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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 *Amicus Curiae* of the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Virginia Chamber of Commerce in Support of Appellee NACCO Materials Handling Group, Inc.

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TABLE OF CONTENTS

Introduction 1

Interest of *Amici* 2

Statement of the Case, Statement of Facts, and Statement Regarding the Standard of Review of NACCO's Assignments of Cross-Error and Evans's Assignment of Error 3

Argument 4

I. The Sanctity of the Civil Jury is Not at Issue 4

II. Virginia Law Requires a Circuit Court Judge to Serve as Gatekeeper 8

III. The Trial Court Erred in Failing to Apply Virginia Law to Exclude Evans's Improper Expert Testimony 9

A. Virginia Law Governing Products Liability 10

B. Virginia Law Governing Expert Testimony 13

C. The Trial Court Should Have Excluded Mallett and Entered Judgment for NACCO 18

IV. The Trial Court Correctly Set Aside the Jury's Verdict Based on Contributory Negligence 25

A. Virginia Law Governing Contributory Negligence and the Standard of Review for the Granting of a Motion to Set Aside 25

B. This Court Should Affirm the Judgment of the Trial Court to Set Aside the Jury's Verdict 26

Conclusion 30

TABLE OF AUTHORITIES

PROVISIONS OF THE CONSTITUTION OF VIRGINIA

Article I, § 11 ..... 4, 5

Virginia Declaration of Rights, § 11,
9 Hening's Statutes of Virginia 109 (1776) 4

VIRGINIA CASES

Atrium Unit Owners Ass'n v. King,
266 Va. 288 (2003) 8

Braswell v. Virginia Electric Co.,
162 Va. 27 (1934) 27, 28, 29, 30

CNH America LLC v. Smith,
281 Va. 461 (2011) 9, 14, 15, 17

Countryside Corp. v. Taylor,
263 Va. 549 (2002) 13

Dagner v. Anderson,
274 Va. 678 (2007) 15

Early v. Mathena,
203 Va. 330 (1962) 28, 29

Featherall v. Firestone Tire & Rubber Co.,
219 Va. 949 (1979) 10, 12

Fobbs v. Webb Building Ltd. Partnership,
232 Va. 227 (1986) 26

Forbes v. Rapp,
269 Va. 374 (2005) 13

Ford Motor Co. v. Bartholomew,
224 Va. 421 (1982) 16, 24

Ford Motor Co. v. Boomer,
285 Va. 141 (2013) 30

Harman v. Honeywell Int'l, Inc.,
288 Va. 84 (2014) 14, 16

Holiday Motor Corp. v. Walters,
292 Va. 461 (2016) ..... *passim*

Hyundai Motor Co. v. Duncan,
289 Va. 147 (2015) ..... *passim*

Jackson's Adm'r v. Wickham,
112 Va. 128 (1911) 6

Jeld-Wen v. Gamble,
256 Va. 144 (1998) 10, 11, 13

Jenkins v. Pyles,
269 Va. 383 (2005) 25

John v. Im,
263 Va. 315 (2002) 15

Kellermann v. McDonough,
278 Va. 478 (2009) 12

Kelly v. VEPCO,
238 Va. 32 (1989) 26

Kendrick v. Vaz, Inc.,
244 Va. 380 (1992) 26

Logan v. Montgomery Ward & Co.,
216 Va. 425 (1975) 11, 12

Maurer v. City of Norfolk,
147 Va. 900 (1926) 26

Meade v. Saunders,
151 Va. 636 (1928) 28

Noland v. Fowler,
179 Va. 19 (1942) 29

Owens-Corning Fiberglass Corp. v. Watson,
243 Va. 128 (1992) 10

RGR, LLC v. Settle,
288 Va. 260 (2014) 25, 26, 29

Slone v. Gen. Motors Corp.,
249 Va. 520 (1995) 10, 13

Spencer v. Commonwealth,
240 Va. 78 (1990) 15, 17

Swiney v. Overby,
237 Va. 231 (1989) 17, 18

Toraish v. Lee, Record No. 160495,
797 S.E.2d 760 (Va. April 13, 2017) 15

Tittsworth v. Robinson,
252 Va. 151 (1996) 14, 17

Turner v. Manning, Maxwell & Moore, Inc.,
216 Va. 245 (1975) 10, 11

Vasquez v. Mabini,
269 Va. 155 (2005) 9, 14, 15

Virginian Railway Co. v. Andrews' Adm'x,
118 Va. 482 (1916) ..... *passim*

W. S. Forbes & Co. v. Southern Cotton Oil Co.,
130 Va. 245 (1921) 4, 5, 6, 17

Whittaker v. Calfee,
214 Va. 301 (1973) 28, 29

VIRGINIA STATUTES

Title 8.01 of the Code of Virginia 4

Code § 8.01-401.1 13

Code § 8.01-401.3 13

Code § 8.01-430 8

Code § 8.01-680 ..... 8, 27

Code § 8.2-314 ..... 10, 11

Section 3484 of the Code of 1887 8

Section 6251 of the Code of 1919 8

Section 6363 of the Code of 1919 ..... 8, 27

Section 8-352 of the Code of 1950 8

Section 8-491 of the Code of 1950 8

RULES OF THE SUPREME COURT OF VIRGINIA

Rules of the Supreme Court of Virginia 4

Va. R. Evid. 2:702 13

Va. R. Evid. 2:703 13

FEDERAL CASES

Alveromagiros v. Hechinger Co.,
993 F.2d 417 (4th Cir. 1993) 10

Mears v. Gen. Motors Corp.,
896 F. Supp. 548 (E.D. Va. 1995) 11

S.L.M. v. Dorel Juvenile Group, Inc.,
514 F. App'x 389 (4th Cir. 2013) 11, 12

FEDERAL STATUTES AND REGULATIONS (AND RELATED MATERIALS)

29 C.F.R. 1910.178 19

SECONDARY SOURCES

Brief *Amicus Curiae* of VTLA in
Holiday Motor Corp. v. Walters,
Record No. 150391 (filed Dec. 7, 2015) 7

Brief *Amicus Curiae* of VTLA in
Hyundai Motor Co. v. Duncan,
Record no. 140216 (filed Aug. 5, 2014) 7

Peter Vieth, *Justices Offer Few Answers for*
Vexed Trial Lawyers, Virginia Lawyers Weekly
(Apr. 11, 2017) 7

Restatement (Third) of Torts: Prod. Liab. § 2 cmt. a (1998) 12

Restatement (Third) of Torts: Prod. Liab. § 4(b) (1998) 12

INTRODUCTION

This appeal requires the Court to apply settled Virginia law to address straightforward legal and evidentiary issues. It is not about an alleged diminishment or erosion of the role of the civil jury in Virginia. If anything, this appeal allows the Court to emphasize the simple procedural truth that plaintiffs *and* defendants each have to adhere to the same basic legal and evidentiary rules and requirements.

Although the complaint filed by Plaintiff/Appellant Ronda Maddox Evans ("Evans") alleged various claims against multiple defendants, JA 1-17, the case ultimately tried to the jury was only a negligent design claim and an implied warranty claim against Defendant/Appellee NACCO Materials Handling Group, Inc. ("NACCO"). JA 109. The jury correctly found in favor of NACCO on the implied warranty claim, *id.*, and that finding has not been challenged by Evans. Unfortunately, however, the trial court erred in allowing the improper and deficient testimony of Evans' design expert, Frederick Mallett. The trial court should have entered judgment for NACCO on the negligent design claim because Mallett's testimony, and therefore Evans's evidence, was improper and insufficient. Despite these errors, the trial court correctly set aside the jury's verdict due to the contributory negligence of the decedent.

This appeal allows the Court to apply well-settled and long-standing Virginia law to enter final judgment for NACCO based on NACCO's three assignments of cross-error, and clarify Virginia law on contributory negligence and affirm the judgment of the trial court based on Evans's sole assignment of error.

INTEREST OF *AMICI*

Amicus Curiae the **National Association of Manufacturers** (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amicus Curiae the **Chamber of Commerce of the United States of America** (the "U.S. Chamber") is the world's largest business federation, representing approximately 300,000 members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the U.S., including a substantial number of members headquartered in Virginia, and many other

members doing business in Virginia. An important function of the U.S. Chamber is representing its members' interests in matters before Congress, the executive branch, and federal and State courts, including this Court.

Amicus Curiae the **Virginia Chamber of Commerce** (the "Virginia Chamber") is an association of over 26,000 businesses throughout the Commonwealth of Virginia. The Virginia Chamber advocates the interests of the business community with a principal focus on Virginia employers.

The *Amici* represented in this Brief *Amicus Curiae*, collectively hereinafter referred to as the NAM *Amici*, have a substantial interest in ensuring that Virginia's tort law requires all parties in Virginia's courts to be subject to the same clear and concrete rules.

STATEMENT OF THE CASE, STATEMENT OF FACTS, AND STATEMENT REGARDING THE STANDARD OF REVIEW OF NACCO'S ASSIGNMENTS OF CROSS-ERROR AND EVANS'S ASSIGNMENT OF ERROR

The NAM *Amici* adopt the Statement of the Case and the Statement of Facts in NACCO's Brief of Appellee. To the extent necessary below, the NAM *Amici* also will address certain legal and factual matters at trial in support of their arguments on behalf of NACCO.

The NAM *Amici* adopt the standard of review articulated by NACCO in its Brief of Appellee regarding both NACCO's Assignments of Cross-Error and

Evans's Assignment of Error. To the extent necessary below, the NAM *Amici* also will address the errors in Evans's assertions regarding the standard of review.

ARGUMENT

I. The Sanctity of the Civil Jury is Not at Issue

The attempts by Evans and her amicus to cast this appeal as a referendum on the future of the civil jury in Virginia are hollow and mistaken.

Since the Commonwealth asserted its independence, the law of Virginia has always recognized "[t]hat in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred." Virginia Declaration of Rights § 11, 9 Hening's Statutes of Virginia 109, 111-12 (1776). Now codified in Article I, § 11 of the Constitution of Virginia, this principle remains foundational and animates the entire framework of civil procedure in the Commonwealth. *See generally* Title 8.01 of the Code of Virginia; Rules of the Supreme Court of Virginia.

This Court has addressed the propriety and constitutionality of a trial court's ability to set aside a jury verdict in light of the requirements of Article I, § 11 of the Constitution of Virginia. In *W. S. Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245 (1921), the Court affirmed the setting aside of a jury verdict in favor of the plaintiff. In doing so, the Court addressed an argument that challenged the constitutionality of the General Assembly allowing a circuit court judge to set

aside a jury verdict in light of Article I, § 11 of the Constitution of Virginia. In finding that a circuit court judge's ability to set aside a civil jury verdict *was* constitutional, this Court stated:

> Assuming that this initial step has been properly taken, that the verdict has been rightly set aside, has the legislature the power to authorize the trial court to enter up such judgment as is right and proper? Is it obliged to authorize another trial by jury? Does the Constitution guarantee a jury trial in *all* "suits between man and man?" Must a jury pass upon questions of law as well as of fact? No such claim can be made. We must look to the law as it existed when the Constitution was adopted and as it has been uniformly construed since that time. We think we may also safely assume that it was the substance of "trial by jury" that our forefathers sought to preserve, and not its mere form. The province of the jury is to settle questions of fact, and when the facts are ascertained the law determines the rights of the parties. This law is announced by the court or judge. "Every judgment is the conclusion of a syllogism of which the law is the major (unexpressed) and the fact the minor premise. Such being understood to be the law -- and such being the fact *ideo consideratum est*, and then follows the judgment as the conclusion." Tucker's Pl., p. 19. It is the method of ascertaining the fact that is intended to be preserved by the Constitution, but if the litigant offers no evidence of the fact which is essential to the maintenance of his pleading, or offers so little in opposition to that of his adversary that a verdict in accordance with that little would be a manifest injustice to his adversary, in other words, if the litigant has offered no facts upon which a jury would be warranted in finding a verdict in his favor, then he has not presented a controversy respecting property or a suit between man and man that entitles him to the jury trial guaranteed by the Constitution. It is the function of a pleading to state facts, not law; and of evidence to support the facts

> alleged in the pleading. If no such evidence is offered, or none that would warrant a jury of fairminded men in finding a verdict in accordance therewith, then the rights of the parties become a question of law, and there is no controversy to be determined by a jury, and the constitutional guaranty does not apply. The word "suit" is not always used in a strictly technical sense. Technically the word "suit" is sometimes restricted to litigation in a court of equity, and the word "action" is applied to litigation at law. As used in the Constitution, the word "suit" is manifestly used in much the same sense as the word "controversies" in the preceding part of the same sentence. It seems inconceivable that the framers of the Constitution should guarantee a jury trial in a "suit between man and man," when there was no controversy between them. In such a case no right is in jeopardy which would need such protection, and we can see no good reason why the court should not pronounce the judgment of the law upon the case as it stands. The relevancy and admissibility of the evidence, and whether or not what is offered is of sufficient probative value to go to the jury are questions for the court and not for the jury. So also, under the well settled rule in this State, it is for the court to say, subject to review on a writ of error, when a verdict does "manifest injustice" or is "plainly not warranted by the evidence." *Jackson's Adm'r v. Wickham, supra.* [112 Va. 128, 131 (1911)].

W.S. Forbes, 130 Va. at 260-262 (emphasis in original).

Thus, contrary to the arguments by Evans and her amicus, the Virginia Trial Lawyers Association, the civil jury is alive and well in Virginia. For the reasons discussed below, the arguments by the VTLA in this appeal are without merit. *See* VTLA *Amicus* at 1, 12-17. If anything, these types of arguments, and related criticisms of this Court, pose the true threat to both the civil jury and the rule of

law itself. *See, e.g.,* Peter Vieth, *Justices Offer Few Answers for Vexed Trial Lawyers*, Virginia Lawyers Weekly (Apr. 11, 2017); Brief *Amicus Curiae* of VTLA in *Holiday Motor Corp. v. Walters*, Record No. 150391 (filed Dec. 7, 2015); Brief *Amicus Curiae* of VTLA in *Hyundai Motor Co. v. Duncan*, Record No. 140216 (filed Aug. 5, 2014). In this appeal, what the VTLA appears to be seeking is an uneven playing field before civil juries – perhaps where contributory negligence no longer exists in Virginia or perhaps where a plaintiff in Virginia may prove a case by relying on expert testimony that lacks foundation or evidentiary support.

The NAM *Amici* respectfully ask this Court to reaffirm the clear and unambiguous rule in Virginia that all parties – whether plaintiff, defendant, or third-party – must adhere to the same basic requirements regarding the admissibility of expert testimony. The NAM *Amici* also respectfully ask the Court to clarify and restate the law governing contributory negligence in Virginia. Thus, the issues in this appeal do not involve the sanctity or viability of the civil jury. Instead, the assignment of error and three assignments of cross-error involve straightforward legal and procedural issues that should be resolved in the first instance by a trial court so that a case might be presented to a jury.

II. Virginia Law Requires a Circuit Court Judge to Serve as Gatekeeper

Whether at the pleading stage, throughout discovery, during trial, or after trial, a Virginia circuit court judge has crucial and necessary gatekeeping functions throughout the course of all civil proceedings. There are two important gatekeeping functions at issue in this appeal.

First, in the context of setting aside a jury verdict, Virginia law clearly allows a circuit court judge to set aside a jury verdict when "it appears from the evidence that such judgment is plainly wrong or without evidence to support it." Code § 8.01-680. *See also* Code § 8.01-430 (allowing a civil jury verdict to be set aside on the "ground that it is contrary to the evidence, or without evidence to support it").[1] This Court has consistently held that, when applying Code § 8.01-680 and the principles supporting it, "if it appears that a judgment is plainly wrong or without evidence to support it, we *must* set it aside." *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 293 (2003) (emphasis added and citations omitted). The trial court in this appeal correctly recognized the correct standard in Code § 8.01-680 and the controlling precedent from this Court. JA 220.

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[1] Code § 8.01-680 dates to § 3484 of the Code of 1887, and was subsequently codified in § 6363 of the Code of 1919, and then § 8-491 of the Code of 1950 before its current recodification in 1977. Code § 8.01-430 dates to § 6251 of the Code of 1919, and was subsequently codified in § 8-352 of the Code of 1950 before its current recodification in 1977. The ability of a Virginia trial court to set aside a jury's verdict is neither novel nor unusual. *See supra* text at 4-6.

Second, in the context of determining whether to allow expert testimony to go to a jury, Virginia law requires a circuit court judge first to determine if the expert testimony is "premised upon assumptions that have a sufficient factual basis and take into account all relevant variables." *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 155 (2015). "Expert opinion that is founded upon assumptions having no basis in fact is inadmissible." *Holiday Motor Corp. v. Walters*, 292 Va. 461, 483 (2016) (citing *Duncan*, 289 Va. at 155; *CNH America LLC v. Smith*, 281 Va. 60, 67 (2011); *Vasquez v. Mabini*, 269 Va. 155, 159-60 (2005)). The "[f]ailure of the trial court to strike such [inadmissible] testimony upon a motion timely made is error subject to reversal on appeal." *Walters*, 292 Va. at 483 (citing *CNH America*, 281 Va. at 67). As discussed below, this rule is not of recent origin or "federal." Instead, it is firmly rooted in the jurisprudence of this Court. Because the trial court's failures to follow settled Virginia law regarding the admissibility of expert testimony are dispositive of the entire appeal, the NAM *Amici* will address this issue first.

III. The Trial Court Erred in Failing to Apply Virginia Law to Exclude Evans's Improper Expert Testimony

The jury found in favor of Evans based only on her negligent design claim. JA 109. Evans support for her negligent design claim was based entirely on the testimony of her design expert, Frederick Mallett. Because Mallett had no support for his opinions, the trial court erred in allowing him to testify. Instead, the trial

court should have excluded his testimony and entered judgment for NACCO on Evans's negligent design claim.

A. Virginia Law Governing Products Liability

In Virginia, "[t]o sustain a claim for negligent design, a plaintiff must show that the manufacturer failed to meet objective safety standards prevailing at the time the product was made." *Walters*, 292 Va. at 478 n.14. In making that determination, a court looks to applicable government regulations, applicable industry standards, and reasonable customer expectations. *Id.* *See also* Code § 8.2-314(2)(a), (c); *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir. 1993) (assessing relevant government regulations).

A manufacturer is under no obligation to create "an accident-proof product." *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251 (1975). *See also Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 963 (1979). There also is no duty on the part of vehicle manufacturers to design or supply a crashworthy vehicle. *See Slone v. General Motors Corp.*, 249 Va. 520, 525-26 (1995) (expressly rejecting the "crashworthiness" doctrine). Nor is a manufacturer "an insurer of its product's safety." *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 134 (1992). Thus, a manufacturer is not charged with protecting every person in "'every conceivably foreseeable accident, without regard to common sense or good policy.'" *Jeld-Wen v. Gamble*, 256 Va. 144, 149 (1998) (citation

omitted). Only when the product "is measured against concrete standards and expectations, and falls short of these criteria, can it be found to be unreasonably dangerous." *Mears v. Gen. Motors Corp.*, 896 F. Supp. 548, 553 (E.D. Va. 1995).

In Virginia and around the country, the standard of care for selling a merchantable product is straightforward: what are the minimum standards for putting this product on the market? *See* Code § 8.2-314(2)(a), (c) (product is merchantable if it "pass[es] without objection in the trade" and is "fit for the ordinary purposes for which such goods are used."). A key objective of merchantability law, as with other measures of liability for products, is to balance the risks and benefits associated with manufacturing a product. Under Virginia law, a manufacturer must produce a product that is "reasonably safe for its intended use." *Logan v. Montgomery Ward & Co*., 216 Va. 425, 428 (1975).

Additionally, Virginia law is clear that absent other competent evidence that a product is not reasonably safe, compliance with government and industry custom may be conclusive. *Walters*, 292 Va. at 478 n.14; *Turner*, 216 Va. at 251. Virginia is not alone. In most states, compliance with government and industry safety standards is admissible to show that a product is not defective. *See, e.g., S.L.M. v. Dorel Juvenile Group, Inc.*, 514 F. App'x 389, 391 (4th Cir. 2013) ("We begin with black-letter law, namely, that a 'product's compliance with an applicable product safety statute or administrative regulation is properly considered

in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation.'") (quoting Restatement (Third) of Torts: Prod. Liab. § 4(b) (1998)).

Virginia's merchantability law for safety features that meet applicable safety standards should not be expanded to allow for tort liability when the safety feature does not cause injury, but merely fails to prevent or mitigate injuries that are otherwise going to occur. In particular, in cases involving prophylactic safety devices, adding the safety device must have been unreasonable in order for the manufacturer to be subject to liability. *See Logan*, 216 Va. at 428 (equating merchantability and design defect with negligence, which looks at the reasonableness of the manufacturer's conduct); *cf. Kellermann v. McDonough*, 278 Va. 478, 489 (2009) (stating even when a person voluntarily undertakes a duty to protect someone from harm, liability is based on the reasonableness of the person's conduct). Further, the inquiry into the "fitness" of the product for determining merchantability must be focused on its fitness for the overall consuming public, which would involve a risk-utility test, not the experiences or expectations of a single person. *See Featherall*, 219 Va. at 963 (establishing a "fitness" standard); Restatement (Third) of Torts: Prods. Liab. §2 cmt. a (1998) ("Most courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design… must be done in light of the knowledge of

risks and risk-avoidance techniques reasonably attainable at the time of distribution.”).

As this Court has stated, “[c]ommon knowledge of a danger from the foreseeable misuse of a product does not alone give rise to a duty to safeguard against the danger of that misuse. To the contrary, the purpose of making the finding of a legal duty as a prerequisite to a finding of negligence, or breach of implied warranty, in products liability ‘is to avoid the extension of liability for every conceivably foreseeable accident, without regard to common sense or good policy.’” *Jeld-Wen*, 256 Va. at 149 (citation omitted). Thus, foreseeability is cabined by duty. Just because something is “conceivable” does not mean it is legally foreseeable. *See also Slone*, 249 Va. at 528-30 (1995) (Compton, J., dissenting).

B. Virginia Law Governing Expert Testimony

The Court recently summarized the standard in Virginia for the admissibility of expert testimony in *Holiday Motor Corp. v. Walters*, 292 Va. 461 (2016):

> “Expert opinion may be admitted to assist the fact finder if such opinion satisfies certain requirements, ‘including the requirement of an adequate factual foundation.’” *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 154 (2015) (quoting *Forbes v. Rapp*, 269 Va. 374, 381 (2005)); *see* Code §§ 8.01-401.1 and -401.3; Va. R. Evid. 2:702 and 2:703; *Countryside Corp. v. Taylor*, 263 Va. 549, 553 (2002). We review the circuit court’s decision to admit expert opinion using an abuse of discretion standard and, therefore, will reverse the circuit court's decision “only

> upon a finding of abuse of that discretion." *Duncan*, 289 Va. at 155. A circuit court, though, "has no discretion to admit clearly inadmissible evidence." *Id.* (quoting *Harman v. Honeywell Int'l, Inc.*, 288 Va. 84, 92 (2014)).
>
> Expert opinion that is founded upon assumptions having no basis in fact is inadmissible. *See Duncan*, 289 Va. at 155; *CNH America LLC v. Smith*, 281 Va. 60, 67 (2011); *Vasquez v. Mabini*, 269 Va. 155, 159-60 (2005). Therefore, the "[f]ailure of the trial court to strike such testimony upon a motion timely made is error subject to reversal on appeal." *CNH America*, 281 Va. at 67.

Id. at 483. It has long been established in this Court, independent of any federal precedent or evidentiary rule, that the trial court, not the jury, determines in the first instance whether expert testimony is admissible. *See, e.g., CNH America*, 281 Va. at 67 (trial court must ensure that there is an adequate factual foundation for proffered expert testimony); *Virginian Railway Co. v. Andrews' Adm'x*, 118 Va. 482, 489 (1916) (same). In *Tittsworth v. Robinson*, 252 Va. 151 (1996), this Court summarized "fundamental requirements" expert testimony must satisfy in order to be admissible in a Virginia court:

> Such testimony cannot be speculative or founded upon assumptions that have an insufficient factual basis. Such testimony also is inadmissible if the expert has failed to consider all the variables that bear upon the inferences to be deduced from the facts observed. Further, where tests are involved, such testimony should be excluded unless there is proof that the conditions existing at the time of the tests and at the time relevant to the facts at issue are substantially similar.

Id. at 154 (citations omitted).

Where the record reveals that expert testimony supporting a jury verdict was improperly admitted, this Court has never hesitated to reverse. *See, e.g., CNH America*, 281 Va. at 65-68; *Dagner v. Anderson*, 274 Va. 678, 681 (2007); *Vasquez*, 269 Va. at 160; *Andrews*, 118 Va. at 489. Thus, contrary to the arguments advanced by Evans and the VTLA, the holding of *Walters* stands in a long line of precedent from this Court that clearly outlines the requirements *any* party must satisfy in order to present expert testimony to a jury. *See also Toraish v. Lee*, Record No. 160495, 797 S.E.2d 760, 766 (Va. April 13, 2017) (holding defendant's expert testimony should not have been admitted because it was based upon an assumption that has no basis in fact, reversing the judgment for the defendant, and remanding for a new trial).

In order to be admissible, expert testimony must be predicated upon both a sufficient factual foundation, *Vasquez*, 269 Va. at 159-160, and a sufficient scientific foundation. *Spencer v. Commonwealth*, 240 Va. 78, 97 (1990). A trial court commits reversible error in admitting expert testimony if it has "an insufficient factual basis" or if the expert fails "to consider all variables bearing on the inferences to be drawn from the facts observed." *John v. Im*, 263 Va. 315, 320 (2002) (citations omitted).

Where there are specific government or industry standards that govern the performance of a product, an expert should not be permitted to proffer his *ipse*

dixit, subjective opinion that the industry standards are inadequate. *Duncan*, 289 Va. at 156; *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430 (1982). Only in the absence of an "established norm in the industry, [is] it a matter of opinion of trained experts what design was safe for [a product's] intended use." *Bartholomew*, 224 Va. at 430.

Under Virginia law, it is the trial court's duty to determine whether expert testimony has a sufficient foundation to be admissible. A trial court "has no discretion to admit clearly inadmissible evidence" and leave it to the jury to sort out. *Duncan*, 289 Va. at 154 (quoting *Harman*, 288 Va. at 92). The trial court's gatekeeper role regarding expert testimony has been an established part of Virginia law for more than 100 years.

In *Virginia Ry. Co. v. Andrews' Adm'x*, 118 Va. 482 (1916), this Court reversed a jury verdict that rested on improperly admitted expert testimony:

> [I]t is enough to say that a painstaking examination of this evidence shows that the opinion of the witnesses were neither founded upon facts within their own knowledge, or established by other evidence in the case. Hence, their conclusions were matters of speculation, and possessed no evidential value. Such statements violate the fundamental principle (so often accentuated in opinions of this court) that an inference cannot be drawn from a presumption. A verdict resting upon such foundation is not the fruit of evidence, but of conjecture, and cannot be upheld.

Id. at 489. The Court consistently has reaffirmed this principle, including recently in *Duncan*, in which the Court held that "'[e]xpert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible.'" *Duncan*, 289 Va. at 155 (quoting *CNH America*, 281 Va. at 67); *see also Tittsworth*, 252 Va. at 154 (setting forth certain "fundamental requirements" for admissibility of expert testimony); *Spencer*, 240 Va. at 97 ("When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method.").

A trial court's responsibility to ensure that expert testimony meets the essential requirements of admissibility is especially important because of the significant weight that such testimony is likely to have on the jury. *See, e.g., Andrews*, 118 Va. at 490 (overturning the verdict because "there is no criterion by which to estimate the influence that this inadmissible matter may have exerted on the minds of the jury"). Thus, this Court consistently has recognized the role of the trial judge in making admissibility decisions in order to protect juries – and guard the sanctity of the jury trial itself – from the mischief that is caused by unfounded and speculative expert testimony. *See, e.g., Spencer*, 240 Va. at 97; *W.S. Forbes*, 130 Va. at 260-262; *Andrews*, 118 Va. at 490. *See also Swiney v. Overby*, 237 Va. 231, 233 (1989) ("Hypothetical events, unrelated in any major particular to the

original event, can have little probative value and must be disallowed because of their prejudicial and confusing impact on the fact finder.")

C. The Trial Court Should Have Excluded Mallett and Entered Judgment for NACCO

At trial, Evans's sole liability theory was that the design of the parking brake was unreasonably dangerous because it allowed the lift truck operator to tighten or loosen the brake. This sole liability theory was supported by the testimony of a single expert witness, Frederick Mallett. *See* JA 322-323 (Tr. 225:19 – 226:17). Mallett clearly and unambiguously confirmed this liability theory on both direct and cross-examination. On direct, Mallett stated that the "design was defective and unreasonably dangerous in that it failed to eliminate misuse by the operator, intended or unintended misuse," JA 344-345 (Tr. 247:22 – 248:1), and that his opinion "is that the operator should not be required to make adjustments. It may be convenient for the operator to make adjustments in lieu of a qualified and trained technician to make the adjustments, but the potential then exists for incorrect adjustment based on the level of experience and training of the operator." JA 398 (Tr. 301:14-20). On cross-examination, Mallett confirmed his testimony and stated: "I can cut to the chase here and say that my objection is to the operator adjustability of the over-center parking brake. I'm not being specific about Hyster or Caterpillar or any brand." JA 453 (Tr. 356:9-12). Thus, throughout the course of his testimony Mallett repeatedly and clearly stated to the jury that this was his

sole basis for concluding that the Hyster S120XMS lift truck manufactured in 2003 by NACCO and that is at issue in this appeal was unreasonably dangerous.[2]

Mallett reached this conclusion even though he conceded that the design of the over-center, operator-adjustable parking brake complied in all respects with the applicable government and industry standards. Mallett agreed that ANSI B56.1-2000 is the governing standard for the design, performance, and use of the Hyster S120XMS. JA 314 (Tr. 217:8-22); JA 369 (Tr. 272:3-21); JA 469-477 (Tr. 372:6 – 380:24). Mallett also agreed that the ANSI B56.1-2000 standard has been adopted into federal law. JA 314 (Tr. 217:8-22); JA 369 (Tr. 272:3-21) (stating that ANSI B56.1-2000 is the "the only specified requirement that defines how the park brake should operate"). *See also* JA 1768 (NACCO Ex. 8, which is 29 C.F.R. 1910.178). Importantly, Mallett conceded that the ANSI B56.1-2000 standard "doesn't reference design specifics; it talks about the performance of the parking brake system. And as much as I dislike the operator over-center parking brake, it does not deviate or disagree with the standards as written because there is no reference to it in here." JA 476 (Tr. 379:6-11).

[2] Evans failed to properly disclose portions of Mallett's testimony, and the trial court consequently limited certain aspects of Mallett's testimony. *See* JA 352-358, 362-363. Evans did not assign error to this ruling by the trial court.

In addition to conceding that the Hyster's operator-adjustable parking brake complied with the relevant federal and industry standards, Mallett testified as follows:

- Mallett testified that he has never "personally taken pen to paper or gotten on the computer and actually designed a park brake." JA 300 (Tr. 203:14-17); JA 306 (Tr. 209:17-20); JA 313 (Tr. 216:8-20).
- Mallett testified that he has never performed any type of testing of a lift truck's parking brakes. Instead, Mallett's background was in comparing "the performance of the trucks to get an idea of how well they would compete with each other. The performance of the brake systems wasn't something that we were looking at specifically, but only in terms of how it contributed to the overall performance of the machine, for example, how long it took to run a specific work cycle, duty cycle." JA 320 (Tr. 223:12-19)
- Mallett testified that his opinions were based on his review of documents and depositions, and site visits. JA 301-302.
- Mallett testified that he did no testing or independent analysis of the parking brake in the Hyster lift truck at issue in this appeal, or in any other lift truck. JA 320 (Tr. 223:3-19); JA 410-412 (Tr. 313:22 – 315:22) (concluding that parking brake on Hyster lift truck at issue

was working properly); JA 415 (Tr. 318:16-22); JA 472 (Tr. 375:22-23) (admitted that he did not even measure grade at scene of accident).

- Mallett testified that Hyster's process of "tagging out" the lift truck for service was proper. JA 380 (Tr. 283:17-22).
- Mallett testified that the Hyster lift truck at issue in this appeal complied with the applicable federal standard, ANSI B56.1-2000, and that, while he did not test or confirm it himself, the grade at time of accident was under 15-percent, which is the threshold in ANSI B56.1-2000. JA 381 (Tr. 284:10-23); JA 394 (Tr. 297:18-20).
- Mallett testified that there was no malfunction of the parking brake on the Hyster lift truck at the time of the accident, JA 386-387 (Tr. 289:3 – 290:16), and no mechanical failure of the parking brake at the time of the accident, JA 389 (Tr. 292:16-22); JA 516 (Tr. 419:20-22).
- Mallett testified that Hyster was the largest manufacturer of lift trucks in 2003 in North America, JA 416 (Tr. 319:7-17), and conceded there were positive design benefits to Hyster's "over-center operator-adjustable park brake," JA 417-418 (Tr. 320:10 – 321:4).
- Mallett testified, without support or citation to any authority, that the basis for his criticisms of the Hyster parking brake at issue in this

appeal rested on his "concepts" and his "design hierarchy or the safety hierarchy." JA 339 (Tr. 242:14-15); JA 341 (Tr. 244:1-2).

- Mallett offered several alternative designs. One, the "setscrew," allegedly "would deter the operator from making manual adjustments." JA 348 (Tr. 251:4-19); JA 348 (Tr. 251:17-19). But Mallett conceded that it would in fact allow the operator to make manual adjustments. JA 458 (Tr. 361:13-21), JA 465 (Tr. 368:11-22); JA 467-468 (Tr. 370:16 – 371:15). Mallett also admitted that this "setscrew" design was not introduced by Caterpillar until at least four years after the Hyster at issue in this appeal was manufactured, JA 440 (Tr. 343:7-11), and that it is not used at all in either Japan or Europe, JA 443 (Tr. 346:7-12). In another alternative design, the "one-way ratchet," Mallett conceded that he had not performed any testing or analysis of this alternative, JA 420-424 (Tr. 323:8 – 327:20), and that it in fact this alternative was his own "concept" and a "theory" that no one in the industry had ever used or even contemplated. JA 423 (Tr. 326:15-16, 24).
- Mallett conceded that his prior employers manufactured lift trucks with the same parking brake design as the Hyster and that those trucks are still in use. JA 429 (Tr. 332:1-21). Mallett also admitted

that there is "huge population" of lift trucks using the parking brake design Mallett criticizes in this appeal "because most manufacturers, especially those using Japanese components, have use that type of parking brake at some point in time." JA 430 (Tr. 333:5-8).

- Mallett also admitted that other manufacturers of lift trucks, like Hyster in this appeal, are clear in their warnings that a user of a lift truck must be authorized and trained, JA 434 (Tr. 337:16-20), and should not park on a grade. JA 438 (Tr. 341:21).
- Finally, Mallett testified that Mr. Evans was not certified, should not have been operating the lift truck, and that his operation of the lift truck was a misuse, JA 502 (Tr. 405:6-18).

As the foregoing summary demonstrates, the trial court erred in allowing Mallett to testify. Mallett did no testing or analysis. Mallett did not conclude that the design of the parking brake violated any government or industry standard, or any practice in the industry. Mallett's focus on the alleged failure to eliminate the possibility for any possible misuse is a type of crashworthiness argument that is not recognized or allowed under Virginia law. Mallett's alternative designs refuted his own conclusions – or else existed only in his own imagination. Besides himself, Mallett offered no source from anywhere in the world that criticized much less prohibited the operator-adjustable parking brake used by Hyster. To the contrary:

Mallett conceded that the operator-adjustable parking brake design is still used throughout the world. *See Bartholomew*, 224 Va. at 430 (holding that only in the absence of "an established norm in the industry" does it become "a matter of opinion of trained experts what design was safe for [a product's] intended use.").

As has been the rule in Virginia for over a century, Mallett's "statements violate the fundamental principle . . . that an inference cannot be drawn from a presumption. A verdict resting upon such foundation is not the fruit of evidence, but of conjecture, and cannot be upheld." *Andrews*, 118 Va. at 489. Mallett's *ipse dixit* conclusions are more deficient than the testimony offered in either *Walters* or *Duncan*, and Mallett's testimony should have been struck.[3] Because Mallett's testimony offered the only support for Evans's negligent design claim, which was the sole basis for the jury's verdict, NACCO is entitled to judgment as a matter of law. *Walters*, 292 Va. at 478 n.14; *Duncan*, 289 Va. at 157-58.

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[3] Evans attempts to compare Mallett's testimony with the expert testimony this Court approved in *Bartholomew*, but the comparison fails. *See* Evans Opening Br. at 33, 38, 44-45. The expert approved in *Bartholomew*, which was an automotive product liability action, was based upon the expert witness's analysis of instruction manuals and data compiled by NHTSA, consultation with other experts, experimentation with the transmission systems in several different vehicle models, and a courtroom demonstration confirming his theory of how the Ford transmission failed. 224 Va. at 430. Nothing in Mallett's testimony comes close to the expert testimony allowed in *Bartholomew*.

IV. The Trial Court Correctly Set Aside the Jury's Verdict Based on Contributory Negligence

Should the Court address it, the trial court's decision to set aside the jury's verdict based on the contributory negligence of the decedent should be affirmed. When the entirety of the evidence is viewed in context, it is clear that Mr. Evans was contributorily negligent as a matter of law and the trial court correctly set aside the jury's verdict.

A. Virginia Law Governing Contributory Negligence and the Standard of Review for the Granting of a Motion to Set Aside

In Virginia, contributory negligence "is an affirmative defense that must be proved according to an objective standard whether the plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances. The essential concept of contributory negligence is carelessness." *RGR, LLC v. Settle*, 288 Va. 260, 283 (2014) (quoting *Jenkins v. Pyles*, 269 Va. 383, 388 (2005)). A defendant must prove contributory negligence by the greater weight of the evidence. *RGR*, 288 Va. at 283. In order to establish a prima facie case of the plaintiff's contributory negligence, "a defendant must show that the plaintiff was negligent and that such negligence was a proximate cause of the accident" *Id.* at 284. This is generally a question of fact "to be decided by the factfinder unless 'reasonable minds could not differ about what conclusion could be drawn from the evidence.'" *Id.* (quoting *Jenkins*, 269 Va. at 388-89) (collecting cases)).

With regard to the standard of review, if this was an appeal of a jury verdict for a plaintiff that had been entered by the trial court, the plaintiff would occupy "the most favored position known to the law." *RGR*, 288 Va. at 283 (citations omitted). In such a circumstance, a circuit court's judgment "is presumed to be correct, and we will not set it aside unless the judgment is plainly wrong or without evidence to support it." *Id.* But that is not the procedural posture of this appeal.

Here, because the trial court set aside the jury verdict, the jury's decision is not entitled to the same weight as a verdict approved by a trial court. *See, e.g., Kendrick v. Vaz, Inc.*, 244 Va. 380, 384 (1992); *Maurer v. City of Norfolk*, 147 Va. 900, 910 (1926). On the issue of whether Mr. Evans was guilty of contributory negligence, this Court will "give the party who received the favorable verdict the benefit of all substantial conflict in the evidence, and all fair inferences that may be drawn therefrom." *Fobbs v. Webb Building Ltd. Partnership*, 232 Va. 227, 230 (1986) (citations and internal quotation marks omitted). "[W]hen persons of reasonable minds could not differ upon the conclusion that such [contributory] negligence has been established," the issue becomes one of law and "it is the duty of the trial court so to rule." *Kelly v. VEPCO*, 238 Va. 32, 39 (1989).

B. This Court Should Affirm the Judgment of the Trial Court to Set Aside the Jury's Verdict

The NAM *Amici* concur with the NACCO's arguments in support of the trial court's decision to set aside the jury's verdict, and will not repeat those arguments

here. Instead, the NAM *Amici* respectfully urge the Court to address and clarify the line of precedent from this Court regarding how a trial court should evaluate the trial evidence when evaluating whether to grant a motion to set aside a jury verdict.

Evans and the VTLA take issue with the trial court's reliance on this Court's decision in *Braswell v. Virginia Electric Co.*, 162 Va. 27, 28-39 (1934). *Compare* JA 220 *with* Evans Opening Br. 12-26 & VTLA *Amicus* 15 & n.4. This Court's decision in *Braswell*, and its progeny, remain good law and the criticisms of this line of precedent illustrate why the Court should address the issue now.[4]

In *Braswell*, this Court affirmed the setting aside of a jury verdict for the plaintiff. 162 Va. at 41. In construing § 6363 of the Code of 1919, the predecessor to current Code § 8.01-680, the Court stated:

> We have frequently had occasion to consider Code, section 6363. The jury's verdict may be set aside when "it appears from the evidence that such judgment is plainly wrong or without evidence to support it." That is to say, it may be set aside for either of two reasons; it may be set aside when it is without evidence to support it and it may be set aside when it is plainly wrong even if it is supported by some evidence.

162 Va. at 38. The Court then noted that the "very fact that [a trial court judge] is given the power to set aside a verdict as contrary to the evidence necessarily means

[4] The VTLA's arguments regarding the so-called "short circuiting cases," *see* VTLA *Amicus* at 13-15, are inapposite because none of the cases cited by the VTLA involved the granting of a motion to set aside a jury verdict.

that he must, to some extent at least, pass upon the weight of the evidence." *Id.* This so because "[i]t would, indeed, be a futile and idle thing for the law to give a court a supervisory authority over the proceedings and the manner of conducting a cause before the jury, and the right to set aside the verdict of the jury therein because contrary to the evidence unless the judge vested with such power could consider, to some extent at least, the evidence in the cause." *Id.* (citations omitted).

In *Braswell*, the Court announced the rule that should guide a trial court when deciding a motion to set aside a jury verdict: "Where it can be seen from the evidence as a whole that the verdict has recorded a finding in plain deviation from right and justice, the court may, indeed should, set it aside.'" *Id.* at 39 (quoting *Meade v. Saunders*, 151 Va. 636, 640 (1928)). In summarizing its holding, the Court stated: "For reasons given we are of opinion that the action of the judge of the trial court who saw the witnesses and who heard them testify, should be sustained, and it is so ordered." 162 Va. at 41.

The rationale and holding of *Braswell* remain good law. *See, e.g., Whittaker v. Calfee*, 214 Va. 301 (1973); *Early v. Mathena*, 203 Va. 330 (1962). In *Early*, this Court reversed the trial court and, relying on *Braswell*, said the jury verdict for the plaintiff should have been set aside. 203 Va. at 334-335. In *Whittaker*, the Court relied on *Early*, reversed the jury verdict for the plaintiff, held that the plaintiff was guilty of contributory negligence as a matter of law, and

entered final judgment for the defendant. 214 Va. at 303. Importantly, the Court recognized that "[even] though all the conflicts in the oral testimony have been resolved in favor of a plaintiff by the verdict of a jury, if the physical facts are such as to demonstrate that the oral evidence upon which the jury based its verdict is incredible, then the trial court and this court are not bound by the verdict of the jury." *Id.* (quoting *Noland v. Fowler*, 179 Va. 19, 23 (1942)).

In the appeal now before the Court, the trial court followed this guidance. It was undisputed that it was a violation of federal law for Mr. Evans to operate the Hyster lift truck at all. Evans's own expert, Mallett, to told the jury that Mr. Evans was not certified or authorized to use the lift truck, that Mr. Evans was not supposed to be operating the lift truck, and that operation of a lift truck by an operator who is not fully trained and certified is not an intended use of the lift truck and in fact constitutes a misuse. JA 502 (Tr. 405:6-18). Based on the rule of *Braswell* and its progeny, this testimony alone by Evans's own expert supports the trial court's decision to set aside the jury's verdict.

Finally, the NAM *Amici* also respectfully urge this Court to use this appeal to clarify the holding of *RGR*. For the reasons outlined in Justice McClanahan's dissent, the Court's decision in *RGR* recognized a broad maxim as an affirmative duty and also created discord in Virginia law regarding contributory negligence. *See* 288 Va. at 298-313 (McClanahan, J., dissenting). This discord is demonstrated

by the jury's verdict in this case. The trial court recognized its responsibility under *Braswell* and correctly set aside the jury's verdict. The Court should affirm the setting aside of the jury verdict in the matter now before the Court, and use this appeal as an opportunity to clarify contributory negligence law in Virginia.

CONCLUSION

For the reasons stated above, the NAM *Amici* respectfully ask this Court to reverse the trial court and enter final judgment for NACCO on NACCO's Assignments of Cross-Error 1 and 2.[5] The NAM *Amici* also respectfully ask this Court to affirm the trial court's judgment to set aside the jury verdict based on contributory negligence.

Dated: June 26, 2017

Respectfully submitted,

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[5] With regard to NACCO's Assignment of Cross-Error 3, the NAM *Amici* concur with NACCO that this Court's holding in *Ford Motor Co. v. Boomer*, 285 Va. 141 (2013), should resolve the issue in favor of NACCO. *See id.* at 160 ("Virginia does not observe a heeding presumption."). Given that the negligent failure to warn claim was not provided on the finding instruction or the verdict form, and not submitted to the jury, this issue should have been addressed by the trial court to ensure that the jury was not confused by the arguments advanced by Evans.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing complies with Rules 5:26, 5:28, and 5:30, and further certifies as follows:

1. The NAM *Amici* are the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Virginia Chamber of Commerce.

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9. On this 26th day of June, 2017:

   a. The undersigned caused the original and three copies of the foregoing to be hand-delivered to the Clerk's Office of the Supreme Court of Virginia within the time allowed by the Court's VACES Guidelines; and

   b. The undersigned caused an electronic copy of the foregoing to be filed with the Clerk of this Court as required by the Court's VACES Guidelines and also to be served electronically on all of the foregoing Counsel of Record.

/s/ *Robert W. Loftin*

_____

Robert W. Loftin (VSB No. 68377)