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.

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

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1. (3/3/14) Letter of Roger T. Creager, Esq. [Counsel for Appellants]

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***AMICUS* STATEMENT OF INTEREST**

Honeywell asserts Brief *Amicus Curiae* “is in substance a second merits brief” and “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”. Brief of Appellee (“BA”) at 40-41. Honeywell is wrong.

First, it is not collusion.[1] *Bottoms v. Bottoms,* 249 Va. 410 (1995)(four Appellee *amici curiae*). Second, Honeywell misconstrues *amicus* status.

Amicus is a non-party “who petitions the court…to file a brief in the action because that person has a strong interest in the subject matter”. BLACK’S LAW DICTIONARY (9th ed. 2009) at 98. This Court recognizes *amicus* “on the ground that it…has a substantial interest in the subject matter”. *Whitehead v. H and C Dev. Corp.*, 204 Va. 144, 149 (1961).[2]

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[1] *Amicus* affirms no counsel for a party authored this brief in whole or in part, and no person or entity made a monetary contribution to its preparation or submission; represents it obtained consent of Appellant, but not Appellee, to file; and files Reply Brief with Motion for Leave to File, subject to Administrators’ objection BA is untimely, improper and invalid.

[2] Federal law in Virginia is consistent, explicit, and persuasive authority. “Although an amicus…is not a party to the litigation and participates only to assist the court, nevertheless, by the nature of things an amicus is not normally impartial…and there is no rule…that amici must be totally disinterested.” *Tafas v. Dudas*, 511 F. Supp.2d 652, 661 (E.D.Va. 2007).

Va. Sup. Ct. R. 5:30(e)(emphasis added) states, "A brief *amicus curiae* shall comply with the rules applicable to the <u>party</u> <u>supported</u>." This contemplates *amicus* reaching the merits. *Cf.*, *Tafas,* 511 F. Supp.2d at 652 ("mere fact that a non-party seeks to put forth [merits] opinion in the case does not disqualify it as an amicus").

Third, this appeal's five issues will be precedent beyond this case. That implicates public interest and policy.

Va. Code §8.01-401.1's "reliable authority" exception in Assignment of Error ("AOE") 1 is evidentiary cornerstone of essentially every medical malpractice case, and this Court's opinions construe it in such cases. There is genuine public interest - plaintiff and defendant - in that limited statutory exception not being eroded by Honeywell skipping its evidentiary precondition, introducing documentary exhibit, and admitting biased case-specific investigation.

Honeywell's "absence of other incidents" arguments and their judicial ratification in AOE 2 cut across product liability, medical malpractice, vehicular accidents, and other torts. There is genuine public interest in this Court's prohibitions thereof - and of mirror-image "evidence of other incidents" - not being eroded by Honeywell's repeated impermissible closing arguments and by judicial ratification thereof.

Administrators' multiple cause instruction in AOE 3 pervades all tort litigation. There is genuine public interest in a more informative causation instruction that explicitly, fully, and fairly informs juries about two or more possible proximate causes; that is based on "any" evidence introduced, plaintiff and/or defendant; and that is not rejected contrary to *Va. Code* §8.01-379.2 because it is not the "Model" then.

Honeywell's introduction of improper multiple lay opinions by Abel and Norman in AOE 4 and 5 is a specter in any case. There is genuine public interest in litigants not being denied a fair day in court because admittedly "crucial" fact witnesses wrongfully are allowed to give expert opinion and otherwise inappropriate testimony.

Finally, ensuring justice in this case is legitimate public interest. Fiscal hardships of lengthy trials about which Honeywell complains are suffered disproportionately by private individuals like Administrators versus Goliaths like Honeywell, so it is fundamental that justice not be denied by prejudicial error. *Cf., Crowson v. Swan,* 162 Va. 82, 83 (1935)("never been contended…the rights of a litigant should be determined by matters of expediency.").

ARGUMENT

Honeywell argues "abuse of discretion" review standard, BA15-16; but that is red-herring. Even assuming that *arguendo*, re AOEs 1, 4 and 5, judge has "no discretion to admit clearly inadmissible evidence," *Lawrence v. Commonwealth*, 279 Va. 490, 496 (2010); or re AOEs 2 and 3, to make errors of law.

Honeywell misstates "Court views the facts in the light most favorable to the prevailing party," and "presume[s] that the law was correctly applied to the facts," citing *Bottoms*. BA16. *Bottoms* is a custody case reviewing "best interests" findings, not errors of evidence and law.

Honeywell impliedly concedes its misstatement, invoking harmless error, BA17, quoting *Blue Stone Land Co. v. Neff*, 259 Va. 273, 279 (2000). And judgment is affirmed <u>only</u> when this Court "can say that the error complained of could not have affected the result". *Id*.

Evidentiary error is "presumed prejudicial unless the record clearly shows that the error could not have affected the result," *Dandridge v. Marshall*, 267 Va. 591, 597 (2004); and "erroneous admission of evidence, which may have 'tipped the scales'," is not harmless. *Hale v. Maersk Line, Ltd.*, 284 Va. 358, 377 (2012). This Court reverses for error on grounds undercutting Honeywell's arguments. *E.g.*, *Lawrence, supra*, 279 Va. at

499 ("speculative and unreliable" opinions inadmissible); Hinkley *v. Koehler*, 269 Va. 82, 91-92 (2005)("does not plainly appear from the record [erroneous expert evidence] could not have affected the jury's verdict ['despite'] that defendants had another expert witness"); *Dandridge, supra,* 267 Va. at 597 ("nothing in the record…clearly shows [evidentiary] errors…did not affect"); *Blue Stone, supra,* 259 Va. at 280 (different "evidence…might have produced a different result"); *Tittsworth v. Robinson*, 252 Va. 151, 155 (1996)(no harmless error because "no way of determining what evidence may have influenced the jury"); *Norfolk & Western Ry. Co. v. Puryear*, 250 Va. 559, 563 (1995) ("[erroneously admitted exhibit] could have been reviewed during the jury deliberations and this would have impermissibly emphasized Puryear's version of the facts to the prejudice of N&W"); *CSX Transp. V. Casale*, 247 Va. 180, 183 (1994)(erroneously admitted expert testimony not harmless despite other expert testimony); *Ring v. Poelman*, 240 Va. 323, 328 (1990)("cannot determine from the record [on what] the jury based its verdict [so] we cannot say that the error was harmless"); *Agelasto v. Frank Atkinson Real Estate*, 229 Va. 59, 65 (1985)("improper evidence may have tipped the scales [so] we cannot say…error was harmless"); *Doe v. Thomas*, 227 Va. 466, 473 (1984)("cannot say as a matter of law that the inadmissible

evidence did not affect the jury"); *Rhoades v. Painter,* 234 Va. 20, 24 (1979)("cannot say as a matter of law the erroneous instruction could not have affected the result"); *Venable v. Stockner*, 200 Va. 900, 905 (1959)("does not necessarily show that the admission of this evidence was harmless").

Hence this Court undertakes evenhanded review of all evidence, not one-sided view of Honeywell's evidence. Honeywell bears burden of showing errors of evidence and/or law individually and collectively "could not have affected the result," may not have "tipped the scales".

I. RELIABLE AUTHORITY

Va. Code §8.01-401.1 includes "two preconditions to the admission of hearsay: First, the testifying witness must have relied upon [it]; second, the statements must be established as 'a reliable authority' by testimony". *Bostic v. About Women OB/GYN, P.C.*, 275 Va. 567, 576 (2008).

Honeywell glosses inaccurately "Dr. Clarke relied on the report and vouched for its authority". BA18. Honeywell asserts falsely its expert satisfying first precondition ("relied upon") itself satisfied second precondition ("reliable authority"): "Dr. Clarke testified that he relied on the report and thereby endorsed its authority." *Id.* (emphasis added).

In truth, Honeywell's attorney said Mooney Report is "document that's normally relied upon by experts". JA1523. That's not requisite "testimony".

Consequently, judge admitted absent expert opinion that inherently is not "reliable authority": biased case-specific investigation. That is contrary to history, jurisprudence, and commentators.

Forerunner federal "learned treatise" exception presumes "high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for accuracy, with the reputation of the writer at stake." Advisory Committee Notes to Federal Rules of Evidence, *Fed. R. Evid. 803*, Exception 18, 56 F.R.D. 183, 316 (1972). "[A]uthors of treatises have no bias in any particular case." 2 McCormick on Evidence §321 (6th ed. 2006).

United States v. Martinez, 588 F.3d 301, 312 (6th Cir. 2009) *cert. denied* 131 S.Ct. 538 (2010), ruled material inadmissible as learned treatise because it "was prepared for…litigation purposes, it was not subjected to peer review or public scrutiny, and it was not 'written primarily for professionals…with the reputation of the writer at stake'." *O'Brien v. Angley*, 63 Ohio St.2d. 159, 407 N.E.2d. 490, 494 (Ohio Sup. Ct. 1980)(citing 5 Wigmore on Evidence §1692 at 6 (Chadbourn Rev.)), held admission of JAMA editorial as learned treatise "prejudicially erroneous"

because “it was written with a view toward litigation [and] was primarily an expression of opinion by a physician concerning a controversial subject which posed a risk of litigation for his colleagues in the medical profession.”

By law, §8.01-401.1 is “strictly construed and not to be enlarged in [its] operation by construction beyond [its] express terms”. *Bostic*, 275 Va. at 576. By public policy, its “second precondition” (“reliable authority”) is construed narrowly for “learned treatises,” not enlarged for biased case-specific investigation (whose creators must testify).

Alternatively, Honeywell asserts incorrectly judge erring “by permitting [Mooney Report’s] introduction into evidence…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.” BA19. Honeywell claims falsely “it is thus waived twice over”. *Id.*

In truth, Administrators objected to Mooney Report testimony, JA1520-1521; <u>and</u> Mooney Report itself as documentary exhibit, *id.* and JA1525; both for lack of “foundation” (since §8.01-401.1 provides none). *Id.* AOE 1 preserves admission of “hearsay Mooney Report” itself as error. Opening Brief of Appellants (“OB”) at 1. Administrators brief judge “erred in allowing Honeywell’s expert…to introduce the entire hearsay report into evidence,” OB32. That is <u>not</u> waiver.

Tacitly conceding waiver is meritless, Honeywell alternatively argues Mooney Report admitted as documentary exhibit is harmless. BA19-22. Honeywell incorrectly pooh-poohs Mooney Report is “bland,” “expresses no opinion about the cause of accident, [and] makes no comment on whether Honeywell’s autopilot was defective”. BA21-22.

Honeywell spins the following Mooney Report excerpt as “needle-in-the-haystack statement - which was merely cumulative of other evidence - could not have affected the outcome of this trial,” BA22:

> **Conclusions: The IIC [“NTSB”], Lycoming representative and myself [Mooney] 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, JA463 (emphasis added). That’s just not so.

Indisputably, Mooney Report “Conclusion” on the ultimate issue is not bland, impliedly expresses opinion about the cause of accident, and essentially comments Honeywell’s autopilot was not defective. Although “cause,” “autopilot” and “defective” are not used, Conclusion the aircraft was “not uncontrollable” (as Administrators allege) is tantamount to opining autopilot system was working sufficiently, *i.e.*, not defective, and impliedly that there was pilot error.

Therefore, although NTSB Report as admitted left jury dangling about crash cause (showing no conclusion re cause), Mooney Report went the final step and reached the ultimate issue by effectively concluding Honeywell's autopilot was "not uncontrollable," not defective. Because it opined on behalf of "The IIC ['NTSB']," Mooney Report purported to speak on behalf of NTSB, the Federal agency officially responsible for crash investigation, even though NTSB Report admitted did not speak re cause.

That is materially prejudicial to Administrators; and Honeywell cannot prove jury did not read and rely on that pivotal Conclusion, particularly with Honeywell calling Mooney Report to jury's attention twice in closing. JA1582-1583. This Court cannot say "error complained of could not have affected the result;" thus, error was not harmless.

II. OTHER INCIDENTS

A. Honeywell ignores *Goins v. Wendy's Int'l*, 242 Va. 333 (1991); *Wood v. Woolfolk Properties, Inc.*, 258 Va. 133, 138 (1999); and *Velocity Express Mid-Atlantic v. Hagen*, 266 Va. 188 (2003). They control.

B. Honeywell conjures waiver, claiming several cases hold Administrators had to move for curative instruction precisely

when they objected to closing statements, BA23-25; but careful scrutiny discloses none hold that. *Velocity Express* controls.

C. Honeywell claims "obvious and crucial difference" between: (1) absence of other incidents; and (2) what Administrators' experts testified. BA26-27. But both are improper, plus Honeywell argued the worst, absence of other incidents: transcript does not mention Administrators' experts in any of the five violations; and judge claiming it so, does not make it so.

D. Honeywell's five "absence of other incidents" rule violations is prejudicial, not harmless. General instruction at trial outset is <u>not</u> curative instruction after and for five violations; and Administrators' pure protest retorts in closing - which, unlike cases cited by Honeywell, BA30, did <u>not</u> precipitate Honeywell's violations - are not curative, particularly not given judge's ratification of Honeywell's five violations. *Velocity Express*.

III. JURY INSTRUCTION

A. Honeywell ignores *McClung v. Commonwealth*, 215 Va. 654 (1975) and *Lawlor v. Commonwealth*, 285 Va. 187 (2013). They control.

B. Honeywell concedes jury had only "either/or" choice. "At the end of the day, the jury was presented with a clear choice:…autopilot…? Or…pilot…?" BA13 (emphasis added).

C. Honeywell misstates Administrators rely "primarily on a single case, *Holmes*," BA34; then criticizes Administrators that *Holmes* does not reach supporting evidence coming from both plaintiff's and defendant's evidence. BA34-35. In truth, Administrators relied on *Holmes* and *McClung* together, with *McClung* reaching evidence coming from plaintiff's and defendant's case, Brief *Amicus Curiae* at 30-31; as argued by Administrators. JA1545-1547 and TT3222-3223.

D. Honeywell objected to Administrators' multiple-cause instruction solely because it then was not the "Model Jury Instruction," JA1545-1547; not on redundancy, confusion, and inconsistency grounds it raises on appeal first-time. Correspondingly, judge indisputably sustained Honeywell's lone it's-not-the-Model objection on that ground - clear unjustified indefensible violation of §8.01-379.2 - not on Honeywell's new different grounds.

E. Virginia Model Jury Instruction 5.000's post-trial amendment effective December, 2013, added the disputed sentence

Administrators requested: "There may be more than one proximate cause of an accident, injury, or damage." (emphasis added). Citing *Holmes*, its "ALERTS" emphasizes: "Where the evidence in a case shows the possibility of more than one proximate cause of an accident, injury, or damage, the final [new] sentence of Instruction should be given to fully and fairly explain the principle of proximate cause to the jury." *Id.* (emphasis added).

IV. ABEL OPINIONS

A. Honeywell ignores *Combs v. Norfolk and Western Ry. Co.*, 256 Va. 490 (1998); *Keesee v. Donigan,* 259 Va. 157 (2000); and *Doe v. Dewhirst*, 240 Va. 266 (1990). They control.

B. Honeywell admits Abel is “pretty critical witness,” JA657, who “entered the realm of opinion,” BA37; and judge treated Abel as “quasi-expert”. TT349. But Abel never was qualified as expert.

C. Honeywell lists Administrators’ objections to Abel’s testimony: irrelevant, prejudicial, subjective, speculative, unreliable, unfounded, and opinion. BA37. Honeywell simply pays lip-service, and does not actually refute each objection.

D. Honeywell focuses mostly on weather, particularly visibility. BA37-39. Honeywell inaccurately claims "zero visibility" was "undisputed," BA38; when in truth it was disputed, it actually was knowable only by pilot, and Honeywell's own exemplar photo shows visibility through cloud covering. BA8(Tr. Ex. 987).

E. Abel's opinion testimony about pilot's "judgment" was unduly prejudicial. Honeywell inundated the jury with it. JA792, JA1352, JA1354, JA1645 and JA1594-1595.

V. NORMAN OPINIONS

A. Honeywell ignores *Wright v. Kaye*, 267 Va. 510 (2004). It controls.

B. Honeywell admits Norman's testimony "touched on his opinion," BA 40; gross understatement. Norman's lay subjective opinions are inflammatory hyperbole, couched in exaggerated terms, *e.g.,* "afraid," "healthy fear," "a thousand different mistakes," and "something bad happen"; but Honeywell does not address each of Administrators' objections re them.

C. Norman's subjective opinions are unduly prejudicial, individually bespeaking pilot error and collectively screaming it. Honeywell inundated the jury. JA1380-1389, JA1593-1594, and JA1598.

CONCLUSION

This Court should reverse and remand all issues for retrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014, fifteen copies of the above Reply Brief *Amicus Curiae* have been hand-delivered to the clerk's office. This same date, three copies of the same have been sent via first class postage prepaid mail to the following counsel:

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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 Reply 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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