IN THE

Supreme Court of Virginia

RECORD NO. 130627

MICHELLE C. HARMAN,
Administratrix of the ESTATE of
JOSEPH A. GRANA, III, Deceased, *et al.*,

Appellants,

v.

HONEYWELL INTERNATIONAL, INC.,

Appellee.

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INTRODUCTION

Joseph A. Grana, III ("Grana") was a new pilot. On April 27, 2008, the day he and his father, Joseph E. Grana, Sr. ("Grana Sr.") tragically lost their lives, he had been flying just sixteen months. The airplane Grana was piloting that day was more powerful and more complicated than the one on which he had trained. And the skies were cloudy—so cloudy that, above 800 feet, visibility reduced to zero. The circumstances presaged disaster: Grana had practically no experience flying *that* plane in *those* conditions without an instructor present.

Right after takeoff, as Grana steered the plane upward toward the clouds, things were going just fine. But just as the plane passed into the cloud layer, it veered off course. What began as a series of disoriented turns ended in a spiral dive. The plane hit the ground two-and-a-half minutes after taking off.

What happened that day was sad but unmistakable. An inexperienced pilot lost control of a plane when he became disoriented in the clouds—a phenomenon that is unfortunately all too common. The Administrators of the Granas' estates nevertheless looked for someone to blame. They filed suit against twenty-eight persons and entities, one of which was Honeywell International Inc. ("Honeywell")—the maker of the

plane's autopilot system.

As against Honeywell, the Administrators claimed that a flaw in the autopilot somehow allowed microscopic debris to enter one of the gear systems, causing the plane to become uncontrollable. But as the jury later would determine, this theory lacked proof. The Administrators had no evidence that Grana had engaged the autopilot during the flight; they gave no viable account of how debris could have entered the autopilot system; and they offered no explanation of why the supposed autopilot malfunction would have occurred just as the plane entered the clouds. Moreover, evidence demonstrated that the debris in question—found in the wreckage of a plane that had been destroyed by impact with the ground and the resulting fire, and then stored outdoors in a dumpster—was the *result* of the crash, not its cause.

Over the course of a nine-day trial, the Administrators pressed their debris-in-the-gears theory, while Honeywell presented evidence that the accident was just what it seemed to be: the unfortunate result of an inexperienced pilot becoming disoriented while flying without visual cues. The jury heard from seven lay witnesses and eleven experts; 148 exhibits were entered into evidence. After just an hour of deliberations, the jury returned a unanimous verdict for Honeywell.

Of hundreds of decisions the trial court made over the course of the trial, the Administrators pick out four they maintain should have gone the other way. And of eighteen jury instructions, they challenge the adequacy of just one. On these slimmest of reeds the Administrators seek to upset the determination of a unanimous jury.

The trial court is at the front lines of litigation, and this Court reviews a trial court's determinations on these kinds of issues only for abuse of discretion. With respect to all five assignments of error, the trial court was not only within its discretion—it reached the right outcome. Even if this Court were to disagree, trials are not unwound on the basis of harmless errors. Given the copious and duplicative evidence demonstrating that Honeywell's autopilot had nothing to do with the accident, the Administrators have demonstrated no prejudice that resulted from the supposed errors they assert.

In sum, the trial court has broad discretion on the kinds of questions this appeal raises, and it got those questions right. Even if it did not, no prejudice resulted. This Court should affirm.

STATEMENT OF FACTS

The Plane. The 2000 Mooney M20M is a high-performance, turbo-charged airplane. (JA 1412-14). It is a very complex machine, capable of

reaching high altitudes and traveling at high speeds. (JA 1288-89, 1412-14). The Mooney is equipped with the Honeywell KFC 225 autopilot system, a sophisticated flight-control mechanism with a number of components. (JA 961, 1443-53). The autopilot system need not be engaged for the plane to fly, and it can be overpowered or disconnected by the pilot at any time. (JA 1274-75, 1388-89, 1460). But when activated, the KFC 225 system can be used to help control the plane's movement. (JA 1274-75, 1459-63).

It works like this: The pilot activates the autopilot computer; the computer sends a signal to three servo motors; and those motors physically move the necessary parts of the plane's wings and tail. (JA 1448-71). In this way, the autopilot system can turn the aircraft left or right (roll) and move it upward or downward (pitch). (JA 1277). A plane's roll is controlled primarily by the movements of its wings; its pitch is controlled largely by the position of its tail. (JA 1448-71).

Particularly relevant here, the movement surface of the Mooney's tail—and thus the angle of its ascent or descent—is controlled by the pitch trim system. (JA 1499-1516, 1448-63; Def.'s Exh. 882). The trim system contains a component called a "jackscrew," and the position of the jackscrew corresponds with the position of the tail's surface. (*Id.*). The

jackscrew's position, accordingly, can be used to establish the position of the tail surface, and thus the pitch of the plane.

The Pilot. Grana began training as a pilot just sixteen months before the accident. (JA 1425-26). Nearly the whole first year of his training occurred in a Cessna 172—a plane that, as compared to the Mooney, is slower, less powerful, and easier to operate. (JA 471, 1414-26, 1292-93). The Cessna's navigational equipment is different, too. (JA 1292-93) Five months before the accident, Grana, together with two partners, Robert Norman and Kenneth Linton, purchased an eight-year-old Mooney. (JA 450, 1270, 1378). It was only then that Grana began training in the accident aircraft. (JA 1269-70, 1291-92).

Grana received virtually all of his flight training from William Abel, a certified flight instructor. (JA 1267, 1286-1310). As Grana's instructor, Abel had extensive personal knowledge of Grana's flying experience and abilities. (*Id.*). Before the accident, Grana had logged a total of 334 hours of flight time, with just 73 of those hours in the Mooney. (JA 471, 1143-47, 1286-87). The vast majority of Grana's experience, moreover, was under Visual Flight Rules ("VFR"), which apply when the pilot is able to see where he is going by reference to outside visual cues, such as the horizon, natural objects, or landmarks. (JA 471, 1140-48). Grana had only 30 hours of

experience flying in Instrument Meteorological Conditions ("IMC"), which occur when visibility is so impaired by clouds or other weather that a pilot must rely only on his instruments. (JA 471, 1140-48, 1318-28). And nearly all of that IMC experience was in the Cessna—a plane with a different and less complicated navigational system. (JA 471, 1414-26, 1292-93, 1299). At most, Grana had one hour of solo IMC flight time in the Mooney. (JA 1301, 1426-27).

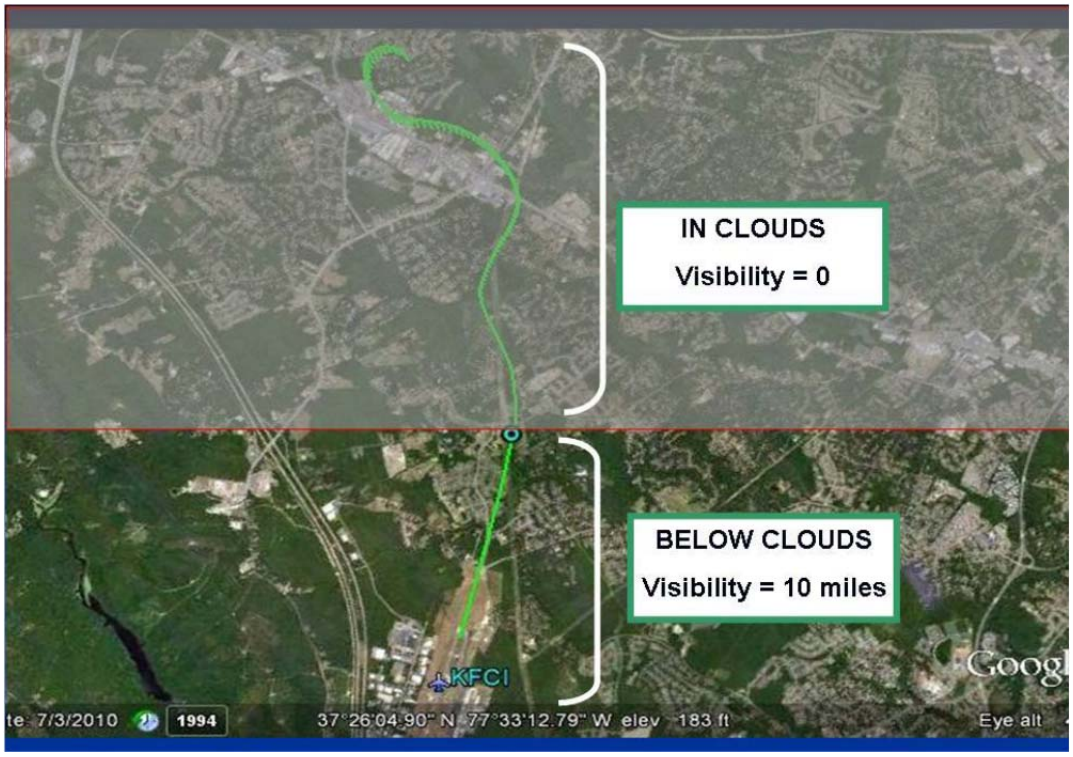
According to Abel, Grana's training should have enabled him to fly the Mooney safely in VFR conditions—when he could rely on outside visual cues to guide the plane. (JA 1298-1300). But, "[d]ue to the complexity of the aircraft, the speed of the aircraft, [and] the addition of systems compared to the [Cessna]," Grana's limited experience in the Mooney left him unprepared to fly the plane without an instructor in *IMC* conditions. (JA 1595). Indeed, Grana and Abel had agreed that Grana would fly the Mooney solo only in good visual conditions; Grana said he would refrain from flying the Mooney in IMC conditions until he received more training on its instrument systems. (JA 1299, 1305-06, 1352-53).

The Accident. Tragedy struck on Sunday, April 27, 2008. It "was a bad day for flying." (JA 1258). Clouds blanketed the sky at an altitude of 800 feet. (JA 451, 1258-61). Below the clouds, there were ten miles of

visibility; above the clouds, visibility reduced to zero. (JA 451, 990, 1535). Notwithstanding Grana's lack of experience flying the Mooney solo in IMC conditions and his agreement with Abel that he would not try to do so before completing additional training, Grana decided to go ahead with a short flight he had planned to take with his father.

At 10:16 a.m., the pair took off from Chesterfield County Airport. For a minute and a half, the plane climbed normally. (JA 448-49, 980-92). But once the plane penetrated the clouds, radar data showed that its flight path changed dramatically. The plane turned gradually one way, then another, and ultimately spiraled downward toward the ground. (JA 448-49, 454, 980-92, 1081-82, 1430-38, 1535-38). The plane crashed just one minute after entering the clouds—two-and-a half minutes after takeoff. (JA 448-49, 992). Both Grana and his father were killed.

The image below, which was entered as an exhibit, shows a bird's-eye view of the flight path:



(Tr. Exh. 987). Honeywell's experts established that the plane's movement after entering the clouds was indicative of a pilot suffering from spatial disorientation—a phenomenon, particularly common among inexperienced pilots, in which a pilot flying without visual cues becomes unable to determine which way is up. (JA 1303-04, 1430-31, 1436-49, 1535-38, 1543-44).

The Investigation. The National Transportation Safety Board (NTSB), an independent agency charged with investigating civil aviation accidents, performed a thorough investigation of the accident. (JA 447-58). The impact and resulting fire had caused extensive damage to the plane, and the wreckage had been subsequently stored outdoors in a dumpster

and exposed to the elements. (JA 451-53, 1220, 1485-87). Nevertheless, the NTSB examined the pieces that remained and, in 2010, issued an Accident Report. (JA 447-58). The NTSB Accident Report does not mention the autopilot system. (*Id.*).

Other investigations were also conducted, including by the parties' experts and by Mooney, the manufacturer of the aircraft. (JA 459-63). The wreckage was repeatedly combed through, studied, and documented. There was one key fact on which the investigators and experts from both sides agreed: The trim-system jackscrew found in the wreckage was within the normal range of takeoff positions, with six threads showing. (JA 452, 461, 470, 1499-1507, 1512-20, 1524).

The Trial. The Administrators of the Granas' estates filed suit in the Chesterfield County Circuit Court against the Mooney's co-owners Norman and Linton; Grana's flight instructor Abel; and twenty-five other entities and individuals involved in manufacturing components of the aircraft ranging from its engine to its braking mechanisms, leasing the aircraft, maintaining and servicing the aircraft, and managing the airport from which the aircraft departed. Honeywell was among the twenty-five. And as against Honeywell, the Administrators claimed that a defect in Honeywell's

autopilot system had allowed debris to enter one of the servos, causing the plane to become uncontrollable and crash.

At trial, however, it became clear that this theory was more fanciful than factual. The Administrators presented no evidence showing that the autopilot was even engaged during the flight. They gave no explanation of why the autopilot would begin to malfunction at the same time the plane hit the cloud layer. Their experts admitted to having been unaware that the window through which they claimed debris had entered the servo was actually covered with a piece of metal called a "capstan guard." (JA 877-78, 896-99). The Administrators introduced evidence that the servo design at issue had been around since 1974 (TT 2720-21; Tr. Exh. 52), but neither the Administrators' experts nor Honeywell's had ever encountered the debris-in-the-servo crash theory before this case. (JA 834-35, 891, 894, 964, 1042-43, 1110-11, 1166-67, 1198-99, 1201-03).

Honeywell's evidence showed that what really happened on that cloudy April day was much simpler. Inexperienced with flying the Mooney in IMC conditions, Grana became spatially disoriented when the plane entered the clouds. Unable to see, he lost control, and the plane crashed. The evidence supporting this straightforward explanation was overwhelming. Abel testified to Grana's lack of experience with the

Mooney, with IMC conditions, and with flying generally. (JA 1286-1310). Radar data demonstrated that the plane deviated from a normal flight path just after the plane entered the clouds. (JA 448-49, 454, 980-92, 1081-82, 1430-38, 1535-38). Experts testified about spatial disorientation, and they explained that the flight path was consistent with Grana's becoming disoriented. (JA 1430-31, 1436-39, 1535-38, 1542-44).

Honeywell's evidence also thoroughly refuted the Administrator's theory. Grana's Mooney had been regularly maintained, and there had never been any issues with the autopilot system. (JA 1272-77, 1540-42). Grana had been trained to run pre-flight tests of the plane's flight controls—standard procedure for pilots—and he reported no problems before takeoff. (JA 448-50, 1280-86). During the flight, there were no radio communications indicating any mechanical difficulties. (JA 448, 451). The position of the trim-system jackscrew, which was independently documented in the NTSB's investigation, Mooney's investigation, and the examinations conducted by *both* parties' experts, was consistent with a normal takeoff position. (JA 452, 461, 470, 1499-1507, 1512-20, 1524). Indeed, Honeywell conducted a series of demonstration flights in an actual Mooney M20M aircraft with the jackscrew and tail position exactly as found in the accident aircraft. (JA 1504-06). These demonstration flights,

coupled with expert testimony, proved that, at the time of the crash, there was no mechanical issue preventing the pilot from controlling the plane.

Moreover, evidence demonstrated that the servo debris and gear markings on which the Administrators' theory hinged were entirely unremarkable. The plane, after all, had suffered "extensive impact and fire damage" and then been "stored in a dumpster . . . outside and subjected to further deterioration due to the elements." (JA 452, 1485-87). The Administrators presented no evidence showing that the debris was present before the crash. To the contrary, Honeywell affirmatively demonstrated—through photographs, CT scans, x-rays, and animations—that both the debris and the markings on the wreckage were the result of the impact, fire, and post-accident storage. (JA 1216-39, 1246-55).

The trial lasted nine days. There were eighteen witnesses, and 148 exhibits. The jury saw demonstration flights; an in-court, working autopilot system; photographs; and a computer-generated flight path video. And the court was evenhanded throughout. Some evidence was excluded, some admitted over the Administrators' objection, and some admitted over Honeywell's objection. Some of the Administrators' proposed modifications to the model jury instructions were rejected, and some of Honeywell's proposed modifications were rejected.

At the end of the day, the jury was presented with a clear choice: Was the accident caused by a flaw in the autopilot system that allowed microscopic debris to enter the servos, as the Administrators contended? Or did an inexperienced pilot flying in bad weather become disoriented and lose control, as Honeywell's evidence showed? The jury deliberated just one hour before returning a unanimous verdict in Honeywell's favor.

The Post-trial Proceedings. After the trial, the Administrators moved to set aside the jury's verdict and for a new trial. (JA 421-25). They identified fifteen separate grounds for undoing the jury's decision, most of which related to the court's discretionary determinations regarding the admission of particular pieces of evidence. (*Id.*). The court rejected each of the Administrators' challenges in a carefully considered post-trial order. (JA 428-36). Five of those discretionary determinations remain at issue in this appeal.

First, the Administrators argued that the court had erroneously admitted the Mooney Report—the investigative report issued after the accident by the Mooney Airplane Company. The trial court disagreed, explaining that the report had been properly admitted under a Virginia statute allowing for the introduction of certain authoritative documents. The report, the court emphasized, was "a pamphlet on the scientific subject of

aircraft accident investigation, replied upon by [Honeywell's expert], and established by the same as reliable authority." (JA 429-30).

Second, the Administrators maintained that portions of Honeywell's closing arguments that referred to the novelty of the Administrators' debris-in-the-servo theory of the crash violated Virginia law and a prior motion *in limine*. The court reaffirmed its initial ruling. The allegedly objectionable portions of the closing, the court reasoned, merely referred back to the testimony of the Administrators' own experts. The court also emphasized that it had repeatedly instructed the jury not consider closing arguments as evidence. (JA 428-29).

Third, the Administrators alleged that the court had erred by refusing to supplement the model jury instruction on proximate cause with two additional sentences about multiple proximate causes and proving proximate cause. But, as the court recognized, the model instruction was a wholly accurate statement of Virginia law. Moreover, it "states three times that a proximate cause is merely 'a cause' and not 'the cause.'" (JA 429).

Finally, the Administrators objected to the admission of testimony by William Abel (Grana's flight instructor) and Robert Norman (one of the co-owners of the Mooney). The court rejected both contentions on similar grounds. Abel's testimony, the court explained, was based on his "first-

hand knowledge" of Grana's flying experience. (JA 431). And Norman's testimony, the court concluded, was based on his personal experience with both the Mooney that Grana was flying when the accident occurred and the Cessna on which Grana had trained. (*Id.*). The court accordingly reaffirmed its decision to allow both witnesses' testimony. (*Id.*).

The Administrators sought this Court's review. The Court agreed to consider the assignments of error.

STANDARD OF REVIEW

The Administrators challenge determinations at the heart of a trial court's expertise and supervisory discretion. Contrary to the Administrators' continued efforts to shoehorn these issues into a *de novo* framework, this Court has made clear that all five of the Administrators' assignments of error are reviewable only for abuse of discretion.

Three of the Administrators' assignments of error (the first, the fourth, and the fifth) challenge the admission of evidence. This Court "review[s] a trial court's decision to admit or exclude evidence using an abuse of discretion standard." *John Crane, Inc. v. Jones*, 274 Va. 581, 590 (2007). Another assignment of error (the second) relates to portions of Honeywell's closing argument. Just as with the admission of evidence, "[a] trial court has broad discretion in supervision of opening statements and closing

argument." *O'Dell v. Commonwealth*, 234 Va. 672, 703 (1988). The remaining assignment of error (the third) relates to jury instructions—yet another area of broad trial-court discretion. As this Court has put it, "the matter of granting and denying instructions . . . rest[s] in the sound discretion of the trial court." *Cooper v. Commonwealth*, 277 Va. 377, 381 (2009).

Abuse of discretion, accordingly, is the standard of review across the board. And that standard, of course, is highly deferential. "The essence of any discretionary determination is the exercise of judgment." *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010). Where—as here—the trial court correctly stated the legal standard, an abuse of discretion occurs "only when the record does not fairly support the circuit court's exercise of its judgment." *Id.* In evaluating the trial court's exercise of judgment, this Court views the facts in the light most favorable to the prevailing party, and should "presum[e] that the law was correctly applied to the facts." *Bottoms v. Bottoms*, 249 Va. 410, 414 (1995).

Even if the Court were to conclude that the trial court abused its discretion, Virginia law precludes the reversal of a jury's verdict "for any error committed on the trial" so long as the parties "had a fair trial on the merits and substantial justice has been reached." Va. Code § 8.01-678. In

other words, even an abuse of discretion does not merit reversal in the absence of prejudice. "'Under [this] harmless error doctrine, the judgment of the court below will be affirmed whenever [the reviewing court] can say that the error complained of could not have affected the result.'" *See Blue Stone Land Co. v. Neff*, 259 Va. 273, 279 (2000) (quoting *Rhoades v. Painter*, 234 Va. 20, 24 (1987)).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH RESPECT TO THE MOONEY REPORT.

A. Honeywell's Expert Was Properly Permitted to Rely on the Mooney Report.

At trial, one of Honeywell's experts, Dr. Clarke, testified that he had physically examined the jackscrew found in the wreckage and opined that the jackscrew indicated that the aircraft's trim-pitch system was in a normal takeoff position at the time of the accident. (JA 1512-25). During this testimony, Dr. Clarke was asked about the basis for his opinion. Specifically, he was asked about his reliance on two authoritative accident reports—one issued by the NTSB, and the other by Mooney. (JA 1520, 1523-25). Dr. Clarke explained that he had relied on both reports. The former was admitted without objection. (JA 1520). The Administrators, however, sought to exclude the latter as hearsay. (JA 1520-23).

Section 8.01-401.1 of the Virginia Code 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.

Va. Code § 8.01-401.1. After reading the requirements of the statute into the record, ensuring that Dr. Clarke relied on the report and vouched for its authority, and conducting its own independent review of the document, the trial court concluded that the Mooney Report qualified as a "pamphlet" under that provision. (JA 1520-25).

That judgment was entirely sound. The Mooney Report is a "pamphlet[ ] on a subject . . . of other science." Dr. Clarke testified that he relied on the report and thereby endorsed its authority. (JA 1522-25). Moreover, the Administrators' own experts admitted to relying on the report in forming their opinions. (JA 960). That is all Virginia law requires and more.

Indeed, the Administrators' own favorite case supports this conclusion. In *Bostic ex rel. Brock v. About Women*, 275 Va. 567 (2008), this Court emphasized that the purpose of Section 8.01-401.1 is merely to ensure "that the testifying witness fully vouche[s] for the opinions of the absent authors of the articles and [is] prepared to withstand the test of

cross-examination on the truthfulness and accuracy of their statements." *Id.* at 577. This means, the Court went on to explain, that the testifying witness must aver "that he relied on the article in forming his opinion, which is consistent with the views expressed by the absent author." *Id.* The testifying expert in *Bostic* did not rely on the article in question—which had to do with one possible cause of an injury—in forming his opinion; to the contrary, he was "candidly uncertain as to" causation. *Id.* In contrast, Dr. Clarke here relied on, and vouched for, the accuracy and veracity of the Mooney report, just as Section 8.01-401.1 requires. With Dr. Clarke vouching for the veracity of the Mooney Report and fully available for cross-examination, the dangers of hearsay were avoided and the purpose of Section 801-401.1 was served.[1]

B. Any Error Was Harmless.

Even assuming that the Mooney Report does not qualify as reliable authority, the trial court's contrary determination was harmless error.

[1] The *amicus* brief submitted by the Virginia Trial Lawyers' Association ("VTLA") argues that even if it was proper to permit Dr. Clarke to read the Mooney Report to the jury, the court nevertheless erred by permitting its introduction into evidence. *See* VTLA Br. 15. But this issue—as distinct from the argument that the report does not qualify as a reliable authority—was never raised below, and the Administrators do not raise it now. It is thus waived twice over. *See* Va. Sup. Ct. R. 5:25; *Smith v. Commonwealth*, 219 Va. 455, 460 n.1 (1978) (declining to consider issues raised by *amici* that "were never raised in the court below" and that "are not addressed by [appellant] on appeal").

Virginia law is clear: "Even though testimony is objectionable as hearsay, its admission is harmless error when the content of the extra-judicial declaration is clearly established by other competent evidence." *Schindel v. Commonwealth*, 219 Va. 814, 817 (1979); *see also, e.g.*, *Facchina v. Richardson*, 213 Va. 440, 443 (1972) (admission of hearsay evidence is harmless error where the evidence was redundant with properly admitted evidence).

Dr. Clarke referred to the Mooney Report for the proposition that six threads were showing on the jackscrew after the accident and that the six-threads position is within the normal takeoff range. (JA 1520, 1523-25). These facts were independently established at trial many times over. For instance, the NTSB Report, which was admitted without objection, said the same thing as the Mooney Report about the plane's trim position—that "[e]xamination of the manual trim wheel assembly and the empennage jackscrew revealed both indicated approximately takeoff trim setting." (JA 452). A photo of the jackscrew, with six threads showing, was entered into evidence. (JA 470). Honeywell's experts and the Administrators' experts both testified that they personally observed the jackscrew, that the jackscrew's position reflected the settings at the time of impact, and that the settings were within the normal range (JA 1499-1507, 1512-17, 1524).

And one of the defense experts even performed a demonstration flight with the pitch trim system in precisely the position the jackscrew indicated and found the plane to be perfectly controllable. (JA 1504-06).

The Mooney Report was thus "merely cumulative of other competent evidence properly admitted." *Greenway v. Commonwealth*, 254 Va. 147, 154 (1997). Any error by the court in permitting Dr. Clarke to rely on it was therefore entirely harmless. *See Facchina*, 213 Va. at 443 (concluding that a "document was not admissible because of the hearsay rule" but finding "its admission to be harmless error since other competent evidence clearly established" the facts contained therein); *see also Garbincius v. Boston Edison Co.*, 621 F.2d 1171, 1175 (1st Cir. 1980) (finding that booklets improperly received in evidence under the learned treatise exception were harmless in light of the record as a whole).

Attempting to argue otherwise, the Administrators greatly exaggerate the role of the Mooney Report in this trial. To judge from their account, one might think the Mooney Report was a dramatic revelation. It was nothing of the sort. The Mooney Report is a bland, five-page document consisting mostly of undisputed factual information about the accident. (JA 459-63). It has information about the pilot, the plane, the weather, and the wreckage. (*Id.*). The report expresses no opinion about the cause of the

accident, makes no comment on whether Honeywell's autopilot was defective, and makes no suggestion that the pilot was responsible.

The Administrators' appeal brief nevertheless fixates on a single line in the report—a statement that there was no evidence "the aircraft was uncontrollable at the time of the accident." (JA 463). This statement was never referenced by any witness or any counsel during trial. It is a single line from among thousands of pages of documents before the jury during its hour of deliberations. Like the rest of the Mooney Report, the statement is duplicative of expert testimony and other evidence admitted without objection that established that the plane's trim setting was in a normal, takeoff position. This evidence even included demonstration flights that definitively established that the plane was controllable with the jackscrew in that position. And more generally, mountains of duplicative evidence presented at trial refuted the Administrators' theory that debris in the servo gears caused the accident. *See supra* 10-12. This needle-in-the-haystack statement—which was merely cumulative of other evidence—could not have affected the outcome of this trial. *See, e.g., Owens-Corning Fiberglass Corp. v. Watson*, 243 Va. 128, 138 (1992) (finding that exhibits were improperly admitted but that the error was harmless).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH RESPECT TO HONEYWELL'S CLOSING ARGUMENT.

Next, the Administrators challenge certain isolated statements made by Honeywell's counsel during closing arguments. But the Administrators' assignment of error is thrice flawed: The Administrators waived it by failing to timely move for a mistrial or curative instruction; the trial court did not abuse its discretion by allowing the statements in question; and any error was harmless.

A. The Administrators Waived This Assignment of Error.

Virginia courts have long recognized that "errors assigned because of a [counsel's] alleged improper comments or conduct during argument will not be considered on appeal unless [a party] timely moves for a cautionary instruction or for a mistrial." *Cheng v. Commonwealth*, 240 Va. 26, 38 (1990). "[T]he 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 or for a cautionary instruction to the jury to disregard the improper remarks." *Reid v. Baumgardner*, 217 Va. 769, 773 (1977).

Timeliness is key. *See Cheng*, 240 Va. at 38 ("The motions must be made timely if the accused desires to take advantage of his objection on appeal."). And as this Court has explained, making a timely motion "means making the motion 'when the objectionable words were spoken.'" *Yeatts v.*

Commonwealth, 242 Va. 121, 137 (1991) (quoting *Reid*, 217 Va. at 774). Waiting until the conclusion of an argument does not suffice. *See Beavers v. Commonwealth,* 245 Va. 268, 279 (1993) (deeming argument waived where the appellant failed to object and ask for a mistrial at the time the allegedly improper statement was uttered and instead waited until the entire opening statement was concluded); *Pullen v. Nickens*, 226 Va. 342, 346-47 (1983) ("[I]f counsel believes that an argument requires or justifies a mistrial, he has the duty to move promptly before conclusion of the argument so that the trial court may determine what corrective action, if any, should be taken."). The purpose of this rule is straightforward: It encourages parties to object and seek relief at the time the trial court is best able to evaluate those objections in context and issue any appropriate relief. *See Beavers*, 245 Va. at 278-79.

Here, the Administrators made a contemporaneous objection to counsel's remarks. But at the time the words were uttered, the Administrators neither requested a curative instruction nor moved for a mistrial. Indeed, the Administrators never asked for a mistrial; and they waited until after Honeywell's closing argument had finished before asking for a curative instruction. That is not good enough. To preserve their assignment of error, the Administrators had to move for relief—not merely

object—"before the conclusion of the argument." *Pullen*, 226 Va. at 346-47; *see also Morris v. Commonwealth*, 14 Va. App. 283, 287 (1992) (*en banc*) ("A timely motion for a mistrial or a cautionary instruction is required to preserve the issue for appeal even if an objection was properly made to the conduct or comments and improperly overruled by the trial judge."). Having failed to do so, their assignment of error is waived.

B. Honeywell's Closing Argument Was Proper.

Even if it were properly preserved, the Administrators' argument is meritless. Because trial courts are best positioned to evaluate counsel's statements in context, they have "broad discretion in the supervision of opening statements and closing argument." *O'Dell,* 234 Va. at 703. The trial court was well within that discretion when it permitted the comments to which the Administrators now object.

Viewed in their proper contextual frame—as the trial court viewed them—the statements to which the Administrators object merely summarized testimony of the Administrators' own experts. The Administrators' theory of this case was that debris entered the Honeywell servo and caused the crash. But their own experts testified without objection that, in all their years of experience, they had not investigated or

even heard of any crash caused by the debris-in-the-servo theory they were presenting:

> Q. And in those 1,200 accidents you've investigated, in all the accidents you've been involved with, you cannot show me or tell me about any one where the capstan/pinion gear interface became jammed or seized as a result—or otherwise compromised because of outside contamination like you say happened here, agreed?
>
> A. I agree.

(D. Sommer, JA 1042).

> Q. I think I asked you earlier: You have never investigated an accident, whether you were with the NTSB or for a private party, you have never investigated an accident or heard of an accident involving a KS 270C series servo or a KM 275 servo mount binding as a result of contamination, correct?
>
> A. I have not.

(J. Lipscomb, JA 1112). Honeywell's attorney even made a notation of this testimony on a demonstrative chart. (JA 1606; Def.'s Exh. 596).[2]

There is an obvious and crucial difference between (1) arguing that the autopilot system had, as a matter of fact, never caused a similar accident, and (2) arguing that the Administrators' experts conceded that,

[2] The reference in closing by Honeywell's attorney to the servo design's "35 year" history, *see* VTLA Br. 23-25, likewise arose from evidence introduced by the Administrators themselves. The Administrators introduced a design drawing of the servo mount at issue while questioning Honeywell's corporate representative. (Tr. Exhs. 52 and 52A; TT 1474). The drawing is dated 1974. (TT 1474). After the drawing was received into evidence, Honeywell's corporate representative testified about the age of the design without objection. (TT 2720-21).

despite their theory that debris in the servo caused the plane crash in this case, they themselves had no knowledge of any other plane crash ever being caused by debris in a servo. The first category of argument was excluded by the motion *in limine*; the second was completely permissible.

Here, the trial court—ideally positioned to interpret both the scope of its own ruling and the meaning of the statements in question—correctly ruled that Honeywell's counsel's statements fell squarely in the second category:

> A review of the record reveals that counsel's comments were not intended as evidence, as they were given during closing arguments, and *the comments were made in reference to the testimony of the parties' experts*. No expert, for either side, testified that the alleged cause of this crash was the cause of another crash that *he had investigated*, and the Defense was entitled to make that argument.

(JA 428-29) (emphases added). The purpose of closing argument is "to draw a jury's attention to the body of evidence that has been admitted into the record and to argue reasonable inferences that may be drawn from that evidence." *Wakole v. Barber*, 283 Va. 488, 492 (2012); *Walls v. Commonwealth*, 38 Va. App. 273, 280 (2002). And that is exactly what occurred here. Honeywell established through cross examination—and without objection—that the Administrators' experts were unaware of any other plane crash being caused by the theory of the crash they were

presenting in this case. To the extent the Administrators' objection at closing was a belated attempt to challenge that prior testimony, that objection came far too late. *Cf. Whitten v. McClelland*, 137 Va. 726, 741 (1923) ("It is a well settled and obviously sound general rule that an objection to evidence cannot be availed of by a party who . . . has permitted it to be brought out by his adversary without objection."). The expert testimony was properly admitted, and Honeywell was entitled to draw it to the jury's attention.

C. Any Error Was Harmless.

Even if the Court were to conclude that the trial court erred, such error was harmless for two different reasons. First, the trial court specifically instructed the jury at the start of trial that arguments of counsel are not evidence. It stated:

> The opening statements and the closing arguments that the lawyers make to you are intended to help you understand the case. But what they tell you in the opening statements and the closing argument is not evidence and you must not consider it as such.

(JA 787). After closing arguments, the Administrators themselves expressly recognized that a new trial was not warranted. (JA 1607). So "rather than [ask for] a mistrial," the Administrators sought only a curative instruction. (*Id.*). In response, the Court explained that it had "previously told the jury that what you-all tell them is not evidence, and they should not

consider it as such." (JA 1607). In other words, all the relief the Administrators requested had already effectively been granted. And a trial court has broad discretion to refuse to give duplicative instructions. *See infra* 33-34.

Second, and in any event, any adverse effect statements by Honeywell's counsel may have had was more than canceled out by the Administrators' counsel's argument in response. The Administrators' counsel argued explicitly and at length about prior history:

> [H]e stands up here and he tells you, You know what? This is the only accident. There's never been any evidence of any other accidents. That's not true. That's not true, ladies and gentlemen. There are court rulings about that, that forbid us to get into all the other accidents that there were . . . . And he gets up and stands before you and says there's no other accidents. That's because we only tried this accident. Ladies and gentlemen, there were a number of other pieces of evidence that we could have brought before you on that, but the judge made the decision we're going to try this case. So that's false, what he said.

(JA 1610). While Honeywell's counsel merely summarized the testimony of the Administrators' own experts, the Administrator's counsel went much further. His statements clearly imply that several other accidents had actually been caused by debris in an autopilot servo. This was patently false, and—unlike Honeywell's counsel's statements—it plainly transgressed the Court's *in limine* order.

This Court has previously suggested that improper remarks by counsel are not prejudicial error when both counsel are guilty of the same conduct. *Cf. Brann v. F.W. Woolworth Co.*, 181 Va. 213, 224 (1943) (declining to overturn a verdict where one counsel's improper statements responded to the other's improper statements); *see also Diamond Cab Co. v. Jones*, 162 Va. 412, 418 (1934) (concluding that improper remarks were not reversible error when provoked by similar statements by opposing counsel). Here, the defense offered argument based on the testimony of the plaintiffs' own experts—argument deemed proper after thorough consideration by the trial court. Plaintiffs responded with argument that "[t]here are court rulings . . . that forbid us to get into all the other accidents that there were." (JA 1610). Honeywell's argument did not even approach the line of impropriety. And any supposed transgression by Honeywell is, in any event, far outweighed by the Administrators' great leap into argument of facts neither in evidence nor in existence.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REJECTING THE ADMINISTRATORS' MODIFIED JURY INSTRUCTION.

The Administrators' theory of this case was that a defect in Honeywell's autopilot caused the plane to crash. The jury, accordingly,

was given several instructions about causation. Instruction 18, the proximate-cause instruction, read:

> 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.

(JA 398). This Court recently confirmed that this instruction—one of Virginia's standard-form model jury instructions, *see* 1 Virginia Model Jury Instructions, Civil Instruction No. 5.000 (2012)—is "a plain-language adaptation of the long-accepted definition of proximate cause." *Ford Motor Co. v. Boomer*, 285 Va. 141, 150 (2013).

The Administrators do not dispute that the Instruction accurately states Virginia law. Nevertheless, they maintain that the trial court erred by refusing their suggested modification, which would have added the following two sentences to the end of the instruction:

> 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.

(JA 352).

The trial court properly exercised its "sound discretion" by refusing this redundant and confusing modification that was antithetical to the Administrators' unitary theory of the case. *Cooper*, 277 Va. at 381. As the commentary to the model instruction explains, "the instruction refers to 'a

proximate cause' instead of 'the proximate cause'" precisely because "there may be more than one proximate cause of an injury." 1 Virginia Model Jury Instructions, Civil Instruction No. 5.000 (2012) (commentary) (citing *Kellermann v. McDonough*, 278 Va. 478, 493 (2009)). Indeed, as the trial court emphasized, Instruction 18 uses the phrase "a cause" three times; it never refers to "the cause." (JA 429). And the other jury instructions were completely consistent on that point: Instruction 11 asks the jury to decide whether the autopilot system was "*a* proximate cause of the accident" (JA 391) (emphasis added); and Instruction 15 states that the jury must find that "defendant's breach of warranty was *a* proximate cause of the airplane crash" (JA 395) (emphasis added).

The jury was thus repeatedly instructed that it could find Honeywell liable if it concluded that Honeywell's alleged breach of warranty was *a* proximate cause of the accident; it was never instructed that it had to find *the* proximate cause of the accident. And the Administrators presented zero evidence that anything other than Honeywell's autopilot caused the crash. To the contrary, the Administrators' experts and their evidence affirmatively disclaimed all other causes. Particularly given the Administrators' theory of causation, the first proposed additional sentence

added nothing that was not already fully encompassed by Instruction 18 and the other causation instructions.

The second proposed sentence, which purported to explain that proximate causation need not be "established" with "such certainty as to exclude" all other possible conclusions, was not only redundant, it was also very likely to confuse the jury about the burden of proof. The jury was separately instructed to find for the Administrators if they "proved by the greater weight of the evidence that," among other things, the autopilot was "a proximate cause" of the accident. (JA 395). It was also specifically instructed about what the "greater weight of all the evidence" standard means. (JA 397). These instructions were clear and consistent. Adding words like "certainty" into the mix would only have added potential for confusion.

The trial court was right to reject the repetitive and confusing proposal in favor of the model instruction. As this Court has long recognized, "[w]here the jury has been sufficiently and correctly instructed on any point, it is not error to refuse further instructions on that point, however correct a tendered instruction may be." *Wilson v. Brown*, 136 Va. 634, 637-38 (1923). In fact, this Court has repeatedly "condemn[ed] the . . . requesting and granting of [instructions] that are repetitious." *Bagley v. Weaver*, 211

Va. 779, 783 (1971). And for good reason: Allowing repetitive instructions "can only confuse and mislead the jury and tends to provoke error." *Id.* Accordingly, far from its being error for a court to refuse to admit repetitive instructions, this Court has said that it is "[t]he piling of instruction upon instruction" that "treads close upon the heels of invited error." *H.W. Miller Trucking Co. v. Flood*, 203 Va. 934, 937 (1962).

The Administrators' argument that the trial court nevertheless erred by refusing to modify the model instruction relies primarily on a single case, *Holmes v. Levine*, 273 Va. 150 (2007). In that case, the Court reversed a jury verdict where the trial court had refused to include a multiple-proximate-cause instruction. But that case differs from this one in two crucial respects. First and most important, *Holmes* emphasized that the trial court had erred by "us[ing] the definite article 'the' when instructing the jury that '[t]he burden is upon the plaintiff to prove . . . that any . . . negligence was *the* proximate cause of the death . . . ." *Id.* at 160 (emphasis added). The Court's opinion clearly implies that consistent use of the indefinite article "a"—exactly what occurred here—would have "fully and fairly covered the principle of proximate causation." *Id.*

Second, *Holmes* hinged on the fact that the wrongful-death plaintiff in that case had pursued the theory that there were *two* proximate causes of

an individual's death and presented evidence as to each. *Id.* (quoting *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 78 (2004)). In particular, the plaintiff had put on experts who testified to both causes. *See id.* And the two causes in that case were tightly and necessarily intertwined: cancer, and the defendant's failure to timely diagnose the disease. *See id.*

The Administrators here, however, did not pursue anything remotely akin to the *Holmes* plaintiff's multiple-cause theory. To the contrary, the Administrators' theory has always been that the supposed autopilot malfunction was the *only* cause of the accident. And far from presenting evidence sufficient to support a multiple-cause theory, *see Schlimmer*, 268 Va. at 78, they affirmatively presented evidence disputing that there were multiple causes. No fewer than six of their experts opined that "[o]ther possible or alternative causes of the accident have been considered and rejected." (Expert Disclosures, R3690, 3694, 3698, 3700, 3702, 3705). And their experts specifically rejected the proposition that the pilot's own error or the cloudy weather could have contributed to the accident. (*Id.*; JA 1096, 1126-27, 1163-64). This case is thus nothing at all like *Holmes*.

Finally, this Court should be particularly hesitant to open its doors to litigants seeking to upset jury verdicts by offering redundant additions to model jury instructions. To be sure, a proposed instruction may not "be

withheld from the jury *solely* for its nonconformance with the model jury instructions." Va. Code § 8.01-379.2 (emphasis added). But the word "solely" is key. "The multiplication of instructions does not tend to enlighten the jury and is a practice to be avoided." *Wilson*, 136 Va. at 637-38. And a trial court does not abuse its discretion—and certainly not prejudicially so—by rejecting proposed additions to a model instruction that are redundant, confusing, and inconsistent with the proposing party's theory of the case.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING WILLIAM ABEL TO TESTIFY.

The Administrators' final two assignments of error delve even further into the realm of the trial court expertise and discretion. In deciding whether to admit particular evidence or allow particular testimony, "[t]he responsibility for balancing the competing considerations of probative value and prejudice rests in the sound discretion of the trial court." *Spencer v. Commonwealth*, 240 Va. 78, 90 (1990). This Court has emphasized that "the exercise of that discretion will not be disturbed on appeal in the absence of a clear abuse." *Id.*

William Abel, Grana's long-time flight instructor and personal friend, was a key witness at trial. Grana obtained virtually all of his flight training from Abel. (JA 1286-1306). Abel had flown with Grana in both the Cessna and the Mooney, and in both clear and cloudy skies. (*Id.*). And Abel thus

had extensive firsthand knowledge of Grana's flying experience and abilities. As the only witness who had frequently flown with Grana, Abel was uniquely well positioned to testify on these matters.

The Administrators nevertheless allege that the trial court abused its discretion by permitting Abel to testify that he "had some concerns" with Grana flying the Mooney in IMC conditions and that he thought it "wasn't the best of judgment to take off in those conditions." (JA 1350, 1357). Struggling to pinpoint exactly why this well-founded, clearly relevant testimony should have been excluded, the Administrators throw every adjective within reach: Abel's statement, they say, was "an irrelevant, prejudicial, subjective, speculative, unreliable, unfounded (based on hearsay), inadmissible opinion." Appellants' Br. 44.

It was none of those things. For the most part, Abel's testimony was purely factual. To the extent Abel's testimony at moments entered the realm of opinion, Virginia law expressly permits lay witnesses to give an opinion that is "reasonably based upon the personal experience or observations of the witness." Va. R. Evid. 2:701. And there can be no real question that Abel's opinion was "reasonably based" on his personal experience. Abel taught Grana to fly. He had flown with Grana in different planes and different weather conditions. He knew firsthand the limits of

Grana's skill as a pilot. No witness was in a better position than Abel to testify regarding Grana's piloting experience and abilities.

Furthermore, Abel testified that Grana had agreed that he needed more instrument training in the new Mooney aircraft and that he would not undertake a solo flight in the Mooney in IMC conditions before that training was completed. (JA 1302-07). Abel also testified about e-mail correspondence he exchanged with Grana just three days before the crash. (JA 1307-10). In the correspondence, Abel and Grana discussed the weather forecast, and Grana told Abel that he would not fly the Mooney if IMC conditions prevailed. (*Id.*). Abel had direct, personal knowledge of these conversations and e-mails; he was a party to them.

The Administrators argue that Abel's testimony that he was concerned about Grana flying on the day of the accident was unfounded because Abel was not at the airport. But the weather that day was undisputed; everyone agreed that Grana took off in IMC conditions with an 800-foot cloud ceiling after which there was zero visibility. (JA 451, 457, 543-44, 549-50, 990, 1079-1082, 1259-63, 1350). And if that were not enough, Abel testified that he had personal knowledge of the anticipated IMC conditions three days before the accident, and that he checked the

weather immediately after learning of the accident on the day of the crash. (JA 1349-50).

In the end, Abel's testimony was relevant and well grounded. He did what witnesses are supposed to do: He testified about his own personal observations and experiences. And the trial court did what trial courts are supposed to do: It weighed the "competing considerations" and exercised its "sound discretion" in admitting the testimony. *Coe v. Commonwealth*, 231 Va. 83, 87 (1986). The Administrators cannot ask for anything more.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING ROBERT NORMAN TO TESTIFY.

The Administrators' fifth and final assignment of error is cut from the same cloth as the fourth, and this Court should reject it for the same reasons. This time, the Administrators challenge the testimony of another of Honeywell's witnesses, Robert Norman.

Norman was a co-owner of the Mooney Grana was flying the day of the accident; he was also the owner of the Cessna in which Grana had done most of his training. (JA 1365-75). Norman had personal experience flying both planes, and was thus able to provide important factual testimony about the two planes and the differences between them. (JA 1380-84). Norman testified, for instance, that he, Grana, and one other partner had purchased the Mooney five months before the accident. (JA 1372-76). He

testified, based on his own direct experience, about the instrument systems in the two airplanes. (JA 1380-84). He also testified that he had never experienced binding of the controls when flying the Mooney. (JA 1380-89).

These facts were directly relevant. Grana's transition from the slower, simpler Cessna to the faster, more complex Mooney was an important issue at trial that bore on Grana's ability to handle the plane on the day of the accident.

And again, to the extent Norman's testimony momentarily touched on his opinion, Virginia permits lay opinions that are "reasonably based upon the personal experience or observations of the witness." Va. R. Evid. 2:701. Norman's statements that he had a "healthy fear" of the Mooney—the testimony to which the Administrators most vocally object—simply described the impression he drew from his own personal experiences flying his plane, the same plane that Grana then crashed. That testimony was relevant and based entirely on Norman's firsthand experience. The trial court was well within its discretion to admit it.

VI. PUBLIC POLICY FAVORS DEFERENCE TO TRIAL COURTS' DISCRETIONARY DECISIONMAKING IN MANAGING TRIALS.

A final note merits mention. The Virginia Trial Lawyers' Association ("VTLA") filed a brief in this case that, while styled as an amicus brief, is in substance a second merits brief for the Administrators. As a rhetorical fig

leaf for a brief that is an amicus filing only in name, VTLA repeatedly suggests that public policy favors the Administrators' position.

VTLA is mistaken about where the public interest lies. Day in and day out, trial courts make thousands of decisions necessary to ensuring that justice is done, and they need to make those decisions quickly and fairly. That is why "[i]t is especially common for issues involving what can broadly be labeled 'supervision of litigation' . . . to be given abuse-of-discretion review." *Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988).

The public interest lies in ensuring that trial courts have the latitude to get their job done. There is no public interest in the inefficiencies created when lengthy trials are undone on the basis of nonexistent or harmless errors. Indeed, it is those very efficiencies that can make litigation so expensive and prevent many worthy causes from being heard.

This Court should see VTLA's supposed policy arguments for what they are—a transparent ploy to use an amicus brief to expand the page limits for the Administrators' arguments, not a serious assessment of the public's interest.

CONCLUSION

For the foregoing reasons, Honeywell respectfully requests that the Court affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February 2014, three printed copies of the foregoing were served by first-class mail on Appellants' counsel at the following address:

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I further certify that I have filed 15 printed copies of the foregoing via hand delivery with the Clerk of this Court. I further certify that electronic PDF copies were sent via email to the Clerk of this Court and the above-listed counsel. I further certify that the foregoing brief does not exceed 50 pages and otherwise complies with Rule 5:26 of the Rules of the Virginia Supreme Court.

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