IN THE

Supreme Court of Virginia

RECORD NO. 161788

RONDA MADDOX EVANS,
Administrator of the Estate of
Jerry Wayne Evans, deceased,

Appellant,

v.

NACCO MATERIALS HANDLING GROUP, INC.,

Appellee.

OPENING BRIEF OF APPELLANT

James J. O'Keeffe, IV (VSB# 48620)
JOHNSON, ROSEN & O'KEEFFE, LLC
131 Kirk Avenue, SW
Roanoke, Virginia 24011
Phone: 540-491-0634
Fax: 1-888-500-0778
okeeffe@johnsonrosen.com

P. Brent Brown (VSB# 18760)
BROWN & JENNINGS, PLC
30 Franklin Road, Suite 700
Roanoke, Virginia 24011
540-444-4010
Fax: 540-444-4011
brent@brownjenningslaw.com

Edward Fisher (admitted *pro hac vice*)
PROVOST UMPHREY LAW FIRM, LLP
490 Park Street
Beaumont, Texas 77704
409-203-5030
Fax: 409-838-8888
efisher@provostumphrey.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

SCV: Submitted on 05-30-2017 15:39:18 EDT for filing on 05-30-2017

Table of Contents

Table of Contents i

Table of Authorities iv

Introduction 1

Assignment of Error 1

1. The trial court erred by setting aside the jury's verdict and entering judgment in favor of the Defendant on the ground that the Plaintiff's decedent was guilty of contributory negligence that proximately caused his accident and death. 1

Assignments of Cross-Error 2

1. The Circuit Court should have entered judgement for NMHG as a matter of law because the Administrator's evidence was insufficient to support her negligent design claim. 2

2. The Circuit Court erred in permitting the Administrator's design expert, Frederick Mallett, to testify because he lacked the necessary qualifications and his opinions lacked adequate foundation. 2

3. The Circuit Court erred in failing to strike the Administrator's failure to warn claim for lack of causation. 2

Statement of the Case 2

1. Jerry Evans was killed when NACCO's parking brake failed to hold on an incline. 2

   A. The subject lift truck and parking brake. 2

   B. Mr. Evans spent hours training to operate the lift truck. 5

   C. Mr. Evans's supervisor directed him to use the lift truck. 7

   D. NACCO's lift truck crushed Mr. Evans when its parking brake failed to hold on an incline. 8

2. After a six-day trial, the jury returned a plaintiff's verdict. 9

3. The trial court set the verdict aside as "plainly wrong." 10

Arguments and Authorities 12

1. The trial court erred by ruling that Mr. Evans was contributorily negligent as a matter of law (Assignment of Error 1). 12

   A. Standard of Review 12

   B. A rational jury could find that Mr. Evans behaved reasonably. 13

   C. The trial court erred by setting the jury's verdict aside. 14

2. Ms. Evans proved that the parking brake was defective (Assignment of Cross-Error 1). 26

   A. Standard of Review 26

   B. Safer alternative designs were available. 26

   C. NACCO's design violated reasonable consumer expectations. 29

   D. Ms. Evans pointed the jury to objective safety standards. 32

   E. NACCO made massive concessions about its design at trial. 33

   F. The Court should not read dicta from *Walters* to overrule longstanding principles of Virginia products-liability law. 35

3. The trial court did not abuse its discretion by letting Mr. Mallett testify (Assignment of Cross-Error 2). 39

   A. Standard of Review 39

   B. With 40 years of industry experience as an engineer, Mr. Mallett was qualified to offer an expert opinion. 40

   C. Mr. Mallett's opinion was supported by an adequate foundation. 43

4. The evidence would let a jury find that NACCO's inadequately designed warnings caused Mr. Evans's death (Assignment of Cross-Error 3).....45

A. Standard of Review 45

B. Analysis. 45

Conclusion 46

Certificate.....48

Table of Authorities

Constitutions

Const. of Va., art. I, §11 26

Statutes

Va. Code § 8.01-336 26

Va. Code. § 8.01-401.3(A) 40

Cases

Alevromagiros v. Hechinger Co., 993 F.2d 417 (4th Cir. 1993) 35

Bussey v. E.S.C. Rests., Inc., 270 Va. 531 (2005) 12, 13, 43

Driesonstok v. Volswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974) 36

Estate of Moses v. Southwestern Va. Transit Mgmt. Co., 273 Va. 672 (2007) ... 13

Ford Motor Co. v. Bartholomew, 224 Va. 421 (1982) 33, 38, 44, 45

Harmon v. Peery, 145 Va. 578 (1926) 38

Holiday Motor Corp. v. Walters, 790 S.E.2d 447 (2016) ..... passim

Jones v. Meat Packers Equip. Co., 723 F.2d 370 (4th Cir. 1983) 15

Morgen Indus. v. Vaughn, 252 Va. 60 (1996) 26, 45

Neblett v. Hunter, 207 Va. 335 (1966) 40

Rascher v. Friend, 279 Va. 370 (2010) 13

Redman v. John D. Brush and Co., 111 F.3d 1174 (4th Cir. 1997) 35

RGR, LLC v. Settle, 288 Va. 260 (2014) 13

Sexton v. Bell Helmets, Inc., 926 F.2d 331 (4th Cir. 1991) 29, 38, 39

Slone v. General Motors Corp., 249 Va. 520 (1995) 39

Sutton v. Roth, LLC, 361 Fed. Appx. 543 (4th Cir. 2010) 30

Toraish v. Lee, Record No. 160495, 2017 Va. LEXIS 61 (April 13, 2017).. 39, 40

Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245 (1975) 37

Velasquez v. Commonwealth, 263 Va. 95 (2002) 40

Regulations

29 C.F.R § 1910.178(m)(5) 22

Other

2-11 Frumer, Friedman & Sklaren, *Products Liability* § 11.03[c] 37

3-18 Frumer, Friedman & Sklaren, *Products Liability* § 18.04 37

3-18 Frumer, Friedman & Sklaren, *Products Liability* § 18.05 37

Black's Law Dictionary (10th ed. 2014) 38

David G. Owen, *Products Liability Law* (3d ed. 2015) 36, 37

Restatement (Third) of Torts: Products Liability 27, 36, 37

Introduction

Jerry Evans was crushed to death when the parking brake on an industrial lift truck failed to hold on an incline. His widow sued the lift truck's manufacturer, NACCO Materials Handling Group, Inc., alleging that the parking brake was defectively designed and unaccompanied by adequate warnings.

After a six-day trial, the jury returned a $4.2 million verdict in her favor. The trial court set that verdict aside, holding that Mr. Evans was contributorily negligent as a matter of law. The trial court acknowledged that reasonable jurors could differ in their assessments of any one of Mr. Evans's individual actions. JA 224. It nonetheless held that the verdict was "plainly wrong on the issue of contributory negligence and must be set aside." JA 219. The crux of the trial court's disagreement with the jury was the court's belief that it was unreasonable as a matter of law for Mr. Evans to rely on the safety-critical parking brake to perform its intended function. Ms. Evans appeals. NACCO assigns cross-error, challenging the sufficiency of the evidence and the admission of the Plaintiff's expert's testimony.

Assignment of Error

1. The trial court erred by setting aside the jury's verdict and entering judgment in favor of the Defendant on the ground that the Plaintiff's decedent was guilty of contributory negligence that proximately caused his accident and death. Preserved at JA 139-40, 144-64, 231; H'rg Tr. 23-35, Aug. 19, 2016.

Assignments of Cross-Error

1. The Circuit Court should have entered judgment for NMHG as a matter of law because the Administrator's evidence was insufficient to support her negligent design claim. (Preserved at JA 29-30, 123-28, 209-212, 337, 677-81, 1269-70, 1280-81, 1299-1303.)

2. The Circuit Court erred in permitting the Administrator's design expert, Frederick Mallett, to testify because he lacked the necessary qualifications and his opinions lacked adequate foundation. (Preserved at JA 27-47, 128-32, 212-14, 229-30, 324-28, 227, 337, 347, 678, 1270-71, 1299, 1301-03.)

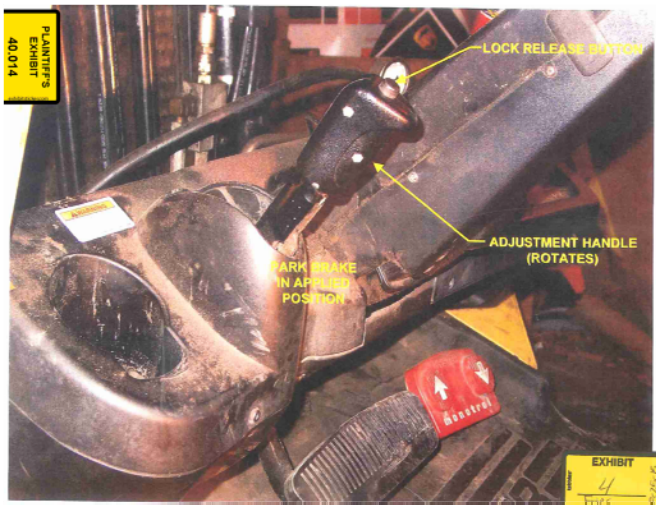
3. The Circuit Court erred in failing to strike the Administrator's failure to warn claim for lack of causation. (Preserved at JA 136-38, 229-30, 681-82, 699-700, 1270-71, 1304-06.)

Statement of the Case

1. Jerry Evans was killed when NACCO's parking brake failed to hold on an incline. Jerry Evans supported his family by working at the International Paper plant in Lynchburg. JA 247, 576. To advance in his job, he volunteered to learn how to operate a Hyster S120XMS lift truck manufactured by the Defendant. See JA 1226.

A. The subject lift truck and parking brake. The lift truck was essentially a forklift with a clamp attachment:

JA 1318. NACCO sold the lift truck in March 2003. It was equipped with an "over-center, operator-adjustable" parking brake:

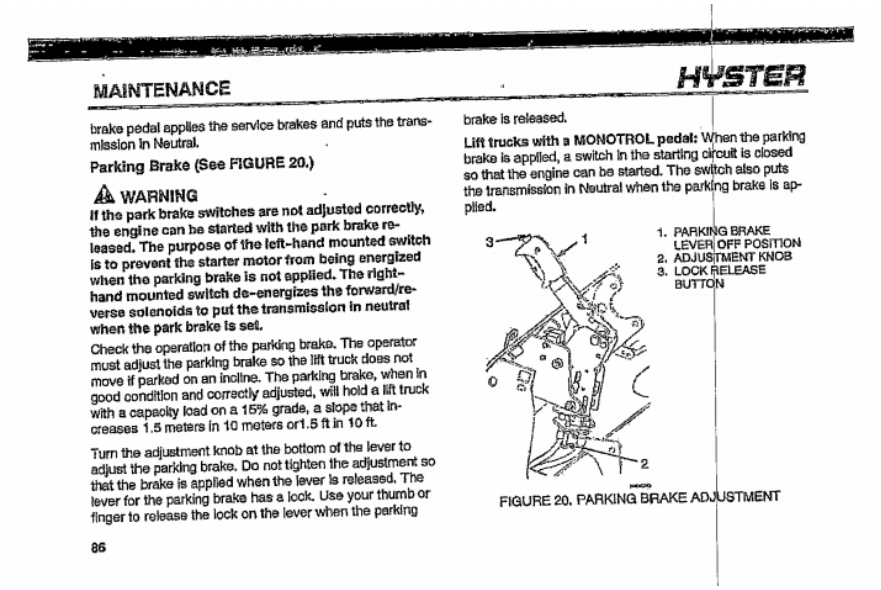


JA 350-51, 1366. The operator applied the brake by pulling it backwards. When the brake lever moved past center, the brake engaged. JA 350-51.

The parking brake's tension adjustment was located on the top of the handle. It was unmarked. Twisting the handle could increase or decrease the brake's holding power. JA 31, 839-40. The parking brake therefore could be adjusted or even inadvertently disabled by an operator—including an operator on an earlier

shift—just by turning the handle, without using any tools. JA 345-46, 349-51. In fact, it was "fairly common" for an operator on a previous shift to loosen the parking brake's tension. JA 738-39.

The maintenance manual that accompanied the lift truck did not accurately describe the parking brake's tension adjustment. Instead, it showed the tension adjustment as a rotating knob under the cowl, in a place readily available to a maintenance technician but not to an operator:



MAINTENANCE HYSTER

brake pedal applies the service brakes and puts the transmission in Neutral.

Parking Brake (See FIGURE 20.)

⚠ WARNING

If the park brake switches are not adjusted correctly, the engine can be started with the park brake released. The purpose of the left-hand mounted switch is to prevent the starter motor from being energized when the parking brake is not applied. The right-hand mounted switch de-energizes the forward/reverse solenoids to put the transmission in neutral when the park brake is set.

Check the operation of the parking brake. The operator must adjust the parking brake so the lift truck does not move if parked on an incline. The parking brake, when in good condition and correctly adjusted, will hold a lift truck with a capacity load on a 15% grade, a slope that increases 1.5 meters in 10 meters or1.5 ft in 10 ft.

Turn the adjustment knob at the bottom of the lever to adjust the parking brake. Do not tighten the adjustment so that the brake is applied when the lever is released. The lever for the parking brake has a lock. Use your thumb or finger to release the lock on the lever when the parking brake is released.

Lift trucks with a MONOTROL pedal: When the parking brake is applied, a switch in the starting circuit is closed so that the engine can be started. The switch also puts the transmission in Neutral when the parking brake is applied.

1. PARKING BRAKE LEVER OFF POSITION
2. ADJUSTMENT KNOB
3. LOCK RELEASE BUTTON

FIGURE 20. PARKING BRAKE ADJUSTMENT

86

JA 1337. The manual appears to be describing an entirely different parking brake. NACCO conceded at trial that this was a "mistake," and one that was "totally not acceptable." It assured the jury that the error would be corrected in the future. JA 852-53, 910-11, 917.

An industry standard, ANSI B56.1 2000, required the parking brake to hold under a full load on a 15% incline.[1] JA 1837. OSHA regulations incorporated this standard by reference. JA 1768. A full load for the lift truck was 7,700 pounds. JA 1747.

B. Mr. Evans spent hours training to use the lift truck. OSHA regulations required that to operate the lift truck, Mr. Evans first had to be trained and certified by his employer. JA 1775-76. International Paper—not OSHA or the DMV—was therefore responsible for granting him a "license" to operate the vehicle. JA 1776.

International Paper's formal training program included three elements: (1) classroom training with a handbook and video; (2) a hands-on demonstration with a lift truck; and (3) on-the-truck training with a mentor. JA 406, 1222-23. The training was based, in part, on NACCO's inaccurate manual. JA 512, 1236, 1775. Mr. Evans had progressed to the third stage of training. He'd undergone substantial classroom training and practical instruction. JA 641-42, 648-50, 1229, 1242-43, 1360-65. Mr. Evans had also received hands-on training from (among others)

[1] Specifically, the standard required that the parking brake be capable of holding the truck on the maximum grade that the truck can climb with a rated capacity load, or on a 15% grade, whichever is lesser. JA 1837. Both parties treated this as a requirement that the brake hold under full load on a 15% grade. E.g., JA 272, 472, 830-31, 952, 1150-53.

Julian Lindsay, who was the most experienced lift-truck operator at the Lynchburg plant at the time of trial. JA 719, 723, 733.

Mr. Evans spent hours on the truck learning from Mr. Lindsay. JA 723.[2] Particularly relevant here, he was taught how to inspect the lift truck before using it and how to park the vehicle. See JA 1362-65.[3] Operators at the International Paper plant, however, were not supposed to adjust the parking brake themselves. If they found that the parking brake needed adjustment, they were told to tag the lift truck out for maintenance. JA 739-41, 1227-28. Thus, Mr. Evans was not trained to adjust the parking brake.

---

[2] Mr. Lindsay felt that, in addition to his other training, Mr. Evans should have had at least two weeks of full-time practical training on the truck. JA 723. This opinion conflicted with other testimony, which established that an operator could complete the required training in a single day. JA 1244-47.

[3] JA 1362 is a December 2009 evaluation that directs the evaluator to mark any item for which Mr. Evans did not meet standards and to explain that item in the remarks. It appears, however, that the evaluator did the opposite, marking the items for which Mr. Evans *met* the standards, and explaining some of the unmarked sections. For instance, the boxes under "Fueling" and "Railcar Loading/Unloading" are unmarked, with a notation for each stating "Not yet." Those comments would make no sense if leaving the box unchecked meant that Mr. Evans complied with the standard. By contrast, none of the marked boxes are explained. This includes the boxes checked for "Demonstrates proper pre-shift inspection" and "Demonstrates proper procedure for parking." JA 1363-65 is a January 2010 written training review, and it includes a question about pre-shift inspections. The reasonable inference to be drawn from this evidence is that Mr. Evans was trained on pre-shift inspections and parking.

Mr. Evans ultimately withdrew from his formal training because he was not getting as much training time as he wanted on the lift truck. JA 502, 556, 658, 664, 723-24.

C. Mr. Evans's supervisor directed him to operate the lift truck. On the night of January 22, 2010, Mr. Evans's supervisor told him to use the lift truck to unload a tractor-trailer. JA 538, 641-42, 658. The trailer was backed up to the end of a ramp at the loading dock. Mr. Evans entered the trailer by driving up the loading dock ramp and across a retractable dock plate that bridged the 11-inch gap between the ramp and the trailer. JA 268, 568-69, 1001-04.

International Paper employed a "dock lock" warning system to protect lift-truck operators entering trailers from the dock ramp. If a trailer was locked in place and the dock plate was extended, so that it was safe to enter the trailer, the dock light would be green. JA 726-27. If the trailer was not positioned properly or the dock plate was not extended, the dock light would be red. JA 262, 727.

On the night of January 22, however, the safety-critical dock light was malfunctioning. JA 260-62. It was stuck on the red signal. JA 261-62. After Mr. Evans had successfully completed several trips into and out of the trailer, his lift truck became stuck in the 11-inch gap between the trailer and the loading dock. JA 246, 268, 539; see JA 556, 1309-10, Trial Tr. 1544. He'd evidently tried to drive into the trailer while the dock ramp was retracted.

Mr. Evans recruited another lift-truck operator, Lamont Lacy, to help him move the lift truck. JA 539. Mr. Lacy first suggested that they contact a supervisor, but ultimately decided to assist Mr. Evans. JA 539, 551. Mr. Lacy left to get fuel for his truck while Mr. Evans retrieved a tow chain. JA 540. When they returned to the trailer, Mr. Lacy attached his vehicle to the stranded lift truck with the chain and pulled it out of the gap, towing it part of the way down the dock ramp. JA 540-41.

The towing procedure was easy and uneventful. JA 541, 544.

D. NACCO's lift truck crushed Mr. Evans when its parking brake failed to hold on an incline. It is unclear from the record where on the ramp, exactly, the trucks stopped. As noted above, the parking brake was required to hold a full load on a 15% grade. JA 1768, 1837. It is undisputed that the truck was not on a grade that steep. The maximum effective grade experienced by the lift truck was about 12%. JA 381-82, 385-86, 390, 472-73. And the lift truck was not carrying any load. JA 388.

Mr. Evans turned off his lift truck. JA 541. He set the parking brake and removed his seat belt. JA 381, 541-42.

A warning next to the parking brake stated that an alarm would sound if the parking brake was not applied. JA 382, 1330. The alarm did not sound. JA 631.

The parking brake held on the incline. JA 543.

Mr. Evans dismounted the truck. He did not block the wheels because chocks were not available to lift-truck operators, JA 645, and he was not leaving the truck unattended, see JA 1777.

Mr. Evans walked around to the back of the truck and began to undo the tow chain. JA 542.

Then the parking brake failed. The 20,000-pound lift truck rolled down the incline. It crushed Mr. Evans against Mr. Lacy's truck, killing him. JA 385, 542-43, 794.

Mr. Lacy grabbed a forklift operator, Dirk Zinn, to help him free Mr. Evans. JA 543, 556. Mr. Zinn was "frustrated" to see that whenever they would move Mr. Lacy's lift truck, Mr. Evans's truck would roll downhill even though its parking brake was engaged. JA 559-61. He expressed this frustration repeatedly in his trial testimony. *Ibid*.

Post-accident evaluation showed that the truck's parking brake was out of adjustment. JA 386-87, 390.

2. After a six-day trial, the jury returned a plaintiff's verdict. Mr. Evans's widow qualified as his Administrator and brought a wrongful-death action against NACCO in the Circuit Court for the City of Roanoke. JA 1-17. Over the course of a six-day trial, she proved that the lift truck was unreasonably dangerous because:

1) The parking brake's tension adjustment was on the top of the handle, and it was unmarked. Any twisting of the handle could change the brake's holding power. The parking brake could be adjusted or even inadvertently disabled by an operator (not a maintenance worker) without any tools, just by turning the handle. E.g., JA 345-46, 350-51; and

2) As designed by NACCO, the warnings accompanying the parking brake were inadequate and affirmatively misleading. E.g., JA 382-84, 597-98.

NACCO denied that the parking brake was unreasonably dangerous. It tried to direct blame elsewhere, simultaneously insisting that Mr. Evans died because of his own carelessness and because of International Paper's negligence.

The jury heard from 18 witnesses, including multiple experts for both sides. It considered dozens of exhibits and viewed an exemplar lift truck.

After weighing the evidence, the jury rejected NACCO's contributory-negligence defense and returned a $4.2 million verdict.[4] JA 109, 1252-53.

3. The trial court set the verdict aside as "plainly wrong." NACCO moved to set the verdict aside. Among other things, it insisted that Mr. Evans was contributorily negligent as a matter of law; challenged the qualifications of the

[4] The verdict form indicates that the jury found in Ms. Evans's favor on her negligent-design claim. JA 109. The jury instructions defined negligent design to include the failure to provide an adequate warning. See JA 1251-53 (issues instruction), 1258 (warning instruction), 1260 (definition of "unreasonably dangerous"), 1263 (standard of safety), 1265-67 (findings instruction).

Plaintiff's design expert, Frederick Mallett, and the foundation for his opinion; disputed the sufficiency of Ms. Evans's proof of defect; and argued that there was no evidence that any defective warning caused Mr. Evans's death.

The Circuit Court agreed with only the first argument. It ruled that the jury's verdict was "plainly wrong on the issue of contributory negligence and must be set aside." JA 219. The trial court drew the following conclusions from the evidence, which it deemed to constitute proof of contributory negligence as a matter of law:

> (i) Jerry Evans operated the lift truck with full knowledge that he was neither certified nor fully trained to do so, and had in fact unilaterally elected to terminate his training regarding the safe and proper use of lift trucks;
>
> (ii) Before his fatal accident, Jerry Evans did not discover any defect in the parking brake during a pre-operation inspection (as is evidenced by the lack of any inspection form and by his subsequent use of the lift truck) or during his subsequent operation of the lift truck;
>
> (iii) During Jerry Evans' operation of the lift truck immediately before his fatal accident, he suffered a significant mishap when he drove his lift truck into a gap at the end of the dock, which effectively disabled the lift truck;
>
> (iv) Following the mishap, and despite the repeated admonition of his co-worker, Mr. Lacy, Jerry Evans elected to try and operate the disabled lift truck without reporting the mishap to supervisory personnel and without the assistance of supervisory personnel;
>
> (v) After Mr. Lacy used his lift truck to "tow" Jerry Evans' disabled lift truck out of the gap, Jerry Evans "parked" his lift truck on an incline, as opposed to traveling a short distance down the incline to the relative safety of level ground;

(vi) After Jerry Evans parked his lift truck on the incline, and contrary to an explicit and prominently displayed warning, Jerry Evans dismounted his now unattended lift truck without lowering the clamp attachment or chocking the wheels in any way; and

(vii) Jerry Evans' death resulted when he placed himself on the downhill side of his unattended lift truck, and his lift truck subsequently rolled down the incline and crushed him between his lift truck and the one operated by Mr. Lacy.

JA 221-23 (footnote calls and bullet points omitted).

The trial court conceded that reasonable jurors "could have possibly differed about the reasonableness of a specific undertaking in the chain of events leading to" Mr. Evans's death. JA 224. Even so, it held that they could have not differed on the ultimate question of whether Mr. Evans was contributorily negligent. *Ibid*. The trial court set the verdict aside and entered judgment in NACCO's favor. JA 226-32. It did not reach NACCO's other arguments.

Arguments and Authorities

1. The trial court erred by ruling that Mr. Evans was contributorily negligent as a matter of law (Assignment of Error 1).

A. Standard of Review

A trial court may set a jury's verdict aside only when it is plainly wrong or without credible evidence to support it. *Bussey v. E.S.C. Rests., Inc.*, 270 Va. 531, 534 (2005). It must show "the utmost deference" to the verdict. *Ibid*. If the evidence is conflicting on a material point, or if reasonable people could draw

different conclusions from the evidence, or if a conclusion depends on the weight that the fact-finder gives to the evidence, the trial court cannot substitute its own conclusion for the jury's just because it would have reached a different result. *Estate of Moses v. Southwestern Va. Transit Mgmt. Co.*, 273 Va. 672, 677 (2007). On appeal, this Court will give Ms. Evans "the benefit of all substantial conflicts in the evidence, and all fair inferences that may be drawn from the evidence." *Bussey*, 270 Va. at 535.

B. A rational jury could find that Mr. Evans behaved reasonably.

Contributory negligence is an affirmative defense that consists of two independent elements, negligence and causation. *Rascher v. Friend*, 279 Va. 370, 375 (2010). The defendant must prove not only that the plaintiff acted carelessly, but also that his negligence was a proximate cause—a direct, efficient cause—of his accident. *Ibid*. Negligence and proximate causation present classic questions of fact for the jury. A plaintiff can be found contributorily negligent as a matter of law only when reasonable people could not disagree on the outcome. *Ibid*. The Court's recent decision in *RGR, LLC v. Settle*, 288 Va. 260 (2014), highlights just how hard it is to establish contributory negligence as a matter of law.

Here, five simple facts would let the jury decide that Mr. Evans acted reasonably:

1) Mr. Evans received hours of classroom instruction and practical training on the lift truck before he tried to use it. JA 648-50, 723, 1229, 1242-43, 1360-65.
2) On the night of his death, Mr. Evans operated the lift truck only at the direction of his employer, who was responsible for his training and certification. JA 538, 641-42, 658.
3) Mr. Evans set the parking brake. JA 541-42. An industry standard and a government regulation both required that the parking brake be capable of holding a full load on a 15% incline. JA 1768, 1837. The parking brake was under no load on an incline of — at most — about 12%. JA 381-82, 388.
4) A sign next to the parking brake said that an alarm would sound if Mr. Evans left his seat without applying the parking brake. JA 1330, 1366. That alarm did not sound. JA 631.
5) The parking brake initially held the truck on the incline. JA 543.

Only *after* that did Mr. Evans dismount and move behind the lift truck. In doing so, he relied on the parking brake to perform its intended purpose. A jury could find that this was reasonable.

C. The trial court erred by setting the jury's verdict aside.

The trial court disagreed, voicing the seven criticisms quoted above. Its analysis was fundamentally flawed. As is clear from the critical tone of its opinion,

the trial court did not view the evidence in the light most favorable to the Plaintiff. Worse, the trial court conceded that reasonable jurors could disagree on any one of its points. But it never explained why seven disputed questions of fact were supposed to add up to one judgment as a matter of law for the defense.

Setting that overarching problem aside, each of the trial court's seven points fails on its own terms:

First, the trial court faults Mr. Evans for operating the lift truck at all when he was not certified or fully trained. This complaint overlooks the fact that Mr. Evans's employer, International Paper, was responsible for his training and certification. That's important, because International Paper also told Mr. Evans to use the lift truck. Given the state of his training, it was for the jury to determine whether it was reasonable for Mr. Evans to follow that instruction. "[A]n employee who is injured while performing a job in accordance with instructions provided by the employer is not guilty of contributory negligence unless the danger is so apparent that no reasonable person would encounter it." *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 372 (4th Cir. 1983). International Paper knew exactly how much training he'd received. Mr. Evans could have considered its direction to use the lift truck an informal "certification" that he was ready to operate the machine.

Equally troubling, the record does not support the trial court's conclusion that incomplete training or a lack of a formal certification proximately caused the accident. Mr. Evans was trained to inspect and park the lift truck. JA 1362-65. It's causally irrelevant that he did not finish his training on other points not involved in the case.

Nor is there any reason to think that finishing the training, or receiving a paper certificate, would have changed the outcome. Defense witness Stephen Grandstaff, International Paper's former safety supervisor, admitted that training and certification could be completed in a single day. JA 1244-47. And the trial testimony showed how much that training could leave out. Mr. Lacy was a fully trained and certified lift truck operator with six years' experience. JA 528. He was nonetheless involved in the fatal accident. His training notwithstanding, Mr. Lacy testified that he was never taught to adjust the parking brake, or even told that it was adjustable in the first place. JA 531. In six years of service as a lift truck driver, he'd never adjusted one. *Ibid*. Nor had Mr. Lacy received any training about how to move a disabled truck, or what to do if his truck got stuck, or how to park on an incline. JA 534.

Second, the trial court blames Mr. Evans for not discovering any defect in the parking brake during his pre-operation inspection or use of the truck.[5] JA 222. This argument overlooks the fact that International Paper trained its lift truck operators to test the parking brake two ways, one of which was completely ineffective. That is, some operators were taught to test the brake by engaging the brake and putting the truck in gear, and then trying to drive the truck. JA 371. But when the parking brake is applied, it puts the truck's transmission in neutral, so no amount of pressure on the accelerator will move the truck. JA 372, 1068-69, 1111. This test will *always* tell the operator that the parking brake is functional. Six of the eight operators who gave depositions tested the parking brake this way. JA 372. A jury could find that it was reasonable for Mr. Evans to test the parking brake as he was trained to do, even if—in hindsight—it turned out that the method that he was taught did not work.

[5] The trial court's argument should not be read as a conclusion that Mr. Evans did not conduct a pre-operation inspection. Mr. Evans was trained by Mr. Lindsay, among others. JA 719. In his testimony, Mr. Lindsay stressed the importance of pre-shift inspections and said that he taught his trainees how to conduct them. JA 733-34, 736, 744. Mr. Lindsay explained that he usually filled out an inspection checklist only when he found something wrong during the inspection. JA 759-60. Mr. Evans did not complete an inspection checklist on January 22, 2010. The reasonable inference to be drawn, consistent with the standard of review, is that he conducted a pre-shift inspection but found nothing wrong with the lift truck, so in accordance with his training he did not fill out a checklist.

Third, the trial court chides Mr. Evans for driving "his lift truck into a gap at the end of the dock, which effectively disabled the lift truck." JA 222. This critique impermissibly views the evidence in the light most favorable to the Defendant. Driving the lift truck into the gap was not necessarily negligent because the safety-critical dock light was malfunctioning. As a result, it was not providing useful information about the status of the dock plate. Mr. Evans had already made several trips into and out of the trailer. The jury could rationally infer that he knew that the dock light was malfunctioning and reasonably chose to discount it.

What is more, Mr. Lindsay inspected the lift truck after the accident, and he saw no damage. JA 737. He certainly did not report that it was disabled. That makes sense, because the gap between the dock and the trailer was only 11 inches wide, while the truck's tires were about 22 inches wide. JA 246, 268, 1309-10; see JA 1313 (dimensions of truck), 1318 (photograph of truck); Tr. 1544 (argument). Even if the jury considered the trailer incident to be significant, it was not concurrent with NACCO's primary negligence, and it was too far removed from the accident to be considered a proximate cause as a matter of law.

Fourth, the trial court scolds Mr. Evans for trying to "operate the disabled lift truck without reporting the mishap to supervisory personnel and without the assistance of supervisory personnel." JA 222. There are at least three problems with this argument. First, neither party called a supervisor to testify. There was no

record evidence to explain what a supervisor might have done, had he or she been on the scene, or how that might have changed the outcome. There was certainly nothing in the record to support the conclusion that the failure to summon a supervisor proximately caused Mr. Evans's death. Quite the contrary, defense witness Julian Lindsay, the most experienced operator at the plant, testified that the towing method that Mr. Evans and Mr. Lacy employed was simply the way that operators handled stuck trucks. He explained that there was nothing unsafe about the procedure. JA 736-37, 747-48. In fact, Mr. Lindsay had himself towed a lift truck that way. He did not recall whether he'd contacted a supervisor, explaining that it wasn't a requirement at the time. JA 747-48. A jury could reasonably believe this testimony.

Second, as explained above, there was no evidence that the truck was disabled. Third, there was no evidence that Mr. Evans planned to continue operating the lift truck in any meaningful sense, as opposed to simply towing it out of the gap. So long as the lift truck remained stuck between the dock and the trailer, it presented immediate operational concerns for the lift truck itself; for the trailer, which couldn't leave; and for any other trailers trying to unload. A jury could find it reasonable that Mr. Lacy and Mr. Evans tried to get the lift truck out of this position as quickly as possible.

Fifth, the trial court faults Mr. Evans for parking the lift truck on an incline, rather than having Mr. Lacy tow it "to the relative safety of level ground." JA 222. But a jury could find that it was reasonable to park the lift truck on an incline for the simple reason that the lift truck was designed to be parked on an incline. Mr. Mallett explained that it was sometimes necessary to park on a grade, JA 506-07, and NACCO's corporate representative conceded that it was foreseeable that an operator would do so, JA 883-84. OSHA has promulgated regulations governing parking a lift truck on an incline, and OSHA and ANSI standards required the parking brake to hold on a 15% incline under a full load. JA 1768, 1837. The truck itself was not easy to move; it weighed about 20,000 pounds and had a rated capacity of another 7,700 pounds. JA 495, 794, 1747. On level ground, inertia alone would hold the truck in place. A parking brake strong enough to meet OSHA and ANSI requirements would be necessary only if the truck were to be parked on an incline.

To use the parking brake for its intended purpose should not be considered contributory negligence—and certainly not contributory negligence as a matter of law. The trial court disagreed, arguing in a footnote that parking on an incline is "dangerous," and that "[t]he circumstances did not compel Jerry Evans to park his lift truck on the incline; he could have very well continued on to level ground …." JA 222 n.11. A reasonable juror looking at the numerous photographs of the

crowded area in which the lift trucks were operating could disagree. See, e.g., JA 1315-28. Mr. Evans's truck was, after all, being towed on a chain by another truck. This limited their maneuverability. Both lift trucks had rear-wheel steering. JA 1363. At least when carrying a load, neither truck could turn on the dock ramp without risking a rollover. JA 1052-53. It's just not clear, as a matter of law, that it was unreasonable for the operators to conclude that the circumstances warranted stopping on the dock ramp to decouple the trucks.[6]

The trial court's argument also ignores the fundamental point that doing something *dangerous* is not negligent; doing something *unreasonably dangerous* is, and it's the jury's job to draw the line between the two.

Sixth, the trial court faults Mr. Evans for dismounting the "now unattended lift truck without lowering the clamp attachment or chocking the wheels in any way," contrary to "an explicit and prominently displayed warning." JA 222-23. This criticism is unreasonable for several reasons.

To begin with, chocks were not available to lift-truck operators. JA 645. It's unreasonable to fault Mr. Evans for not using a safety device that wasn't available. And the trial court was wrong to conclude that Mr. Evans's lift truck was

[6] This claim also followed the trial court's unsupported assertions that the lift truck was "disabled." If that were so, then a rational juror could find that the lift truck's disability compelled the operators to stop on the ramp. Even defense witness Grandstaff agreed "[t]here's no parking on an incline *unless you have a disabled vehicle*." JA 1234 (emphasis added).

"unattended" as the applicable regulations define that term. Under 29 C.F.R. § 1910.178(m)(5), a lift truck is unattended, and its wheels must be blocked, when (1) the operator is at least 25 feet away from it, if the truck is in his view, or (2) whenever the operator leaves the vehicle and it is not in his view.

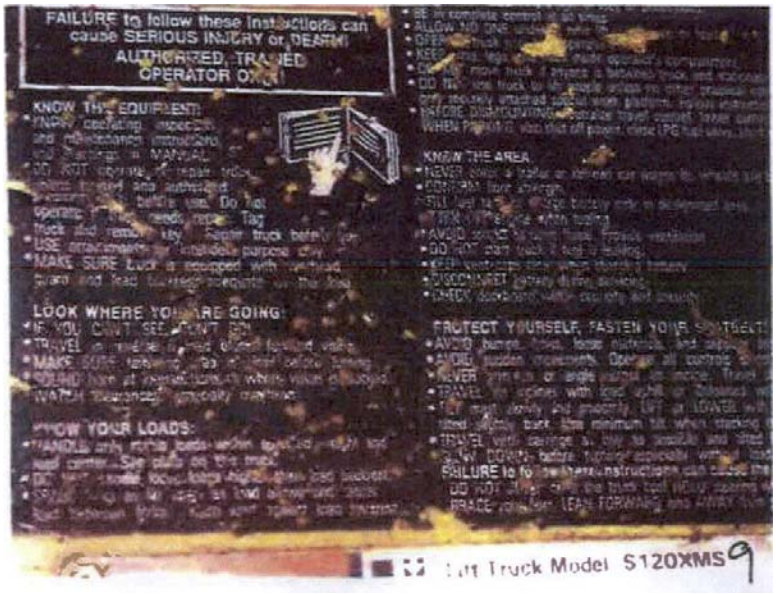
Here, Mr. Evans was less than 25 feet away from the truck, JA 1137-38, so the question is whether the truck was in his view. The trial court evidently read the phrase "not in his view" to mean that a lift truck becomes unattended the instant an operator looks away from it—even if he is standing right next to the vehicle, with his hand on it. That is an unreasonable interpretation, because no operator could ever comply with it. When trying to follow the regulation, as the trial court reads it (e.g., by grabbing the required chocks), the operator would have to take his eyes off the vehicle and leave it "unattended" with its wheels unblocked. The trial court offers no explanation or authority for its reading, and this Court should not adopt an interpretation that an operator could never satisfy. A more reasonable understanding of the regulation is that a truck is not in the operator's view, and is therefore "unattended," when some obstruction blocks the operator's view of the vehicle.[7] Here, there was no evidence of any such visual obstruction, so the truck was not unattended and Mr. Evans was not required to block its wheels. Even if the

[7] In fact, International Paper's safety coordinator testified that it was acceptable to leave the lift truck *running* if the operator remained within three feet of the machine. JA 643-44.

Court were to adopt the trial court's reading of the regulation, the lower court's argument would still fail because the evidence would not let it conclude, consistent with the standard of review, that the lift truck was outside of Mr. Evans's view. Mr. Lacy was the only eyewitness to the accident. In his testimony, he did not specify where Mr. Evans was looking. JA 542. Mr. Evans clearly was not looking back at Mr. Lacy, because Mr. Lacy was unable to get his attention. *Ibid*.

Nor does Mr. Evans's failure to lower the clamp provide any basis for upsetting the jury's verdict. International Paper's safety coordinator, Shawn Baier, personally investigated the accident. He testified that at the time of the fatality in 2010, operators were not trained to lower the clamp when dismounting. JA 641-44. This was International Paper's considered policy, because lowering the clamp to the ground would damage the clamp's pad. JA 644-45. Once again, the jury could find that it was reasonable for Mr. Evans to follow his training.

As for the Defendant's warning, the jury was free to determine just how "explicit and prominently displayed" the relevant text was:



JA 1751. The trial court seized on the last bullet point in the upper-right block: "BEFORE DISMOUNTING, neutralize travel control, lower carriage, set brake. WHEN PARKING, also shut off power, close LPG fuel valve, block wheels on inclines." But this was just one of numerous warnings emblazoned on the truck. Its adequacy—and even its basic legibility—presented questions of fact for the jury. The trial court instructed the jury that, in determining whether a warning is adequate, it should consider (1) whether it could be expected to catch the attention of a reasonable person; (2) whether it could be understood by a reasonable person; and (3) whether it gives a reasonable indication of the nature and extent of the potential danger. JA 1258. Ms. Evans's human-factors expert likewise explained that an effective warning should communicate three types of information: (1) the nature of the hazard; (2) the consequences of the hazard; and (3) the manufacturer's instructions about how to avoid the hazard. JA 593-94.

NACCO's warning fails these tests. It's inconspicuous, buried in a welter of boilerplate. The warning has nothing to say about the nature or extent of the hazard, let alone how to avoid it. It does not tell operators to put the clamp on the ground for added traction or to stop the truck from rolling downhill. It could just as easily be read as an instruction to lower the clamp to prevent a rollover. In fact, the warning states that "FAILURE to follow these instructions can cause the truck to tip over!" It does not say that the clamp is a necessary anchor, without which the parking brake will not hold. Nor could it. The industry standard and government regulation do not require a parking brake to hold on a 15% incline only when the clamp is lowered; they require the parking brake him to hold on a 15% incline, full stop. JA 1768, 1837.

Finally, there is no evidence in the record to support the trial court's conclusion that failing to lower the clamp was a proximate cause of the accident as a matter of law.

Seventh, the trial court criticizes Mr. Evans for moving to the downhill side of the lift truck. JA 223. Again, the parking brake was designed to hold on an incline. See JA 1837. A jury could conclude that it was reasonable for Mr. Evans to rely on the brake to serve its explicit purpose.

* * *

There is nothing unusual about a judge and a jury arriving at different conclusions about the weight or credibility of the evidence. But it is extraordinary for a trial court to set a verdict aside based on those disagreements. Virginia has long recognized "[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other and ought to be held sacred." Const. of Va., art. I, § 11. The General Assembly has preserved this right inviolate. Va. Code § 8.01-336(A). The decision below violates these foundational precepts. It must be reversed.

2. Ms. Evans proved that the parking brake was defective (Assignment of Cross-Error 1).

A. Standard of Review

The Court will consider NACCO's challenge to the sufficiency of the evidence viewing the facts in the light most favorable to Ms. Evans. See *Morgen Indus. v. Vaughan*, 252 Va. 60, 62 (1996).

B. Safer alternative designs were available.

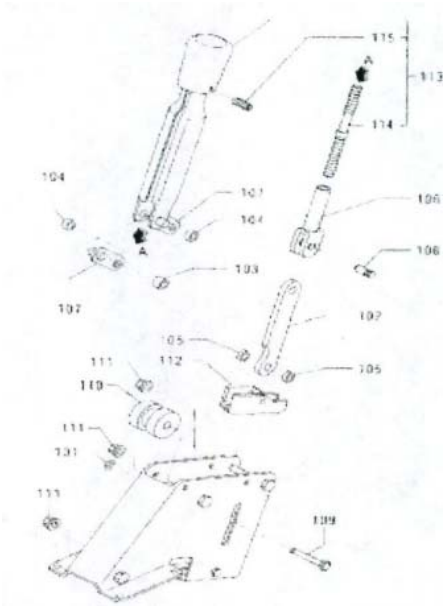
To prove that the parking brake was defective, Ms. Evans had to show that (1) it was unreasonably dangerous for its ordinary and reasonably foreseeable uses, and (2) the unreasonably dangerous condition existed when it left NACCO's hands. See, e.g., *Vaughn*, 252 Va. at 65. A product is unreasonably dangerous if it is defective in manufacture, unreasonably dangerous in design, or unaccompanied

by adequate warnings. *Ibid*. Whether a product is unreasonably dangerous presents a question of fact. *Id*. at 66.

Ms. Evans's design expert, Frederick Mallett, explained that the Defendant's parking brake was unreasonably dangerous because it could be adjusted (or even inadvertently disabled) by an operator, not a maintenance technician, without the use of tools. JA 344-46. No reasonably safe design should allow an operator to inadvertently disable the only parking brake on the lift truck.

Mr. Evans backed this conclusion up with several types of proof. First, she presented the jury with safer alternative designs. A product is defective in design when the foreseeable risks of harm it poses could have been avoided by adopting a reasonable alternative design, and the omission of that design renders the product not reasonably safe. *Restatement (Third) of Torts: Products Liability* § 2(b). As a safer alternative, Mr. Mallett proposed a parking brake with a set screw that would prevent operators from adjusting or disabling it without tools. JA 348, 391-92. He pointed to the parking brake used on the Mitsubishi-Caterpillar GC55K model series of lift trucks. When first introduced, the GC55K—which was directly equivalent to the lift truck at issue—had a parking brake with an adjustable knob like the one on the NACCO model. Mitsubishi-Caterpillar determined that this was undesirable, so it inserted a set screw that locked the parking brake adjustment knob so that it could not be rotated without first removing the screw. JA 391-92.

Mr. Mallett showed the jury both a photograph and a schematic of this design:



JA 1334-35. This was not just some conceptual alternative. This was a safety mechanism that one of the world's largest lift-truck manufacturers—and one of NACCO's direct competitors—put into production. JA 300, 505-06. Had the set screw been applied in this case, it would have prevented the turning of the handle. JA 392-93, 516.

NACCO now faults Mr. Mallett for not knowing when the set-screw design was introduced. That's a red herring because the set-screw design was feasible in 2003, when the subject lift truck was sold. JA 393-94, 506, 923, 925-26.

Mr. Mallet proposed another safer alternative design: a handle that would not allow the operator to adjust the parking brake. He observed that, before 2003, some manufacturers placed the parking brake's tension adjustment inside the handle and below the cowl. JA 393-94. This meant that the operator could not easily—let alone inadvertently—adjust the parking brake, but maintenance personnel equipped with the proper tools could. JA 393-94, 515. In fact, NACCO seems to be describing just such a brake in its (inaccurate) manual for the subject lift truck. See JA 852-53, 911, 1337.

Third, Mr. Mallet noted that it was possible to design a parking brake handle that an operator could tighten but not loosen, through the application of a ratcheting mechanism. This, too, was economically feasible before the subject lift truck rolled off the assembly line. JA 398-400.

C. NACCO's design violated reasonable consumer expectations.

Ms. Evans also showed the jury that NACCO's design violated reasonable consumer expectations. Reasonable consumer expectations may be proven by evidence of actual industry practices, published literature, and direct evidence of what reasonable purchasers considered defective at the time. *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1990). The evidence supporting consumer expectations needn't be overly technical. For example, the statements of diners at a fast-food restaurant may constitute evidence of what reasonable

purchasers considered defective food, and a statement from the restaurant's employee may constitute evidence of actual industry practices. *Sutton v. Roth, LLC*, 361 Fed. Appx. 543, 548 (4th Cir. 2010).

As to industry practices, NACCO's corporate representative conceded that in 2002, other manufacturers offered lift trucks with parking brakes that were not operator adjustable. JA 924-25, 938-40.[8] Mitsubishi-Caterpillar moved away from offering operator-adjustable parking brakes on its lift trucks around the turn of the century. JA 391-92, 505-06. By the time of trial, none of the major North American manufacturers were following NACCO's over-center, operator-adjustable parking brake design. JA 425-27. And by its own admission, NACCO provided operators with inaccurate information about how to adjust the parking brake in its manual. JA 852-53, 911, 1337. There was no evidence that anyone else in the industry was exposing consumers to such risks.

---

[8] NACCO later tried to walk this concession back. Its hired witness, Walter Girardi, testified that 60% of Class IV and Class V lift trucks (the type involved in this case) were using an over-center, operator-adjustable parking brake like NACCO's during the relevant period. JA 1115. He argued that the remaining 40% were using a different kind of operator-adjustable parking brake. JA 1115-16. As an example, he cited a foot brake with a ratcheting mechanism. JA 1116. Girardi argued that the operator could adjust the parking brake by stepping on it harder to apply more braking power. JA 1116. Girardi did not cite an example of a parking brake that allowed the operator to reduce or disable its tension, let alone one that allowed an operator to do so inadvertently and without tools. At any rate, the jury was free to credit the testimony of NACCO's corporate representative on this point.

Mr. Mallet also pointed to published literature—specifically, a 1944 publication from the Department of Labor's Division of Labor Standards, which explains that positive mechanical means of eliminating machine hazards should be applied whenever possible and to the maximum extent possible. JA 342. The Division found the attitude that it's sufficient to guard a machine so that an operator obeying strict rules of operation can avoid injury to be both incorrect and responsible for "a heavy portion" of industrial accidents. JA 342-43. According to the Division, "[e]very uncontrolled hazard, however remote, will produce its quota of injuries and even the most careful operator will at times do the wrong thing or fail to take some necessary precaution." JA 343.

In addition, Mr. Mallett told the jury about an engineering concept called the "design hierarchy." JA 339. He explained that under the design hierarchy, manufacturers should mechanically eliminate hazards if possible. JA 339. Barring that, they should put physical safeguards in place. JA 340. And as a last resort, they should warn consumers about the hazard. JA 340-41.

Applying these principles, Mr. Mallett concluded that NACCO should have mechanically eliminated the potential for an operator to inadvertently disable the parking brake. JA 344.

Finally, Ms. Evans presented the jury direct evidence of what reasonable users of the parking brake expected. Julian Lindsay, the most experienced operator

at the International Paper plant and the man who trained Mr. Evans, testified that from a safety standpoint, there was "nothing good" about a parking brake that could be disabled by an operator. JA 742. Dirk Zinn, a forklift operator, saw that the parking brake on Mr. Evans's truck was applied but not holding on the incline. He repeatedly expressed his frustration at the parking brake's failure to hold. JA 559-61. The reasonable inference to be drawn from Mr. Zinn's testimony is that he expected the parking brake to hold on the dock ramp. The conduct of Mr. Lacy and Mr. Evans shows that they did as well.

D. Ms. Evans pointed the jury to objective safety standards.

Ms. Evans also pointed the jury to objective safety standards. An ANSI standard and an OSHA regulation required the lift truck to include a parking brake capable of holding the truck on a 15% grade with its rated capacity load. JA 1768, 1837. They further required the parking brake to be "capable of maintaining the specified performance requirement despite any contraction of the brake parts, exhaustion of the source of energy, or leakage of any kind." JA 1837.

NACCO's parking brake failed under no load on an incline of about 12%. JA 381-82, 388. For that reason alone, the jury could find that it did not comply with objective safety standards

To be sure, the parking brake could be *adjusted* to hold on the incline, and nothing in the ANSI standard or OSHA regulation prohibits designing a parking

brake that is operator-adjustable. Mr. Mallett thus felt that the parking brake actually complied with those standards "as designed." JA 472. But he also raised a point that was undisputed at trial: the ANSI and OSHA standards were *performance* standards, not *design* standards. JA 511-12, 916. They are silent on the question of whether a parking brake should be operator-adjustable. JA 473. "Absent an established norm in the industry, it [is] a matter of opinion of trained experts what design [is] safe for its intended use." *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430 (1982). If the design of NACCO's parking brake did not violate the ANSI and OSHA performance standards because those standards simply did not impose design requirements, then Ms. Evans was free to rely on Mr. Mallett's analysis.

E. NACCO made massive concessions about its design at trial.

NACCO's corporate representative and expert witness, David Couch, made enormous concessions at trial, including admissions that:

- A lift truck parked on an incline with a park brake out of adjustment is a hazard. JA 883-84. NACCO knew that this hazard existed on the lift truck at the time of its manufacture in 2003. JA 885.
- In 2003, it was scientifically and economically feasible to design a parking brake handle that was not operator adjustable. JA 923, 925-26.

- 40% of the lift trucks on the market in 2003 did not have an over-the-center, operator-adjustable parking brake. JA 1035. Some did not have a parking brake that was operator-adjustable at all. JA 924-25.
- If a NACCO design engineer can eliminate a dangerous condition through scientifically and economically feasible means, then he must do so. JA 944-45.
- ANSI B56.1 is a performance standard, not a design standard. It does not tell a manufacturer whether a parking brake should be operator-adjustable. JA 916.
- An engineer like Mr. Mallett could analyze the parking brake, consider other parking brakes, review the design drawings, and opine on how the parking brake works. He could also have the opinion that adding a set screw would have prevented the brake's handle from turning. JA 882.
- NACCO's manual provided operators with inaccurate information about how to adjust the parking brake. This was a "mistake," and one that was "totally not acceptable." JA 852-53, 910-11, 917.

The jury was free to believe these admissions. They cripple NACCO's challenges to Ms. Evans's proof of defect.

F. The Court should not read dicta from *Walters* to overrule longstanding principles of Virginia products-liability law.

In its Brief in Opposition, NACCO complains that Ms. Evans's proof of defect was insufficient under footnote 14 of *Holiday Motor Corp. v. Walters*, which states:

> To sustain a claim for negligent design, a plaintiff must show that the manufacturer failed to meet the objective safety standards prevailing at the time the product was made. When deciding whether a product's design meets the standards, a court should consider whether the product fails to satisfy applicable industry standards, applicable government standards, or reasonable consumer expectations.

790 S.E.2d 447, 455 n.14 (2016) (internal quotation marks omitted) (citing *Redman v. John D. Brush & Company*, 111 F.3d 1174, 1177-78 (4th Cir. 1997), and *Alevromagiros v. Hechinger Co*., 993 F.2d 417, 420 (4th Cir. 1993)). *Walters* was handed down about six months after trial, and six days after the trial court issued its letter opinion. NACCO never brought it to the trial court's attention.

At any rate, NACCO's argument is mistaken. Ms. Evans offered proof of reasonable consumer expectations and objective safety standards as discussed above. More fundamentally, though, NACCO reads footnote 14 too narrowly, as an exhaustive list of possible methods of proving defective design. But that's not what it says. Footnote 14 explains that a plaintiff must show that a design violated objective safety standards, then provides examples of standards that the court should consider. It does not foreclose other methods of proof. Reading it to do so

would work a sea change in Virginia products-liability law, and it would unfairly hamstring injured parties with valid design-defect claims.

For example, the dominant modern test for design defect is risk-utility analysis. David G. Owen, *Products Liability Law* 103 (3d ed. 2015). This test is classic negligence law. It is objective. And it is fully consistent with Virginia's traditional approach to products liability. A seminal case applying Virginia law notes that the reasonableness of a design should be determined "by general negligence principles, which involve a balancing of the likelihood of harm, and the gravity of harm if it happens against the burden of the precautions which would be effective to avoid the harm." *Driesonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071 (4th Cir. 1974). The *Walters* Court repeatedly discusses *Driesonstok*, which suggests that it did not mean to abandon this core principle. 260 Va. at 478-79 & n.15. Even so, it is not clear that risk-utility analysis would remain open to plaintiffs as mode of proof under a strict reading of footnote 14.

By the same token, the latest iteration of the *Restatement* explains that a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design … and the omission of the alternative design renders the product not reasonably safe…." *Restatement (Third) of Torts: Products Liability* § 2(b).

This method of proving defect also is objective, but it too fits uneasily within a narrow reading of footnote 14.

At the same time, the *Walters* factors themselves, though useful, are incomplete. Courts allow plaintiffs to prove defect by showing noncompliance with industry standards or government regulations. E.g., 2-11 Frumer, Friedman & Sklaren, *Products Liability* § 11.03[c]. But *compliance* with those safety standards, though probative, generally is not conclusive proof that a product is reasonably safe. David G. Owen, *Products Liability Law* 91, 382-87, 392-93 (3d ed. 2015); 3-18 Frumer, Friedman & Sklaren, *Products Liability* §§ 18.04, 18.05; *Restatement (Third) of Torts: Products Liability* § 4(b). This Court has recognized as much, in line with the weight of authority: "[E]vidence of industry custom does not establish conclusively that due care was exercised," though it can be conclusive under certain circumstances. *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251 (1975).

This only makes sense. Industry standards are promulgated by the industry, after all, and they may expose consumers to unreasonable risk. Government regulations often just define the minimum level of safeguards that a product must incorporate to allow the manufacturer to sell it without incurring criminal or administrative penalties. They often are influenced by members of the regulated industry. Ordinary consumers generally will have no reasonable expectations about

technical design questions. It's unlikely that Gage Duncan, for example, had any particular expectation about where Hyundai would place its airbag sensors.

And in one of its seminal products-liability opinions, the Court affirmed a verdict in favor of a plaintiff who "introduced no evidence to show that Ford's design failed to satisfy 'objective safety standards.'" *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430, 438 (1982). Nothing in *Walters* suggests an intention to overrule that time-honored precedent. Nor could it; footnote 14 is dicta without precedential weight. *Walters* held that (1) Mazda did not owe a duty to manufacture a soft-top convertible that would protect occupants in a rollover and (2) James Mundo's expert testimony was inadmissible. 292 Va. 461 (2016). The Court's commentary about proving negligent design in footnote 14 is not essential to its holding. It is therefore obiter dicta. See, e.g., *Harmon v. Peery*, 145 Va. 578, 583 (1926) (defining obiter dicta); *Black's Law Dictionary* 1240 (10th ed. 2014) (defining obiter dictum).

* * *

Virginia's traditional test for defect—whether a product is unreasonably dangerous for its ordinary and reasonably foreseeable uses—allows for all these methods of proof when appropriate under the facts of a given case. So too does a fair reading of *Walters*. Footnote 14 traces its lineage back to *Sexton v. Bell Helmets, Inc*., 926 F.2d 331(4th Cir. 1990), a case in which the Fourth Circuit

applied Kentucky law. As the *Sexton* court explained, the concept of reasonable consumer expectations is meant to capture what society demanded or expected from a product at the time it was sold. *Id.* at 337. They may be proven "from evidence of actual industry practices, knowledge at the time of other injuries, knowledge of dangers, the existence of published literature, and from direct evidence of what reasonable purchasers considered defective at the time." *Ibid.* An examination of societal standards usually reveals an expectation that balances known risks against the benefits of new technology. *Ibid*. Thus, a reasonable reading of footnote 14's reference to "reasonable consumer expectations" should encompass both risk-utility and safer-alternative-design analysis.

In *Slone v. General Motors Corp*., 249 Va. 520, 525 (1995), the Court observed that it has repeatedly explained the rules governing a manufacturer's liability for a defective product. It wisely declined to confuse its settled jurisprudence by injecting a new doctrine, and instead trusted in the reasoned application of its traditional (and flexible) products-liability principles. *Ibid*. The Court should do the same here.

3. The trial court did not abuse its discretion by letting Mr. Mallett testify (Assignment of Cross-Error 2).

A. Standard of Review

The Court will review the trial court's decision to admit Mr. Mallett's testimony for an abuse of discretion. See *Toraish v. Lee*, Record No. 160495, 2017

Va. LEXIS 61, at *5 (April 13, 2017). A trial court generally abuses its discretion by (1) ignoring a relevant factor that should have been given significant weight, (2) giving significant weight to an irrelevant or improper factor, or (3) considering only proper factors but committing a clear error of judgment in weighing them. *Ibid*.

B. With 40 years of industry experience as an engineer, Mr. Mallett was qualified to offer an expert opinion.

Expert testimony is appropriate when it will help the fact-finder understand the evidence. *Id*. at *6; Va. Code. § 8.01-401.3(A). An expert's testimony is admissible when his experience gives him knowledge of the subject beyond that of lay witnesses. *Neblett v. Hunter*, 207 Va. 335, 339 (1966). "In essence, all that is necessary for a witness to qualify as an expert is that the witness has sufficient knowledge of the subject to give value to the witness's opinion." *Velasquez v. Commonwealth*, 263 Va. 95, 103 (2002).

As a mechanical engineer with more than 40 years' experience evaluating and designing lift trucks for one of the world's largest manufacturers, Mr. Mallett was qualified to discuss the parking brake's design. Mr. Mallett's career began at Caterpillar in 1971. He spent the next seven years in a position that required him to deconstruct, analyze, and reassemble forklifts manufactured in America with parts sourced in Europe, while maintaining their performance. JA 278-81. Mr. Mallet

worked on every essential system on the trucks, including their parking brakes, to achieve compliance with design specifications. JA 280-82.

In the late 1970s, Mr. Mallett took a position in which he was responsible for ensuring that Caterpillar's prototypes would satisfy European customers. This required field testing and analysis of every system on the trucks—again including their brake systems. JA 282-85.

In 1982, Mr. Mallet became a product engineer for product development, responsible for assessing future requirements for products in the European market. JA 287. This, again, required him to analyze various systems on the trucks, including parking brakes. JA 287-89. He also had to test and tear down competitors' trucks. JA 288-89.

Three years later, Mr. Mallet was promoted to a position that required him to perform the same functions for the North American market. JA 289.

In 1999, Mr. Mallet became the manager of product development for a joint venture between Caterpillar and Mitsubishi called "Mitsubishi Caterpillar Forklift America Inc." JA 292-93. He managed a group that performed the same product-development functions that he'd previously handled, but on a much larger scale. *Ibid*. Mr. Mallet oversaw the engineering of future forklifts, including their parking brakes, with an eye toward both current and future standards. JA 294. Engineers who were responsible for regulatory compliance reported to him. JA 293. From

2002 through 2004, he served as chief engineer and project leader for the joint venture's "warehouse product and market development group." JA 294-97. His team adopted an interdisciplinary process in which members of the marketing, engineering, manufacturing, warranty, and service engineering departments all worked together to bring new products to market. JA 297-99.

From 2007 through 2012, Mr. Mallet served as the director of Mitsubishi Caterpillar's "New Product Program" team, which was responsible for ongoing development of all new products company-wide. JA 299-300. The New Product Program team conducted significant analysis of lift-truck braking systems. JA 317-18. As Mr. Mallett explained, "We would analyze how the brake systems worked, how they achieved the requirements, how effectively they achieved the requirements, and then how they stacked up against the systems on our own machines." *Ibid*. This involved tearing down, analyzing, and rebuilding the components and systems. JA 317.

Mr. Mallet's experience and knowledge of the function and design of brake systems thus spanned the entire market. He'd "worked on literally dozens or scores of product brands and again, in multiple markets, not just in the North American market, but also in Europe." JA 317. Mr. Mallett had taken apart and analyzed parking brakes from various manufacturers "hundreds, hundreds of times." JA 300.

These qualifications were more than enough to make his testimony helpful to the jury. NACCO faults Mr. Mallett for lacking specific experience designing parking brake systems and evaluating their safety. Br. in Opp. 22. But a fair reading of his resume shows that he had such experience—and certainly enough to give his opinion value to lay jurors.

C. Mr. Mallett's opinion was supported by an adequate foundation.

Expert testimony is inadmissible if it is too speculative or lacks a sufficient factual basis. *Bussey v. E.S.C. Restaurants, Inc.*, 270 Va. 531, 537 (2005). Here, Mr. Mallett's conclusion that the parking brake was unreasonably dangerous was supported by an adequate foundation, which included:

1) Reviewing all the depositions taken in the case, as well as all the documents produced in discovery, JA 301-02;
2) Conducting two site visits, including one to the scene of the fatality, JA 302, 386-87, 412;
3) Inspecting, testing, and disassembling the subject lift truck. Mr. Mallett inspected the lift truck twice. He tested the truck's performance and confirmed that, when properly adjusted, the parking brake would hold on the dock ramp. He also tested the parking brake with a pressure gauge to identify how much force it took to move the lever. And along with defense

witness Mr. Girardi, Mr. Mallett conducted a teardown inspection of the lift truck, JA 302, 386-87, 412;

4) Considering objective safety standards and industry norms, such as ANSI B56.1 and OSHA regulations, JA 314, 468-70, 472, 507;
5) Proposing three safer alternative designs as discussed in Part 2(B), above;
6) Considering industry practices, such as the design hierarchy and other manufacturers' use of alternative designs as discussed in Part 2(C), above;
7) Ruling out other potential causes for the accident. Mr. Mallett excluded various alternative causes, including (a) failing to set the parking brake, (b) experiencing a mechanical failure of the parking brake's parts, (c) overloading the lift truck, (d) parking the lift truck on too steep a slope, (e) parking the lift truck on an improper surface, or (f) having the lift truck struck by another vehicle and pushed into motion, JA 388-90, 395, 516;
8) Analyzing the lift-truck's manual and warnings, JA 366-68, 374-79; and
9) Relying on his education, training, and 40 years of industry experience, which included disassembling, testing, and analyzing numerous parking-brake systems during his time at Mitsubishi-Caterpillar, JA 278-300, 317.

This gave his opinion probative value and a proper foundation.

Consider, for example, *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 429-30 (1982), where the defendant manufacturer also challenged the foundation of the

plaintiff's expert testimony. The Court rejected that challenge, finding that the expert's opinion about an automobile's transmission had a proper foundation where the expert (1) considered instruction manuals and data compiled by the National Highway Traffic Safety Administration; (2) consulted with other experts; (3) experimented with transmission systems in the subject car and other vehicles, and demonstrated one such test at trial; (4) observed mechanics as they disassembled transmission components; and (5) disassembled one transmission with his own hands. *Ibid*. The foundation for Mr. Mallett's opinion is similarly sound.

4. The evidence would let a jury find that NACCO's inadequately designed warnings caused Mr. Evans's death (Assignment of Cross-Error 3).

A. Standard of Review

The Court will consider NACCO's challenge to the sufficiency of the evidence viewing the facts in the light most favorable to Ms. Evans. See *Morgen Indus. v. Vaughan*, 252 Va. 60, 62 (1996).

B. Analysis

The evidence would let a reasonable jury conclude that NACCO's defective warnings caused Mr. Evans's death. NACCO put a bright orange warning next to the parking brake that said: "APPLY PARKBRAKE before leaving seat, parkbrake not applied automatically. ALARM will sound if parkbrake not applied." JA 1330.

Human-factors expert Dr. Kenneth Laughery explained that this warning was inadequate because it did not communicate the nature or consequences of the hazard facing Mr. Evans, or how to avoid that hazard. JA 597. Worse, the warning was affirmatively misleading because it told the operator that if he applied the parking brake and no alarm sounded, then "everything is fine." JA 598. Mr. Mallet independently concluded that the warning was misleading because it did not account for the adjustment and stopping power of the parking brake, but focused solely on whether the parking brake was engaged or disengaged (that is, whether the lever was up or down). JA 382-84.

Mr. Evans heeded the warning that he was given: he applied the parking brake before dismounting, as instructed. The alarm did not sound. This would let the jury reasonably infer that he relied on the absence of that alarm, and that if NACCO had provided an adequate warning then he would have heeded that warning, too.

Conclusion

The Court should reverse the trial court's judgment, reinstate the jury's verdict, and enter final judgment in favor of Ms. Evans. In the alternative, the Court should reverse the trial court's judgment and remand the case for further proceedings, including a new trial.

/s/ James J. O'Keeffe, IV
James J. O'Keeffe, IV (VSB# 48620)

JOHNSON, ROSEN & O'KEEFFE, LLC
131 Kirk Avenue, SW
Roanoke, Virginia 24011
540-491-0634
Fax: 1-888-500-0778
okeeffe@johnsonrosen.com

P. Brent Brown (VSB# 18760)
BROWN AND JENNINGS, PLC
30 Franklin Road, Suite 700
Roanoke, Virginia 24011
540-444-4010
Fax: 540-444-4011
brent@brownjenningslaw.com

Edward Fisher (admitted pro hac vice)
PROVOST UMPHREY LAW FIRM, LLP
490 Park Street
Beaumont, Texas 77704
409-203-5030
Fax: 409-838-8888
efisher@provostumphrey.com

Counsel for the Appellant

Certificate

I certify that on this 30th day of May, 2017, pursuant to Rules 5:26 and 5:32, three paper copies of this Opening Brief of Appellant and the Joint Appendix were hand-filed with the Clerk of the Supreme Court of Virginia, and electronic copies of the Brief and Appendix were filed via VACES. On the same day, copies were served by email on:

Mark D. Loftis (VSB# 30285) Frank K. Friedman (VSB #25079) WOODS ROGERS PLC 10 South Jefferson Street Suite 1400 Roanoke, Virginia 24011 loftis@woodsrogers.com friedman@woodsrogers.com *Co-Counsel for the Appellee*	Francis J. Grey, Jr. (admitted pro hac vice) RICCI TYRRELL JOHNSON & GREY 1515 Market Street Suite 700 Philadelphia, Pennsylvania 19102 fgrey@rtjglaw.com *Co-Counsel for the Appellee*
E. Kyle McNew MICHIE HAMLETT PLC 300 Court Square Suite 300 Charlottesville, Virginia 22902 434-951-7200 Fax: 434-951-7218 kmcnew@michiehamlett.com *Counsel for Amicus Curiae* *Virginia Trial Lawyers Association*	

/s/ James J. O'Keeffe, IV
James J. O'Keeffe