In the

Supreme Court of Virginia

At Richmond

Record No. 161788

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

Appellant/Cross-Appellee,

– v. –

NACCO MATERIALS HANDLING GROUP, INC.,

Appellee/Cross-Appellant.

REPLY BRIEF OF *AMICUS CURIAE* VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT/CROSS-APPELLEE AND REVERSAL

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INTRODUCTION

NACCO sought to have the jury's verdict thrown out on all of the various grounds set forth in its brief to this Court—sufficiency of the evidence, admissibility of Mallett's expert testimony, and contributory negligence. The trial court—with the benefit of proximity to the actual trial—went with what it presumably considered to be the strongest reason to set aside the jury's verdict when it found Mr. Evans contributorily negligent as a matter of law. And so it is quite telling that neither NACCO nor its amici begin their arguments by trying to defend the ruling that the trial court actually made in their favor. They opt instead to urge affirmance based on alternative grounds and then only belatedly try to justify the court's contributory negligence ruling. NACCO's afterthought defense of the contributory negligence ruling is befitting of the trial court's indefensible decision.

Then, in urging affirmance based on the alternative grounds of sufficiency of the evidence and the admissibility of Mallett's testimony, NACCO and its amici deploy a disappointing two-pronged approach. They first grossly mischaracterize the factual record—often by omission—and present that record in the light most favorable to NACCO. Second, from this faulty factual premise, NACCO and its amici urge a crabbed view of

this Court's recent statements on the law of expert admissibility and products liability. VTLA leaves it to Ms. Evans to point out the numerous problems with NACCO's and its amici's version of the record evidence. But VTLA does wish to comment upon the reductive view of the law employed by NACCO and, even more so, its amici. In the end, VTLA urges the Court to emphatically reject the products liability law of the lowest common denominator advanced by NACCO and its amici.

DISCUSSION

A. The trial court's contributory negligence ruling is still contrary to the evidence.

VTLA begins where NACCO and its amici do not—with the ruling the trial court actually made in NACCO's favor. NACCO's argument in support of the trial court's ruling suffers from the same fatal flaw as the trial court's analysis in its Letter Opinion. At every point, NACCO, its amici, and the trial court construe the facts in the light least favorable to Mr. Evans. NACCO remarks that "no one forced Mr. Evans into any of these actions." (NACCO Br. at 41.) Setting aside just how easily NACCO criticizes a man who was just trying to do his job, this observation does not speak to the question that was actually posed to the jury—whether Mr. Evans's action were unreasonable under the circumstances at the time. That is the question on which NACCO bore the burden of proof, which the jury

resolved against NACCO, and which even the trial court concedes could reasonably be resolved in Ms. Evans's favor as to all of Mr. Evans's actions. (JA 224.)

NACCO's amicus the National Association of Manufacturers, *et al*. [hereinafter "NAM"], also tries to buttress the trial court's use of its power to set aside a jury's verdict as plainly wrong despite being supported by some evidence. NAM's argument rests on its observation that *Braswell v. Virginia Electric Co.*, 126 Va. 27 (1934), and its progeny "remain good law." (NAM Br. at 27.) VTLA has never contended otherwise. Indeed, VTLA pointed out every one of the cases relied upon by NAM in its own brief. (VTLA Opening Br. at 15 n.4.) VTLA's point, which NAM does not confront, is that *Braswell* and its progeny remain good law in a certain context that is not present in this case.

As explained in VTLA's opening brief, this "plainly wrong despite evidence in support" doctrine has usually been used in cases where incontrovertible evidence points to only one conclusion. (*Id.*) For example, if the plaintiff testifies that her light was green at the time of a wreck, but uncontroverted surveillance video shows that the light was red, there would be evidence to support a jury's verdict in favor of the plaintiff. But that verdict would be plainly wrong because it is contradicted by

uncontroverted, undeniable evidence to the contrary. *See, e.g.*, *Whittaker v. Calfee*, 214 Va. 301, 303 (1973) (uncontroverted physical evidence rendered the jury's verdict plainly wrong despite being supported by testimonial evidence). Here, however, the evidence that the trial court, NACCO, and NAM point to as evidence of contributory negligence is neither uncontroverted nor undeniable. Quite the opposite in fact—the trial court agrees that each point could reasonably be resolved in Mr. Evans's favor. So this is not a case where the jury's verdict rests on a thin reed in the face of a gale of damning, undeniable evidence. It rests on a strong foundation that was resolved by the factfinder and is faced with no incontrovertible evidence to the contrary. It thus was not plainly wrong.

Finally, NAM uses the contributory negligence issue as a springboard to ask the Court to "clarify the holding" in *RGR, LLC v. Settle*, 288 Va. 260 (2014). Notably, NAM's request for "clarification"—read: "reconsideration"—includes a request that the Court clarify *RGR*'s duty analysis. (NAM Br. at 29.) Duty is not at issue in this appeal, and so there is no basis for the Court to speak to the question one way or the other. Regarding *RGR*'s contributory negligence analysis, the discussion was based primarily upon a large body of case law concerning vehicular-train collisions, and the obligations of drivers crossing train tracks. *RGR*, 288

Va. at 284-89. There is no corresponding body of lift truck operation case law, and so this case is governed by the standard concepts of contributory negligence and a court's ability to set aside a verdict. *RGR* really did not speak to these more basic concepts because it focused instead on the vehicular-train collision cases, and so there is no basis to clarify anything about *RGR* in this case.

B. Mallett's testimony was admissible and based on an adequate factual foundation.

NACCO and its amici seek to leverage this Court's discussion of expert admissibility in *Holiday Motor Corp. v. Walters*, 292 Va. 461 (2016), and *Hyundai Motor Co. v. Duncan*, 289 Va. 147 (2015), into a regime in which products liability cases are practically impossible to prosecute, no matter their merits. Because this Court did not announce in either of these cases that it was fundamentally changing Virginia law on products liability, VTLA does not read this Court's recent work as being a *sub silentio* reformation of products liability in Virginia. Instead, VTLA respectfully suggests that NACCO and its amici are seeking too much mileage from these cases, and that the circuit court was well within its discretion to admit Mallett's testimony in this case.

1. Federal case law on expert admissibility is inappropriate.

NACCO's amicus the Virginia Association of Defense Attorneys ["VADA"] relies heavily upon federal case law in its discussion of the admissibility of Mallett's testimony. (VADA Br. at 7-9.) The problem with this reliance is that in 2015, in reaction to this Court's having relied upon federal case law on expert admissibility in *Hyundai Motor Co. v. Duncan*, the General Assembly enacted a law stating "nothing in this act, § 8.01-401.2:1, or § 8.01-401.3 shall be construed as a codification of Rule 702 of the Federal Rules of Evidence as presently construed." 2015 Va. Acts ch. 296, 306. In so doing, the General Assembly made clear that Virginia law on expert admissibility is different than the federal standards, and so federal case law applying the federal standard is inapposite. VADA's reliance upon federal case law is thus misplaced.

2. Mallett's testimony was admissible under Virginia law.

First, Mallett was more than qualified to offer expert testimony on lift truck design. He has years of experience working in various lift truck design engineering roles for Caterpillar, one of the nation's largest manufacturers of lift trucks. He was well-familiar with parking brake designs and safety concepts. He was thus perfectly qualified by education and experience to testify about lift truck parking brake design.

Second, his opinion that NACCO's parking brake design was defective was based on an adequate foundation. His opinion was essentially that parking brakes that can be adjusted by operators without tools are much less safe than parking brakes that either require tools to adjust or cannot be adjusted by operators, and that it was reasonably feasible for manufacturers to make the safer kind of brake. Indeed, some manufacturers did just that in 2003 when this truck was manufactured. (JA 924-25.) In other words, the evidence showed that there was a safer, reasonably feasible way to build a mousetrap that was in use when this product was manufactured. Mallett had a factual basis for this opinion, and this opinion is fertile ground for a jury to find that NACCO's failure to use the safer method was negligent.

Nor is Mallett's opinion one that requires extensive testing to verify. As NACCO and its amici trumpet from the rooftops, this parking brake was manufactured according to the applicable minimum standards. And we know that parking brakes manufactured in accordance with these minimum standards are designed to hold on inclines greater than or equal to the incline on which Mr. Evans's lift truck was parked. So that premise needs no laboratory testing because it is baked into the minimum design standards. That said, Mallett did test this parking brake and confirmed that,

when actually engaged, it would hold on a 15% grade. (JA 385-87.) So, it is only if the parking brake has been adjusted to lower the resistance that it will not hold on this degree incline. With no evidence in the record that the parking brake on Mr. Evans's lift truck had intentionally been adjusted to a lower resistance, it was permissible for the jury to conclude that it had been inadvertently or unintentionally adjusted. And it was this ability for inadvertent adjustment that, according to Mallet, made the product unreasonably dangerous.

Mallett's proposed alternative design of a set-screw adjustment mechanism also requires no testing. Set screws are a basic, well known engineering concept, used in everything from automobile manufacturing to bathroom fixtures. By their very nature, set screws require a tool—a screwdriver—to tighten and loosen. Mallett was thus well within his expertise to suggest the use of a set screw as a way to eliminate the flaw in NACCO's design that permitted for inadvertent adjustment. And the jury was within its rights to accept Mallett's testimony that there was a feasible, safer design that more likely than not would have prevented this incident, and to find NACCO negligent on that basis.

The arguments of NACCO and its amici to the contrary are truly startling. For example, in contending that Mallett's opinion had an

insufficient factual basis, the VADA and the NAM point to the fact that this parking brake apparently complied with minimum standards for lift trucks. From this basis, they contend that an expert should not be permitted to give a defect opinion if the product complies with minimum industry standard. This position misreads this Court's prior decisions and leads to undesirable results.

Minimum standards are just that: minimum standards. While compliance with those minimum standards is certainly relevant in a products liability case—as was the case here, where the jury heard about them in detail—there is no authority for the proposition that they are dispositive. To say otherwise would impose a regime of regulatory or industry preemption where as long as the product adheres to minimum standard, there can be no further inquiry. A state's ability to implement its own common law of products liability is thus ceded to regulators or industry groups. *Holiday Motors* says that minimum standards are relevant, and to be sure they are, but it does not support the extreme premise that they are dispositive.

Nor should the law treat them as such. Industry standards are created, unsurprisingly, by the industry. To allow minimum standards to set the upper limit of an expert's testimony would eviscerate one of the main

functions of products liability law—to encourage manufacturers to engage in reasonably safe practices. A products liability law that is slave to minimum standards is a sclerotic products liability law of the lowest common denominator. Even if there is a known, commercially feasible and reasonable, safer design, manufacturers would have no incentive to implement that design so long as their design adhered to the minimum standards. Seat belts and airbags were, at one point, not part of the industry standard for automobiles. But when these safety features became known and commercially reasonable to employ, a healthy products liability law encouraged manufacturers to employ them regardless of industry standards. Experts were not walled off from telling juries about available safety features just because those features had not yet been incorporated into the minimum industry or regulatory standards.

This Court's recent decision in *Holiday Motor Corp.* does not compel a different conclusion. NACCO and its amici focus on the Court's statement in footnote 14 that, to establish a breach of the manufacturer's duty to exercise reasonable care in the design of its products, "a plaintiff must show that the manufacturer failed to meet objective safety standards prevailing at the time the product was made" and that courts should consider whether the product adheres to applicable standards, etc. *Holiday*

Motors, 292 Va. at 478 n.14. NACCO and its amici would have the Court apply that statement in the manner discussed above—that to prevail in a products liability case, the plaintiff must establish a violation of a published minimum standard. Such an application would mark a radical change in Virginia products liability law,[1] and VTLA presumes that this Court does not radically change the law in a footnote.

Rather, VTLA reads this statement in the context of decades of Virginia products liability law, and thus not really saying anything new. "Objective safety standards" is not synonymous with "published minimum standards." Rather, it is a concept that simply ensures that manufacturers are on notice of their obligation to use reasonable care in their product design. Here, the "objective safety standard" in 2003 was for lift trucks to have parking brakes that held under certain conditions. Manufacturers like NACCO were on notice of that obligation. The question then becomes how best to reasonably comply with that obligation. When, as here, there is evidence of a known, feasible and commercially reasonable design that is

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[1] Notably, the Court did not cite any Virginia authority for its assertion that to establish a breach of manufacturer's duty to exercise reasonable care in the design of its products, "a plaintiff must show that the manufacturer failed to meet objective safety standards prevailing at the time the product was made" and that courts should consider whether the product adheres to applicable standards, etc. Instead, the Court relied exclusively upon federal authority. *Holiday Motor Corp.* 292 Va. at 478 n.14 (citing *Redman* and *Alevromagiros*).

more likely to achieve the objective safety standard of a parking brake that holds, an expert is permitted to explain that to the jury and the jury is permitted find that a manufacturer was negligent for failing to implement the safer design.[2]

C. The evidence was sufficient to support the jury's verdict.

NACCO's sufficiency of the evidence assignment of error essentially makes the same arguments that are made with respect to Mallett's testimony—that the absence of published standards calling for a parking brake that requires tools or some other non-passive action to adjust renders Ms. Evans's claim dead on arrival. And the responses are also the same. VTLA does not understand this Court to have ceded Virginia's common law of products liability to a regime of de facto regulatory or industry preemption. Rather, VTLA understands Virginia law still to provide

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[2] NAM focuses some attention on its view of what makes a product merchantable. (NAM Br. at 11.) That question is inapposite here for the simple reason that the jury did not find in the Plaintiff's favor on the breach of warranty claim. The jury's verdict was based solely on the negligence claim. Indeed, the jury's differentiation between the warranty claim and the negligence claim shows a sophisticated, informed understanding of the two different liability theories. Merchantibility focuses more on what the industry custom and common practice was at the time of sale. Negligence, on the other hand, focuses on the reasonableness of the defendant's conduct. A product that is designed just like all of the other products in its class may be merchantable. But if there is a known, safer, commercially reasonable design, it may still be negligent for a manufacturer not to implement that safer design.

a role for juries to determine what is and what is not reasonable under the circumstances in products liability cases. This is not a case, like *Holiday Motors*, where it can be said that no one could reasonably expect the product to be safe in a certain circumstance, *i.e.* a soft-top convertible during a rollover. Rather, everyone agrees that manufacturers of lift trucks were supposed to design parking brakes that hold in certain conditions. The jury question was whether NACCO had acted reasonably in the design of its parking brake, given what was known and feasible at the time. This was a very basic, straightforward products liability case, with sufficient evidence to support the jury's conclusion.

CONCLUSION

This Court should reverse the trial court's judgment and reinstate the jury's verdict.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 10, 2017, the foregoing Amicus Brief was filed electronically via the VACES system with the Supreme Court of Virginia and that three copies of the same were hand delivered to the clerk's office. This same date, a copy was sent via email to all counsel of record, at the email addresses below:

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