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.

REPLY BRIEF OF APPELLANT

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1. NACCO's arguments ignore the standard of review.

Throughout its argument, NACCO misstates or ignores the applicable standard of review. It presents the evidence in the light most favorable to itself, giving itself the benefit of conflicts in the evidence and the inferences to be drawn while largely ignoring Ms. Evans's evidence. When it can't avoid her proof altogether, it presents her evidence as "claims" on appeal while ignoring their underlying record support. NACCO repeats these moves over and over, for issues ranging from whether some lift trucks used parking brakes that weren't operator-adjustable in 2003 (they did, as even NACCO's own evidence showed, JA 924-25; see also 390-91, 393-94), to expert Frederick Mallett's qualifications (which include nearly a decade as a "Lift Truck Design Engineer," JA 1332, though the defense now claims that he's never designed anything), to the fatal events of January 22, 2010.

These efforts to shade the facts can't succeed on appeal, where each issue comes before this Court on a standard of review highly favorable to the Appellant. Ms. Evans challenges the trial court's ruling setting aside the jury's verdict. NACCO challenges the sufficiency of the evidence of defect and failure to warn. On all these issues, the facts are viewed in Ms. Evans's favor. See *Bussey v. E.S.C. Rests., Inc*., 270 Va. 531, 535, 536 n.* (2005) (motion to set aside the verdict); *Morgen Indus. v. Vaughn*, 252 Va. 60, 62 (1996) (sufficiency of the evidence).

Similarly, NACCO's challenges to the admission of Mallett's testimony will be reviewed for an abuse of discretion, which is a deferential standard of review. For that deference to mean anything, the evidence must be viewed at least evenhandedly, if not in a manner charitable to the trial court's ruling. In *Dagner v. Anderson*, 274 Va. 678, 681 (2007), for example, the Court viewed the evidence in the light most favorable to the prevailing party (and the trial court's decision) when reviewing a challenge to the admission of expert testimony.

2. Reasonable jurors could differ about whether Evans was contributorily negligent.

NACCO's struggles with the facts are most pronounced in its treatment of contributory negligence—an affirmative defense, for which NACCO bears the burden of proof. See *RGR, LLC v. Settle*, 288 Va. 260, 283-84 (2014). This is to be expected. The central issue on appeal is the reasonableness of Evans's behavior. The trial court resolved this factual issue as a matter of law, while acknowledging that reasonable jurors could dispute any of Evans's individual actions. JA 224. Thus, even the trial court recognized that these were legitimate factual disputes. NACCO tries to smooth them over in its own favor.

To take just a few examples: The Defendant repeatedly claims that Evans "crashed" the lift truck into a tractor trailer, at one point even asserting that this claim is "undisputed." Br. 17, 17 n.6, 44. The Defendant and the trial court

speculate that this somehow "disabled" the truck, rendering it unsafe to drive. But NACCO never cites any record support for its claim that the lift truck suffered a violent collision. That's because it didn't. One of the truck's 22-inch tires got stuck in an 11-inch gap between the loading dock and the trailer, after Evans had driven up a ramp. See Opening Br. 18. Defense witness Julian Lindsey inspected the truck after the accident, and he did not see any damage. JA 737. NACCO also argues (again without record support) that the stuck lift truck didn't pose any immediate risk to Evans. Br. 45-46. But as defense expert Walter Girardi explained, with the dock plate retracted, the tractor trailer was uncoupled from the dock ramp; this was a "serious situation," because the trailer could move away from the dock. JA 1086, 1089. And while NACCO repeatedly accuses Ms. Evans of speculating, it forgets that, as the defendant, it bore the burden of proof on contributory negligence. The absence of evidence cuts against NACCO, not Ms. Evans.

Ultimately, NACCO insists that it was negligent as a matter of law for Evans to move behind the lift truck. Br. 49. But the express purpose of the parking brake was to hold the lift truck on an incline, and there is nothing negligent about trusting a safety device to do its job. It's no exaggeration to say that millions of people do so every day.

NACCO's contributory-negligence arguments also forget that it was the Defendant's burden to prove both that Evans was negligent and that his negligence

proximately caused his death. NACCO recites a litany of purportedly negligent acts, always viewing the facts in its own favor, but never shows why each act must be considered the proximate cause of Evans's death as a matter of law. For example, NACCO insists that Evans's failure to complete his formal training proximately caused his death, as if no licensed driver had ever been involved in an accident. In support, it claims that International Paper put its drivers through two weeks of full-time training. But as defense witness Stephen Grandstaff explained, it took just one day of training for a lift truck operator to receive his certification. JA 1246-47. As to the failure to notify a supervisor, NACCO never called a supervisor to testify about what he or she would have done. There was no basis to conclude, as a matter of law, that the presence of a supervisor would have changed the outcome. On this factual record, reasonable people could disagree.

3. NACCO misreads Mallett's defect opinion.

Mallett explained at trial that the parking brake was unreasonably dangerous because it could be adjusted or even inadvertently disabled by an operator—not a maintenance worker—without any tools. JA 344-48. NACCO and its NAM amici now try to reframe his conclusion as a more limited complaint that "the over-center, operator-adjustable park brake was unreasonably dangerous because it was

operator-adjustable—period." Br. 10 (double emphasis in original).[1] Recasting Mallett's conclusion is central to their argument, because it allows them to dodge his opinions about the safer alternative "set screw" design, which is adjustable only with the proper tools.

The defense argument is a straw man. Mallett clearly stated his opinion at trial, and it involved tools:

> Q. And your opinion in this case is the operator-adjustable park brakes that don't require mechanics, *don't require tools*, are dangerous, defective, unsafe, and caused this tragedy. Correct?
>
> A. That's correct.

JA 418-19 (emphasis added). This exchange came during cross-examination, so NACCO understood during trial that Mallett was criticizing parking brakes that could be adjusted without tools. That makes sense. Mallett discussed the use of tools a dozen times in his testimony, often in response to NACCO's questions. JA 392, 394, 399-400, 417, 418, 424-25, 427, 428, 441, 473, 474, 506, 507.

What is more, when NACCO asked Mallett about his safer alternative designs, it defined "operator-adjustable" to mean "operator-adjustable without the use of tools":

> Q. . . . Let's talk about a little bit about your alternative designs. Operator-adjustable, operator-adjustable, not mechanic-

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[1] The VADA states Mallett's opinion more accurately: "[T]he design…was unreasonably dangerous because the operator to adjust the tension *without using tools*." VADA Br. 13 (emphasis added).

> adjustable, so when I say operator-adjustable unless I say otherwise, I am talking about that operators can adjust, are still being used on Class IV and Class V trucks today that are rolling off production lines. Isn't that correct?
>
> MR. FISHER: Your Honor, I would just ask for a point of clarification. When we say "operator adjustable," are we talking about the handle adjustment or an adjustment that you use with a screwdriver or tools?
>
> MR. GREY: Other than tools.
>
> MR. FISHER: So just handle, thank you.
>
> Mr. GREY: Other than tools.
>
> BY MR. GREY:
>
> Q. Did you understand that when I asked that?
>
> A. I do. To the best of my knowledge, none of the major manufacturers in North America are still using that design.

JA 424-25. NACCO now cites snippets of the ensuing discussion of alternative designs as evidence that Mallett's opinion had nothing to do with the use of tools. Br. 10 & n.4 (citing, *inter alia,* JA 453, 454-55, 465). That reading is unreasonable. NACCO itself limited the discussion to parking brakes that could be adjusted without tools, because—as it knew, JA 418-19—the use of tools was a central part of Mallett's opinion.

In support of its limited reading, NACCO claims: "Mallett plainly stated this theory on direct examination: 'The opinion is that the operator should not be

required to make adjustments.' (JA 398.)" Br. 10. But NACCO plucks this line out of context. It's not Mallett's defect theory. It's his answer to a different question:

> Q. Do you have an opinion as to whether or not a maintenance technician may or may not be available as to whether or not that is reasonable for a designer to incorporate an adjustable handle?
>
> A. I do have an opinion.
>
> Q. All right. What is that opinion?
>
> A. The opinion is that the operator should not be required to make adjustments.

JA 398. During this exchange, Mallett was explaining his "other opinions in this case," JA 397, 121 pages into his 124-page direct examination. He was hardly offering his central thesis.

NACCO also mistakenly insists that Mallett never once mentioned the possibility of inadvertent adjustment. Br. 11. In fact, Mallett explained that the parking brake's "design was defective and unreasonably dangerous in that it failed to eliminate misuse by the operator, intended *or unintended* misuse." JA 344-45 (emphasis added). The "misuse" that he was talking about was use "with the brake not properly adjusted." JA 356. One of the primary definitions of "inadvertent" is "unintentional." E.g., Definition of INADVERTENT, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/inadvertent. Thus, Mallett criticized the parking brake because it could be inadvertently disabled.

NACCO spends so much time wrestling straw men that it never gets around to Mallett's actual theory. As a result, it never comes to grips with his safer alternative set-screw design, which would have prevented an operator from adjusting the parking brake without tools.[2] It's certainly true that the set-screw could itself be intentionally disabled with the proper tools. But so could any system on the lift truck—or, for that matter, any system on any machine ever built. Requiring the use of tools eliminates the possibility of inadvertent adjustment, and deters operators from trying to adjust the parking brake themselves rather than tagging it out for service. In Mallett's opinion, this would have prevented the accident. JA 392-93, 517; see also JA 390-91.

4. Mallett was qualified to offer expert testimony.

With four decades of industry experience, Mallett was qualified to offer expert testimony about the lift truck's design. The defense disagrees, focusing on his purported lack of "any practical or technical design experience." VADA Br. 13. Our opening brief summarizes Mallett's qualifications. Contrary to the defense claims, he spent seven years at Caterpillar as a "Lift Truck Design Engineer," and

[2] The set-screw design was put into production by Mitsubishi-Caterpillar. JA 391-92. As such, it also qualifies as evidence of an actual industry practice, which is one way of proving reasonable consumer expectations. *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1990).

another four as a "Field Test Engineer" working with prototype lift trucks.[3] JA 279-82, 1332. He then served as a "Product Development Engineer" for five years before moving on to sales and managerial roles. JA 1331-32. Mallett supervised Mitsubishi-Caterpillar's "product development design and test" group; the company's engineers responsible for regulatory compliance reported to him. JA 293. He participated in, and oversaw, the engineering of future lift-truck products, including parking brakes. JA 294. Mallett was also the project leader and one of the chief engineers in charge of the design process for Mitsubishi-Caterpillar's warehouse product and market development group from 2002-06. JA 296-98, 1332. NACCO's claim that he had "no 'expertise in design or redesign,'" Br. 1, is not a fair summary of his credentials.

In fact, Mallett's supervisory job responsibilities later in his career mirrored those of defense expert David Couch, who was the lead design engineer for the subject forklift. JA 759-60. Couch, like Mallett, served in engineering-management and new-product-development roles. JA 755, 759, 769. Like Mallett, he oversaw the work of design engineers. JA 765-66. On cross-examination, Couch was forced to "concede" some of the very same points that the defense now tries to raise against Mallett. Compare JA 303-06 with 879-880. Neither, for example, was the

[3] Mallett also spent three years designing gas turbines for the aviation industry before that. JA 278, 1332.

releasing engineer on a parking brake. That's not surprising, let alone damning. Industrial design and engineering at leading multinational manufacturers is a collaborative process, as both Couch and Mallett explained. JA 297-99, 303-04, 765-767. The engineers who led that process are qualified to offer expert testimony about it.

5. Mallett's opinion was supported by an adequate foundation.

The defense briefs evidence some confusion about the foundation for Mallett's opinion. The NAM amici apparently fault Mallett for not performing a risk-utility analysis, NAM Br. 12, but he explicitly analyzed the risks and limited benefits of the parking brake's design and concluded that it was unreasonably dangerous. JA 344-50, 397, 508. Although the defense claims that Mallett did "no testing or analysis," NAM Br. 23, Mallett described the testing that he performed on the lift truck, JA 302, 386-87, 411-12, and walked the jury through his analysis, JA 344-51, 365-401. Contrary to the VADA's claims, the wires to the parking-brake alarm were not cut at the time of the January 22, 2010, accident. As Girardi explained, they were cut sometime between June 9, 2010, and October 29, 2013—the date of Mallett's first inspection. JA 997, 1024-26, 1113. Mallett testified that, by the time of his first inspection, the wires had been cut, and that *if they had been cut at the time of the accident*, the truck should not have been returned to service. JA 302, 494-95. We know from Girardi's testimony that this was not the case.

Far from conceding that he knew nothing about causation, as the defense argues, Mallett considered and rejected other potential causes for the accident. JA 388-90, 395, 516. Among other things, he considered the service history of the lift truck. JA 489. While the hydraulic *service* brake was leaking fluid before the accident, as the VADA notes, that had no bearing on whether the separate mechanical *parking* brake would function. JA 510, 1093-94, 1142-43. Both Mallett and defense expert Girardi would have expected VBS to test the parking brake before putting the lift truck back in service. JA 510, 1078-79, 1145. And despite the VADA's speculation that Evans was the first person to use the lift truck when it came back from service, Mallett had no reason to think that the first- and second-shift operators didn't use the lift truck before Evans. JA 509-10.

6. The defense overreads *Holiday Motor Corp. v. Walters,* 292 Va. 461 (2016).

On the defense theory of the case, a defendant avoids products liability so long as it meets "the minimum standards for putting [a] product on the market[.]" NAM Br. 11. According to the defense, where government or industry standards exist, "an expert should not be permitted to proffer his *ipse dixit*, subjective opinion that the industry standards are inadequate." *Id*. at 15-16; see also Br. 27-28. That's not what *Holiday Motor Corp. v. Walters*, 292 Va. 461 (2016), says and it's not the law.

Taking the latter point first: As a matter of black-letter law, compliance with government or industry standards generally is not conclusive proof that a products-liability defendant has met the standard of care.[4] Likewise, in Virginia, "evidence of industry custom does not establish conclusively that due care was exercised," though it can be conclusive under certain circumstances.[5] Adopting the defense position would allow manufacturers to set their own standards of care, to the detriment of consumers. Manufacturers are not like doctors, lawyers, or other members of the learned professions. They have not sworn oaths to protect the public, they don't have fiduciary relationships with their clients, and they are not governed by professional codes of ethics. They exist solely to maximize their own profit. If manufacturers are allowed to set their own standards of care, they will set them at a level that minimizes their own liability and maximizes the danger faced by consumers.

That's why *Walters* and its Fourth Circuit predecessors make room for reasonable consumer expectations as a test of defect. Reasonable consumer

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[4] *Restatement (Third) of Torts: Products Liability* § 4(b); David G. Owen, *Products Liability Law* 91, 382-87, 392-93 (3d ed. 2015); 3-18 Frumer, Friedman & Sklaren, *Products Liability* §§ 18.04, 18.05.

[5] *Turner v. Manning, Maxwell & Moore, Inc*., 216 Va. 245, 251 (1975); see also *Reed v. Carlyle & Martin, Inc*., 214 Va. 592, 595 (1974) ("[T]he existence of a custom or usage cannot excuse conduct which is otherwise negligent where, as here, the custom or usage itself is not 'reasonably safe or adequate for its purpose and occasion.'").

expectations provide a backstop when government or industry standards either don't exist or fall below the levels that society deems appropriate. NACCO tries to defang this test by defining the relevant "consumer" as an industrial commercial purchaser. Br. 30-31. It is mistaken. "As for on-the-job injuries, the relevant consumer is the injured employee, not the employer who purchased the product for use on its premises." 2-11 Frumer, Friedman & Sklaren, *Products Liability* § 11.03[6][c][iv] (discussing Illinois law). The injured employee, after all, is the person whom products-liability law is there to protect. Finally, if *Walters* were really so critical as the defense contends, NACCO should have brought it to the trial court's attention. The decision came down before the trial court entered its Final Order. If *Walters* controls this case, then it was only fair to give the trial court an opportunity to consider it in the first instance—especially with respect to its discretionary rulings about Mallett's testimony.

7. The trial court correctly found that Ms. Evans had presented sufficient evidence of her failure-to-warn claim and sent that claim to the jury.

NACCO's argument in favor of Assignment of Cross-Error 3 misreads the record. During argument on NACCO's motion to strike, Plaintiff's counsel Brent Brown explained Ms. Evans's causation evidence. JA 692-93. Plaintiff's counsel Edward Fisher argued a heeding presumption. JA 695. The Circuit Court accepted

"Mr. Brown's argument" and denied NACCO's motion on that basis, not the heeding presumption. JA 702.

NACCO ignores the trial court's actual ruling and seizes on Mr. Fisher's argument, which it takes as a concession that Ms. Evans had no evidence of causation. Br. 38. The trial court disagreed, repeatedly rejecting NACCO's attempts to cast the argument as a concession. JA 229, 702, 1279. And rightly so. Far from abandoning his case, Mr. Fisher simply pointed out that there was no direct evidence of causation because Evans was no longer alive to tell his side of the story (and even if he were, his account would be speculative). JA 695. This Court recently made a similar observation while finding that the evidence of causation was sufficient to sustain a jury verdict. *Ford Motor Co. v. Boomer*, 285 Va. 141, 160 (2013) ("In his *de bene esse* deposition, Lokey was never asked if his behavior would have been changed had he known that he was inhaling a potentially fatal substance. Lokey, deceased by the time of trial, was obviously unavailable for further questioning.") (emphasis in original). It wasn't a concession there, and it's not one here, either.

NACCO also mistakenly claims that the failure-to-warn claim was never submitted to the jury. Br. 38-39. To the contrary, the trial court denied the Defendant's motions to strike. JA 702, 1249. It instructed the jury on the failure-to-warn claim. JA 1258. And it sent that claim to the jury. Read as a whole, the jury

charge defines negligent design to include negligently designed warnings. JA 1251-53, 1258, 1260, 1263, 1265-67. Any other reading would render jury instruction 15 (JA 1258) a nullity, in violation of the surplusage canon.[6] See, e.g., *Idoux v. Estate of Helou*, 279 Va. 548, 554 (2010); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012). *Campbell County v. Royal*, 283 Va. 4 (2012), on which NACCO relies, is inapposite. There, the trial court did not instruct the jury on inverse condemnation, and suggested that it would not have given such an instruction if requested because it would not have been supported by the evidence. *Id*. at 24-26. Here, by contrast, the trial court expressly ruled that Ms. Evans had presented sufficient evidence, and it instructed the jury on her failure-to-warn theory. JA 702, 1249, 1258.

Conclusion

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

/s/ James J. O'Keeffe, IV
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[6] Assignment of Cross-Error 3's very existence undercuts NACCO's argument. If the failure-to-warn claim had not been submitted to the jury, as NACCO claims, then that Assignment would be moot. NACCO has no answer to this point beyond claiming that it assigned a cross-error "out of an abundance of caution." Br. 7 n.2.

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I certify that on this 10th day of July, 2017, pursuant to Rules 5:26 and 5:32, three paper copies of this Reply Brief were hand-filed with the Clerk of the Supreme Court of Virginia, and electronic copies of the Brief were filed via VACES. On the same day, copies were served by U.S. Mail and email on:

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