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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.

BRIEF OF AMICUS CURIAE VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS IN SUPPORT OF APPELLEE"S ASSIGNMENT OF CROSS ERROR NO.2

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INTRODUCTION

The trial court erred by admitting the testimony of Frederick Mallett. He was not qualified as an expert in the *design* of anything. In addition, Mallett's opinions were unsupported citation to regulatory standards, industry norms or customs, reasonable consumer expectations, or any other data against which to measure the reasonableness of the design of the product at issue.

The Virginia Association of Defense Attorneys files this brief *amicus curiae* to underscore the importance of ensuring that (1) an expert witness's qualifications correlate to the issues in the case; and (2) that an expert witness's opinions be grounded in relevant data.

AMICUS STATEMENT OF INTEREST

The VADA is a non-profit, statewide bar organization with more than 800 members whose practice is devoted primarily to the defense of civil actions. The VADA seeks to promote fairness and integrity in the civil justice system. It submits briefs amicus curiae in certain cases involving significant legal issues which, in the VADA's view, have the potential to upset the fairness and integrity of the civil litigation and trial processes.

This brief amicus curiae addresses only NACCO Materials Handling Group's ("NMHG") second assignment of cross-error, which asserts that the trial court erred by permitting the Administrator's lone expert on product defect to give opinion testimony regarding the design of the park brake system on the industrial lift at issue. VADA submits this brief out of a concern that acceptance of the Appellant's arguments would undermine important foundational requirements for the qualification of expert witness and admission of expert opinion testimony in trials involving technical matters.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The VADA adopts the Statement of the Case and Statement of Facts from the Brief of Appellee.

ASSIGNMENT OF CROSS ERROR

The VADA adopts the Assignments of Cross Error by the Appellee, including references to the pages of the Joint Appendix where the error has been preserved. The brief of the Amicus Curiae addresses only Assignment of Cross Error No. 2

ARGUMENT AND AUTHORITIES

The applicable principles of law are oft debated but well settled. An expert witness must possess some "scientific, technical, or other specialized knowledge" that will assist the trier of fact to understand the evidence or to determine a fact in issue. Va. R. Evid. 2:702. Whether an expert's opinion will "assist" the jury depends on whether what the witness is "expert" in and whether that expertise "fits" the issues to be resolve by the jury. Mallett meets neither of these fundamental requirements, so his testimony should have been excluded from trial.

Mallett possesses sufficient knowledge and experience to address such technical matters such as the features of the park brake system on the lift truck at issue and its condition and operation after the event. However, his experience with park brake systems does not "fit" or correlate to the expertise required to offer the only opinions that matter in a product design defect case: Did the design produce a reasonably safe product and how is the defect connected to the accident. On these critical topics, Mallett has neither the credentials nor the factual grounds to offer an opinion consistent with Rule 702.

A. Standard of Review

This Court reviews a circuit court's decision to admit expert opinion testimony under an abuse of discretion standard, which permits reversal of the circuit court's decision "only upon a finding of abuse of that discretion." *Holiday Motor Corporation v. Walters*, 292 Va. 461, 483 (2016); *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 155 (2015). The circuit court's discretion does not, however, permit admission of clearly inadmissible evidence. *Id.* This Court may overturn a circuit court's decision to admit expert opinion testimony that the Court now finds to be inadmissible.

B. Applicable Law

The Virginia Rules of Evidence require that a testifying expert must be qualified "by knowledge, skill, experience, training, or education" before he may testify in the form of an opinion or otherwise. Va. R. Evid. 2:702. However, "the fact that a person is a qualified expert in one field does not make him an expert in another field, even if they are closely related." *CNH America LLC v. Smith*, 281 Va. 60, 68, 704 S.E.2d 372, 376 (2011); *see also Combs v. Norfolk & W. Ry.,* 256 Va. 490, 496, 507 S.E.2d 355, 358 (1998); *Tazewell Oil Co. v. United Virginia Bank,* 243 Va. 94, 110, 413 S.E.2d 611, 620 (1992). For example, in *CNH*, this Court held that the trial

court abused its discretion in admitting the expert opinion testimony of a witness whose "expertise with hydraulic systems was limited to the mining industry" and who lacked expertise "in the hydraulic system of this particular type of hay mower or agricultural equipment generally." *Id.* at 64, 68, 704 S.E.2d at 374, 376.

Once qualified, an expert witness' opinions still must be based on "facts, circumstances, or data made known to or perceived by such witness …" Va. R. Evid. 2:703. "Qualification of an expert witness does not insure admission of his every statement and opinion." *Duncan*, 289 Va. at 155 (quoting *Swiney v. Overby*, 237 Va. 231 (1989)). "Expert opinion must be premised upon assumptions that have a sufficient factual basis and take into account all relevant variables." *Id.* If an expert opinion is founded on assumptions that do not have any basis in fact or do not consider all relevant variables, then the opinion "is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible." *Vasquez v. Mabini*, 269 Va. 155, 160 (2005).

This Court recently provided analysis in products liability cases that directly supports VADA's arguments below. In 2015, this Court held the expert opinion testimony of a mechanical engineer about a design defect in

the side airbag system of an automobile inadmissible. *Duncan*, 289 Va. 147. The mechanical engineer opined at trial that if the airbag sensors had been located in a different position, then the airbag would have deployed. *Id.* at 153. The mechanical engineer's opinion relied upon an assumption that had no basis in fact, was untested, and disregarded significant variables. *Id.* at 155-56. This Court held that "[a]lthough experts may extrapolate opinions from existing data, a circuit court should not admit expert opinion which is connected to existing data only by the *ipse dixit* of the expert." *Id.* at 156 (citation omitted). This Court reversed the judgment of the circuit court and entered judgment for the manufacturer.

This Court took up the issue again in 2016 in *Walters*. The expert in that case, an automotive engineer, opined that the latching mechanism for a convertible's roof structure was defective. This expert premised his opinion on two unfounded assumptions: (1) "that the latches would not have disconnected if they had been designed differently" and (2) "that the front end of the [automobile's] roof structure would not have collapsed if the latches had remained connected." 292 Va. 483-84. Like the expert in *Duncan*, this expert performed no calculations or tests to verify his assumptions. This Court concluded that the trial court abused its discretion

in admitting the automotive engineer's unsubstantiated opinions, reversed the judgment of the circuit court, and entered judgment for the manufacturer. *Id.* at 484-485.

The federal courts have similarly interpreted Virginia law to reject the *ipse dixit* (because I said so) opinion of engineering experts as a sufficient foundation for admissible testimony in products liability cases. In *Alevromagiros v. Hechinger Co*., the U.S. Court of Appeals for the Fourth Circuit rejected the proposition that a plaintiff may "introduce a single example of a competing product and purport to make it a standard for the industry" without any supporting test data or relevant literature in the field. 993 F.2d 417, 422 (4th Cir. 1993).

More recently, the U.S. District Court for the Eastern District of Virginia granted summary judgment in a products liability case using similar analysis. *Snider-Jefferson v. Amigo Mobility International, Inc.*, Case No. 2:15-cv-406, 2016 WL 4424954 (E.D. Va. Aug. 17, 2016), *aff'd* Case No. 16-2064, 2017 WL 729720 (4th Cir. Feb. 24, 2017). The court recognized that the plaintiff's expert, a mechanical engineer, opined only about how the product might possibly have been designed differently and better. *Id.* at *4-

5. The expert failed, however, to demonstrate how the product's design fell below any demonstrated, applicable design standard. *Id.;*

Taken together, this analysis confirms that expert opinions must be founded on more than an expert's vague "industry experience" or professional credentials. *See Duncan*, 289 Va. at 154. To be qualified as an expert, the expert must first possess "knowledge, skill, experience, training or education" that pertains *to the subject matter on which he is opining*. *See* Va. R. Evid. 2:702.

A qualified expert's opinion must itself be founded on actual "facts, circumstances, or data" that were evaluated by that expert through the lens of his uniquely relevant experience, taking into account any relevant variables. Va. R. Evid. 2:703. In the context of an action alleging product defect, the expert must evaluate the reasonableness of the design of the product in question against applicable government regulations and standards, published industry standards and guidelines, generally accepted industry customs and practices, data reflecting reasonable expectations of consumers of the project or other objective evidence of acceptable product design in the industry. *Holiday Motor Corp. v. Walters*, 292 Va. 461, 478 n. 14, 790 S.E.2d 447, 455 n. 14 (2016); *see also Redman v. John D. Brush &*

Co., 111 F.3d 1174, 1177–78 (4th Cir. 1997); *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir. 1993) ("In determining what constitutes an unreasonably dangerous defect, a court will consider safety standards promulgated by the government or the relevant industry, as well as the reasonable expectations of consumers."); *Hambrick ex rel. Hambrick v. Ken-Bar Mfg. Co.*, 422 F. Supp. 2d 627, 634 (W.D. Va. 2002); *Sexton v. Bell Helmets, Inc.,* 926 F.2d 331, 337 (4th Cir.), *cert. denied,* 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991)).

Expert opinion founded upon assumptions lacking factual support is inadmissible. *Holiday Motor Corp*., 292 Va. at 483, 790 S.E.2d at 458. Furthermore, expert testimony is inadmissible if the expert fails to consider all the variables that bear upon the inferences to be deduced from the facts observed." *CNH America LLC v. Smith,* 281 Va. 60, 67, 704 S.E.2d 372, 375 (2011) (citation omitted). In either case, the expert's opinion is impermissibly speculative. Although experts may extrapolate opinions from existing data, a circuit court may not admit expert opinion "which is connected to existing data only by the *ipse dixit* of the expert." *Hyundai Motor Co., Ltd. v. Duncan*, 289 Va. 147, 156, 766 S.E.2d 893, 897 (2015)

(citing *General Electric Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)).

C. Mallett's Qualifications

NACCO's Assignment of Cross Error No. 2 concerns, in part, qualification of Frederick Mallett ("Mallett") as an expert in product design. Counsel conducted extensive voir dire regarding Mallett's qualifications to give opinion testimony as an expert. The record reveals that Mallett is educated as a mechanical engineer and has spent his career working in the lift-truck industry in one capacity or another. *See generally* JA 278-300. His job experience has included dismantling existing lift trucks "hundreds of times" for various reasons. JA 300. From 1971 to 1978, he disassembled US designed and made lift truck park brakes in order to find European sources for the same part and still meet European standards. JA 279-282. From 1982 to 1985 he broke down and studied competitor lift trucks in an effort to incorporate their ideas into new products. JA 288-290, 316-17. Since 1985, Mallett performed a variety of sales, marketing or management jobs. JA 290-300.

Mallett's work caused him to be familiar with US and European safety standards applicable to lift trucks generally and to the design of park brakes

specifically. JA. 293-94. He also gathered feedback from customers regarding ideas to improve lift trucks and participated in internal roundtable discussions with his company's product designers about product development ideas. JA 290, 294, 297-300.

However, Mallett has never personally "taken a pen to paper or gotten on the computer and actually designed a park brake." JA 300, 304-306. Between 1999 and 2012, Mallett was not responsible for park brake designs on any lift truck of the same class as the product at issue, nor was he responsible for determining compliance with applicable US safety standards. JA 313-15, 320.

At the conclusion of the credentialing voir dire, Evans' counsel proffered Mallett as an expert in (i) fork lift design, (ii) "identifying hazards with respect to the design of a forklift, specifically a park brake system that could be encountered by an operator as a result of a particular design of that park brake system;" (iii) instructions that are provided to the end user in manuals that accompany the lift truck upon its sale; and (iv) "engineering and economic feasibility of non-defective safe alternative designs." JA 322-23. Upon further inquiry from the court, counsel refined the proffer to expertise in "design engineering of forklifts." JA 324.

Mallett did not offer and was not asked about any expertise with "identifying hazards" in the design of fork lift park brake systems. Mallett did not offer and was not asked about any expertise with development of either owner's manuals or product placarding for lift trucks or any other industrial machine. Mallett did not offer and was not asked about any expertise he possessed regarding operator training or expected operator knowledge, reading habits, or behavior. He was asked about his expertise in designing park brake systems and conceded that he had none.

In light of his background, there are a few of topics on which Mallett may have been qualified to offer expert testimony. Those topics might include explaining to the jury how the park brake operated and his observation and testing the mechanical function of the park brake after the accident. Those topics might even include opinions about the park brake's compliance with regulatory standards and prevailing industry practice (both in the United States and abroad). But those topics were not in dispute at trial nor the reason he was offered as an expert.

Mallett offered no testimony justifying a determination that he possessed expertise necessary to criticize an engineering design that he conceded met all applicable regulatory standards and prevailing industry

practices. Mallett opined that the design of the park brake system on the lift truck in question was unreasonably dangerous because the operator could adjust the tension without using tools. Mallett agreed on cross-examination that even his own employer, MCFA (where he supposedly developed and applied his supposed expertise in park brake design) specified no-tool-required, operator-adjustable park brakes in comparable lift trucks not only when the truck at issue was manufactured but throughout most of his career at MCFA. JA 427-30, 458-59, 465-67.

"An expert's qualifications must correlate to the opinions for which the expert is being offered." *CNH*, 281 Va. at 68, 704 S.E.2d at 376. The trial court erred by accepting Mallett in the area of "design" of park brake systems notwithstanding the absence of any practical or technical design experience. Direct design experience was necessary in this case because his design opinions ran contrary to established regulatory and industry standards and customary industry design practices. In other words, Mallett did not suffer from a lack of experience that could be offset by studying relevant industry practices, experiences, technological advances or regulatory guidance. Mallett was instead proposing a never before seen

engineering design for the lift truck industry without having any practical or technical design experience to support his opinion.

This error was not cured by letting the jury consider Mallett's design opinions as a question of credibility. Such an approach inevitably requires the jury to balance the credibility of an unqualified, but perhaps persuasive, expert witness against properly admitted evidence, such as the testimony of a qualified counter-expert. It is not the role of the jury to identify and disregard inadmissible expert opinion testimony as a question of "credibility."

Mallett was not qualified to testify as an expert about the "design" of anything. His opinions about why a different park brake design should have been adopted by NACCO were inadmissible.

D. Lack of Factual Predicate for Expert Opinions

1. No reliance on standards or other objective data as basis for analysis of the reasonableness of the design

The park brake is applied by pulling back on a lever mounted to the lift truck's dashboard. JA 349-50. That lever was attached to cables linked to the brake shoes. *Id.* To "adjust" the brake, the operator simply rotates

the lever's handle one direction or the other to tighten or loosen the cables. JA 350-51.

There is no dispute about whether the park brake was capable of being properly adjusted and deployed at the time of the accident. Opening Br. 32. Mallett himself tested the park brake and confirmed that it was functioning properly and as designed, i.e., that by turning the handle, the brake could be adjusted to engage and hold a 15% grade. JA 385-87. Mallett also agreed that the park brake design was subject to several industry and regulatory requirements, both at home and abroad, and complied with all of them. *See* Opening Br. 32-33; JA 426-30, 446, 467-73, 477-48. Mallett admitted that the design of the lift brake at issue was identical in all material respects to the park brake systems on lift trucks he himself "designed" for MCFA from 1999 through 2012. Mallett also agreed that the ANSI standard, with which this park brake complied, was intended "to promote safety through design, construction, application, and operation and maintenance of lift trucks." JA 470-71. Mallett provided no evidence of any industry standard, research papers, literature, guidance, practice, technological advance, custom or customer expectation that might supply a

basis to deem the lift truck in question to be unreasonably dangerous by comparison.

The significance of Mallett's testimony was his opinion that this specific park brake could have been made "safer" in a way that would have prevented this particular event. In a sense, he "reverse-engineered" this particular accident and identified a design change that might have prevented this particular operator from being gravely injured under these unique circumstances.

He is answering the wrong question. In this Commonwealth, no manufacturer is required to possess perfect foresight, insure safety in all circumstances or design an accident-proof product. *Holiday*, 292 Va. at 481-82, 790 S.E.2d at 457 (quoting *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975) and citing *Dorman v. State Industries*, 292 Va. 111, 123, 787 S.E.2d 132, 39 (2016). The question is not whether a particular event might be prevented by a different design but whether the actual design is unreasonably dangerous in the context of industry regulation, standards, experience and expectations. Reasonableness of design is never judged against a particular expert's personal preferences.

Mallett acknowledged that park brakes must be adjusted from time to time to "accommodate stretch in the cables over an extended period of time or wear in the mechanical components of the linkage …" JA 396. Mallett did not suggest that a reasonable design should eliminate the need to adjust park brakes altogether. His testimony focused instead on how a design could accommodate necessary and inevitable adjustments to the park brake system of a lift truck with something other than a simple handle.

It is undisputed that nothing in applicable American National Standards Institute ("ANSI") standards or Occupational Safety and Health Administration ("OSHA") regulations prohibited operator-adjustable park brakes similar to the park brake at issue in this litigation. Opening Br. 32-33; JA 468-73. Despite his personal experience with international standards, Mallett could not identify any standard anywhere in the world that prohibits the use of operator-adjustable park brakes similar to the design at issue in this litigation. JA 477-48. The absence of any connection between Mallett's opinion and some relevant industry data point required that his opinions be excluded.

2. Unfounded assumptions about operator and maintenance training as a basis for design

Mallett agreed it was foreseeable that a park brake might not always be adjusted properly. He disagreed that a lift-truck *operator* should have the responsibility or ability to adjust the park brake before operating a lift truck. JA 365-368. The heart of Mallett's opinion is a belief that park brake adjustments should be the sole responsibility of maintenance technicians, whose training and experience with park brake adjustments he assumed would be superior to training provided to operators. JA 398, 418-19. Mallett prefers a design that requires the lift be taken out of service in order to make adjustments. JA 380. However, he could not explain how it is a reasonable basis for product design to rely on the lift truck operator to recognize an incorrectly adjusted park brake (and then tag out the lift truck for maintenance), and yet not reasonable for the manufacturer to assume as a basis for product design that the same operator cannot be relied upon to simply turn the handle until the park brake is sufficiently adjusted.

Moreover, Mallett provided no testimony or other evidence of industry expectations and practices with regard to operator training at the time of the design of the lift truck in question. Therefore, his assumptions are

unfounded and any opinions based on this assumptions are necessarily speculative.

3. Alternative Design

One common attempt at proving product defect is opinion testimony regarding an inexpensive, technologically feasible, safer alternative design. *See, e.g., Snider-Jefferson v. Amigo Mobility International, Inc.*, Case No. 2:15-cv-406, 2016 WL 4424954 (E.D. Va. Aug. 17, 2016), *aff'd* Case No. 16-2064, 2017 WL 729720 (4th Cir. Feb. 24, 2017)(adding rubber padding on metal edge of electric shopping cart); *Garlinger v. Hardee's Foodsystems, Inc*. 16 F. App'x 232 (4th Cir. 2001) (lowering temperature of coffee served at drive-thru window). As noted above, Virginia law has never required the safest conceivable product or one that is accident proof. Nonetheless, alternative designs, particularly those employed by producers of competing products, can theoretically supply some evidence of what the industry deems reasonable in design.

Mallett cited an equivalent Class IV lift truck manufactured by Caterpillar (his long time employer) that included a set screw on the adjusting knob. According to Mallett's direct testimony, the set screw was the preferred design because it eliminated the operator's ability to adjust

the park brake. Mallett then speculated that if the truck at issue "rolled because the handle had been turned to the extent that the park brake was out of adjustment," then this set-screw approach would have prevented the handle from turning. JA 392-93.

There is no evidence that Mr. Evans or anyone else turned the handle to loosen the park brake so that it was out of adjustment, inadvertently or otherwise. Whatever the merit or relevance of Mallett's first alternate design, it is based on an assumption unsupported by the facts of the case and is therefore inadmissible.

Lift truck operators must be trained and certified according to federal OSHA regulations. JA 496. The goal of this mandatory training is to ensure that lift truck operators are familiar with the equipment they are operating. JA 496. Included in this mandatory training is education about the truck controls and instrumentation as well as vehicle inspection and maintenance. JA 496-97. While Mallett declined to claim expertise in OSHA regulations, he agreed that operators "should be trained to perform whatever type of inspections they need to perform to keep their trucks safe." JA 499.

Mallett agreed that through 2003 (the relevant year for this case), MCFA (Caterpillar) used operator-adjustable park brakes that did not require any tools to adjust. JA 428. Those trucks, manufactured by Mallett's former employer while Mallett was supposedly involved in product design development, are still in circulation and have never been recalled for safety reasons associated with their operator-adjustable park brake. JA 429-430. In other words, when not serving as a litigation expert, Mallett took no exception to the design he now criticizes in court.

4. Hypothetical Alternate Design

Mallett then imagined a hypothetical park brake design that would operate similar to the ratchet of a socket wrench. JA 398-99. This proposed park brake handle would only be permitted to turn in one direction, tightening the brake cables. *Id.* This hypothetical alternate design did not exist in 2003 when the product in question was designed and it does not exist today except in Mallett's imaginings. It, too, is based on the unproven assumption that somehow Mr. Evans loosened the park brake just enough to allow the lift to hold for a moment, then slide down the incline once he had dismounted. It is a solution in search of a problem untethered from any industry regulation, standard, expectation,

technological progress, guidance, practice, research, or testing. It is his own unproven idea conceived only to prevent a particular event -- the *ipse dixit* of an expert and therefore inadmissible.

Moreover, Mallett has not so much as drawn out this concept on paper, much less tested any prototype of the design. JA 420. He performed no failure analysis. JA 420. He has no details about how the hidden release for technicians with special tools would actually be engineered. He did nothing to evaluate the feasibility of this design concept.

Further complicating reliance on this hypothetical alternative design is a hazard Mallett revealed: if the operator overtightens the cables (that he cannot immediately loosen as a feature of design), the brake cables will snap when the operator applies the brake, causing a catastrophic failure of the park brake. JA 400. Mallett agreed that he could not think of any "valid reason why you would deliberately put a device on there that can disable the effectiveness of the parking brake." JA 346. So even Mallett agrees that his imagined alternative design, if it ever put into production, is not, in fact, either "safer" or reasonable.

5. Causation

Mallett's causation opinion was that the lift truck rolled "because the parking brake was not correctly adjusted." JA 390. As noted above, his proposed solution is the addition of a set screw that the operator would need to loosen before making the manual adjustments. Nowhere does he, nor can he, explained why the park brake was "not correctly adjusted" at the time of the accident or how a set screw would have changed the outcome. His implied assumption that is that *Evans* in some way loosened the brake setting without knowing he had done so, and there is no factual support for that assumption.

Mallett agreed that he had no factual basis to reach any conclusion about what may have caused or contributed to the accident or particularly the role of the park brake design in this occurrence. JA 411. A long line of decisions from this Court requires that any expert offered to provide opinion testimony on causation must consider all variables that would affect the experts overall opinions. *See, e.g., Vasquez v. Mabini*, 269 Va. 155, 160 (2005). Mallett freely concedes that he did not consider all variables that would affect his opinion on causation. JA at 411

Mallett agreed that it was a misuse of the lift truck for Evans, who was not certified, to be operating the truck at all. JA 502. Training of lift truck operators was performed internally by Mr. Evans's employer—the manufacturer was not involved. JA 481. Mallett agreed that Evans's employer provided inconsistent training, and he agreed that inconsistent training could lead to accidents. JA 414-15.

Mallett was also aware of the operational history of this specific lift truck, but did not factor that information into his criticism of the operator-adjustable park brake. This lift truck arrived at the plant in 2003. At the time of the accident, it was past its warranty both by time (five-year warranty) and by hours or operation (10,000 hour warranty). JA 478. This lift truck was maintained by a company called VBS, which was unrelated to the manufacturer. JA 480. The lift truck had experienced brake fluid leakage for weeks. JA 491. VBS's service records indicated that this specific truck was likely returned to service after repairs to the brake hours before the accident. JA 492. Mallett testified that it was probable that Mr. Evans was the first person to operate this lift truck since that brake job. JA 492. Mallett agreed that he should have considered whether it was a VBS mechanic who was responsible for the incorrectly adjusted park brake. JA

492-93. To this point, Mallett was aware that this specific lift truck had just been put back into operation by VBS even though VBS was aware that the wiring for the park brake alarm system had been cut. JA 494. He agreed that the truck should not have been put back into service by VBS in this condition. JA 493.

Mallett does not know what caused the accident, and he did nothing to rule out the possibility that the maintenance contractor left the park brake incorrectly adjusted. He did not test his hypothesis that a lift operator could inadvertently cause an accident like this or that addition of a set screw would make any difference. He did no technical analysis and performed no calculations to determine how a set screw might have prevented the accident.

There is simply no factual or scientific basis supporting Mallett's opinion that the design of an operator-adjustable park brake had anything at all to do with causing this specific accident. As this Court noted in *Duncan*, "[a]lthough experts may extrapolate opinions from existing data, a circuit court should not admit expert opinion 'which is connected to existing data only by the *ipse dixit* of the expert.'" 289 Va. at 156, 766 S.E.2d at

898 (quoting in part *General Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

CONCLUSION

Mallett lacked any meaningful design experience. His opinions were unsupported by any rigorous analysis of the variables and facts in this specific case. Mallett did not even rule out the possibility that a maintenance technician actually caused this accident before forming his opinion that only maintenance technicians should be permitted to adjust park brakes.

The trial court erred by admitting Mallett's testimony. The inadmissibility of Mallett's opinion testimony is sufficient, alternative grounds to affirm the judgment below.

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Certificate of Service

I hereby certify that on the 23rd day of June, 2017, I complied with Rule 5:26(e) and emailed a true copy of the foregoing Brief of Amicus Curiae to all counsel of record:

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P.O. Box 40013
bowers@gentrylocke.com

I further certify that the foregoing Brief in Opposition complies with the requirements of Rules 5:6, 5:26 and 5:30. Attached are copies of emails confirming consent of all counsel to the filing of this brief as amicus curiae.

By: _____
Counsel

James W. Walker (VSB No. 29257)
J. Brandon Sieg (VSB No. 84446)
VANDEVENTER BLACK LLP
901 E. Byrd Street, Suite 1600
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Counsel for Amicus Curiae,
The Virginia Association of Defense Attorneys

4836-5124-5898, v. 2

James Walker

From: Loftis, Mark <loftis@woodsrogers.com>
Sent: Thursday, June 22, 2017 3:59 PM
To: James Walker
Subject: RE: Evans v. NAACO Materials Handling Group, Inc. - VADA Amicus Curiae

Yes; absolutely.

Mark D. Loftis
Woods Rogers PLC
10 S. Jefferson Street, Suite 1400 | Roanoke, VA 24011
P (540) 983-7618 | M (540) 521-7193 | F (540) 983-7711
loftis@woodsrogers.com

From: James Walker [mailto:jwalker@vanblacklaw.com]
Sent: Thursday, June 22, 2017 3:58 PM
To: Loftis, Mark
Subject: FW: Evans v. NAACO Materials Handling Group, Inc. - VADA Amicus Curiae

Do I have your consent as well?

From: James Walker
Sent: Friday, June 16, 2017 11:31 PM
To: kmcnew@michiehamlett.com
Cc: fgrey@rtglaw.com; brent@brownjenningslaw.com; okeeffee@johnsonrosen.com; loftis@woodsrogers.com; friedman@woodsrogers.com; bowers@gentrylocke.com; Brandon Sieg <bsieg@vanblacklaw.com>; efisher@provosthumphrey.com; scorgan@rtglaw.com
Subject: Re: Evans v. NAACO Materials Handling Group, Inc. - VADA Amicus Curiae

Thanks, Kyle

Sent from my Verizon 4G LTE Droid
On 16 Jun 2017 4:18 pm, Kyle McNew <kmcnew@michiehamlett.com> wrote:

To the extent you need it, you have VTLA's consent.

Sent from my iPhone

On Jun 16, 2017, at 4:01 PM, Brandon Sieg <bsieg@vanblacklaw.com> wrote:

> Good afternoon,
>
> Jim Walker and I are preparing an amicus brief on behalf of the Virginia Association of Defense Attorneys on NMHG's second assignment of cross-error.
>
> Please let us know if you consent to the VADA participating as amicus curiae.
>
> Thank you,

Brandon

J. Brandon Sieg
VANDEVENTER BLACK LLP
D: 804.237.8829 | F: 804.237.8801
bsieg@vanblk.com
Bio **vCard**

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NOTICE: This communication from Woods Rogers PLC, including attachments, if any, is intended as a confidential and privileged communication. If received in error, you should not copy, save or reproduce in any manner or form, but delete immediately and notify the sender.

James Walker

From: Ed Fisher <EFisher@provostumphrey.com>
Sent: Monday, June 19, 2017 10:50 AM
To: James Walker; Brandon Sieg; brent@brownjenningslaw.com
Cc: okeeffe@johnsonrosen.com; Loftis, Mark; friedman@woodsrogers.com; fgrey@rtglaw.com; scorgan@rtglaw.com; bowers@gentrylocke.com
Subject: RE: Evans v. NAACO Materials Handling Group, Inc. - VADA Amicus Curiae

It appears that we all agree, so you may.

From: James Walker [mailto:jwalker@vanblacklaw.com]
Sent: Monday, June 19, 2017 8:30 AM
To: Ed Fisher; Brandon Sieg; brent@brownjenningslaw.com
Cc: okeeffe@johnsonrosen.com; Loftis, Mark; friedman@woodsrogers.com; fgrey@rtglaw.com; scorgan@rtglaw.com; bowers@gentrylocke.com
Subject: RE: Evans v. NAACO Materials Handling Group, Inc. - VADA Amicus Curiae

Thank you. May I represent in my motion that all parties consent to the VADA amicus filing?

From: Ed Fisher [mailto:EFisher@provostumphrey.com]
Sent: Sunday, June 18, 2017 7:21 PM
To: Brandon Sieg <bsieg@vanblacklaw.com>
Cc: okeeffe@johnsonrosen.com; James Walker <jwalker@vanblacklaw.com>
Subject: Re: Evans v. NAACO Materials Handling Group, Inc. - VADA Amicus Curiae

No objection, although I don't know why you would want to participate in upholding a decision that makes it less likely for a case to be filed that would generate substantial legal work and job security for your members.

Sent from my iPad

On Jun 16, 2017, at 3:06 PM, Brandon Sieg <bsieg@vanblacklaw.com> wrote:

> Mr. Fisher and Mr. O'Keeffe,
>
> I am sorry, but I misspelled your e-mails below. We would like to know if you consent to VADA participating as amicus curiae in this case.
>
> Thank you,
>
> Brandon

J. Brandon Sieg
VANDEVENTER BLACK LLP
D: 804.237.8829 | F: 804.237.8801
bsieg@vanblk.com
Bio vCard

From: Brandon Sieg
Sent: Friday, June 16, 2017 4:01 PM
To: 'brent@brownjenningslaw.com' <brent@brownjenningslaw.com>; 'efisher@provosthumphrey.com' <efisher@provosthumphrey.com>; 'okeeffee@johnsonrosen.com' <okeeffee@johnsonrosen.com>; 'friedman@woodsrogers.com' <friedman@woodsrogers.com>; 'loftis@woodsrogers.com' <loftis@woodsrogers.com>; 'fgrey@rtglaw.com' <fgrey@rtglaw.com>; 'scorgan@rtglaw.com' <scorgan@rtglaw.com>
Cc: James Walker <jwalker@vanblacklaw.com>; 'kmcnew@michiehamlett.com' <kmcnew@michiehamlett.com>; 'bowers@gentrylocke.com' <bowers@gentrylocke.com>
Subject: Evans v. NAACO Materials Handling Group, Inc. - VADA Amicus Curiae

Good afternoon,

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Please let us know if you consent to the VADA participating as amicus curiae.

Thank you,

Brandon

J. Brandon Sieg
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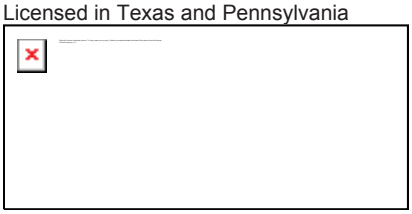
Edward D. Fisher
Partner
Board Certified: Personal Injury Trial Law Texas Board of Legal Specialization
Licensed in Texas and Pennsylvania



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Edward D. Fisher
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Board Certified: Personal Injury Trial Law Texas Board of Legal Specialization
Licensed in Texas and Pennsylvania

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website | vCard | map | email

James Walker

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