayed Norman's most inflammatory opinions immediately before it played Abel's videotape excerpts in closing. JA1593-1595.

CONCLUSION

For the reasons set forth above, consonant with sound public policy, VTLA urges the Court to reaffirm and apply Virginia's longstanding doctrines on reliable authority, prior incidents, proximate causation, and lay and expert testimony and opinions, and reverse the Circuit Court's judgments and remand for new trials on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2014, fifteen copies of the above Brief *Amicus Curiae* have been filed via USPS Certified Mail to the clerk's office. This same date, three copies of the same have been sent via USPS First Class Mail to the following counsel:

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This same day, an electronic version was also sent via email to the Clerk's Office of the Supreme Court of Virginia and to all counsel listed above.

/s/ Avery T. Waterman, Jr.
Of Counsel

ADDENDUM

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January 21, 2014

By E-Mail and Fax
Avery T. Waterman, Jr., Esquire
Patten, Wornom, Hatten & Diamonstein, L.C.
Suite 300
12350 Jefferson Avenue
Newport News, Virginia 23602
(Fax (757) 223-4499)

Re: Michelle C. Harman, Administratrix of the Estate of Joseph A. Grana, III, Deceased, et al. v. Honeywell International, Inc.; Record Number 130627

Dear Mr. Waterman:

This confirms that I, as and on behalf of counsel for the Appellants, hereby consent to your filing in the Supreme Court of Virginia of a Brief *Amicus Curiae* of the Virginia Trial Lawyers Association in the above-styled matter.

Sincerely yours,

Roger T. Creager

cc: Counsel for Appellees
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Turner A. Broughton, Esquire
Joseph R. Pope, Esquire
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January 22, 2014

VIA ELECTRONIC MAIL

Avery T. "Sandy" Waterman, Jr., Esq.
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602

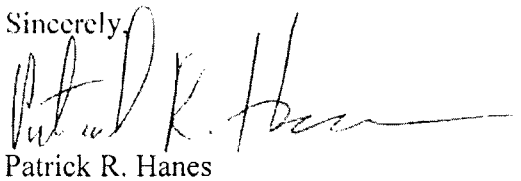
Re: Michelle C. Harman, etc. v. Honeywell International Inc.
Record No.: 130627

Dear Sandy:

As and on behalf of counsel for Appellee, I consent to the filing in the Supreme Court of Virginia of a Brief Amicus Curiae of the Virginia Trial Lawyers Association in the above-styled matter.

Please let me know if you have any questions.

Sincerely,



Patrick R. Hanes

cc: Turner Broughton, Esq. (via e-mail)
Roger T. Creager, Esq. (via e-mail)
Michael McQuillen, Esq. (via e-mail)

Jeanne Varco

From: Austin W. Bartlett <abartlett@AMM-LAW.com>
Sent: Tuesday, January 21, 2014 5:06 PM
To: Jeanne Varco
Cc: Michael G. McQuillen; John M. Kelly; Broughton, Turner (tbroughton@williamsmullen.com); Hanes, Patrick R. (phanes@williamsmullen.com); 'rcreager@creagerlawfirm.com'; 'jshea@marksandharrison.com'; 'arobb@robbrobb.com'; 'grobb@robbrobb.com'
Subject: FW: Harman v. Honeywell c/w Bemberis v. Honeywell - 1/21/14 Email to P. Hanes and M. McQuillen
Attachments: img-121160142-0001.pdf

Importance: High

Hi, Jeanne and Avery:

On behalf of Mike McQuillen, this will confirm that we consent to your filing of an amicus brief.

Best regards,
Austin

Austin W. Bartlett
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From: Jeanne Varco [mailto:jeanne@PWHD.com]
Sent: Tuesday, January 21, 2014 3:05 PM
To: phanes@williamsmullens.com; Michael G. McQuillen; tbroughton@williamsmullen.com; jpope@williamsmullen.com
Cc: jshea@marksandharrison.com; arobb@robbrobb.com; grobb@robbrobb.com; rcreager@creagerlawfirm.com
Subject: Harman v. Honeywell c/w Bemberis v. Honeywell - 1/21/14 Email to P. Hanes and M. McQuillen
Importance: High

This email was sent to you on behalf of Avery T. Waterman, Jr., Esq.

Jeanne M. Varco, Legal Assistant
to Avery T. Waterman, Jr., Esq.
Patten, Wornom, Hatten & Diamonstein, L.C.