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.

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

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TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Statement of Amicus Interest 1

Assignments of Error and Cross-Error 2

Nature of the Case and Material Proceedings 2

Statement of Facts 2

Argument 2

A. Standard of Review 2

B. Discussion 3

1. The circuit court's seven points of contributory negligence do not support its decision to vacate the jury's verdict 3

2. The trial by jury is a historical and meaningful feature of our civil justice system, and was not respected by the circuit court's decision 12

Conclusion 17

Certificate

TABLE OF AUTHORITIES

Cases

Braswell v. Va. Elec. Co.,
162 Va. 27 (1934) 15

Bussey v. E.S.C. Rests., Inc.,
270 Va. 531 (2005) 2, 3

CaterCorp, Inc. v. Catering Concepts, Inc.,
246 Va. 22 (1993) 14

Early v. Mathena,
203 Va. 330 (1962) 15

Goins v. Wendy's Int'l, Inc.,
242 Va. 333 (1991) 5

Heinrich Schepers GmbH & Co., KG v. Whitaker,
280 Va. 507 (2010) 12

Holiday Motors Corp. v. Walters,
292 Va. 461 (2016) 16

Hyundai Motor Corp. v. Duncan,
289 Va. 147 (2015) 16

Meade v. Saunders,
151 Va. 636 (1928) 6

Noland v. Fowler,
179 Va. 19 (1942) 15

Rascher v. Friend,
279 Va. 370 (2010) 14

Renner v. Stafford,
245 Va. 351 (1993) 14

RGR, LLC v. Settle,
288 Va. 260 (2014) 12

Sawyer v. Comerci,
264 Va. 68 (2002) 6

Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship,
253 Va. 93 (1997) 13

Stockbridge v. Gemini Air Cargo, Inc.,
269 Va. 609 (2005) 13

Whittaker v. Calfee,
214 Va. 301 (1973) 15

Rules and Statutes

29 C.F.R. § 1910.178(m)(5)(ii) 9

VA. CODE § 8.01-336(A) 12

VA. CODE § 8.01-430 2

Constitutional Amendments

VA. CONST. art. I, § 11 12

INTRODUCTION

The circuit court's ruling that the jury was "plainly wrong" in failing to find the plaintiff contributorily negligent is both intrinsically and extrinsically troubling. It essentially finds contributory negligence in the case somewhere. But it fails to reconcile the conduct the court deemed negligent with basic principles of proximate causation, concurring negligence, and the ability of reasonable people to come to differing conclusions. The court's analysis is also troubling insofar as it is emblematic of a perceived recent trend of diminishing the factfinder's portfolio in favor of an enlargement of the role of the trial judge in products liability cases. The Virginia Trial Lawyers Association thus files this brief *amicus curiae* urging the Court both to correct the clear error of the trial court's analysis and to make the broader point that jury verdicts still have independent salience in the Commonwealth.

STATEMENT OF AMICUS INTEREST

The VTLA is an organization of over twenty-five hundred Virginia attorneys dedicated to promoting professionalism within the trial bar, enhancing the competence of trial lawyers, protecting and preserving individual liberties and access to justice, and supporting an efficient and constitutionally sound judicial system.

This appeal presents an issue of fundamental importance to Virginia law: the role of the civil jury. The Court's resolution of this case implicates not only the rights of the parties to this case, but also the rights of litigants and the nature of trial practice throughout the Commonwealth.

ASSIGNMENTS OF ERROR AND CROSS-ERROR

VTLA adopts the parties' Assignments of Error and Cross-Error.[1]

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

VTLA adopts Ms. Evans's statement of the nature of the case and material proceedings.

STATEMENT OF FACTS

VTLA adopts Ms. Evans's statement of facts.

ARGUMENT

A. Standard of Review

A trial court may set aside a jury's verdict only if it is plainly wrong or without evidence to support it. *Bussey v. E.S.C. Rests., Inc.*, 270 Va. 531, 534 (2005) (reversing circuit court for setting aside a plaintiff's verdict on the basis of contributory negligence as a matter of law); VA. CODE § 8.01-430. The jury's verdict is entitled to "the utmost deference" and "the trial

[1] VTLA will respond to NACCO's arguments on cross-error in its reply brief if necessary.

court may not substitute its conclusion for that of the jury merely because the judge disagrees with the result." *Bussey*, 270 Va. at 534.

If a trial court does set aside a jury's verdict, then on appeal this Court must reinstate the verdict "if credible evidence supports the verdict." *Id.* And in reviewing the evidence, the Court must "accord the recipient of the verdict the benefit of all substantial conflicts of evidence, and all fair inferences that may be drawn from the evidence." *Id.* at 534-35.

B. Discussion

1. The circuit court's seven points of contributory negligence do not support its decision to vacate the jury's verdict.

The circuit court's decision to set aside the jury's verdict is intrinsically flawed. The court's analysis is devoted to highlighting seven points that the court deems to be proof of Mr. Evans' contributory negligence. The court concedes that it cannot say that the jury's resolution of any one of these specific factual questions was unreasonable or plainly wrong—"the jury could have possibly differed about the reasonableness of a specific undertaking in the chain of events leading to the accident." (JA 224.) Nevertheless, the court essentially reasons that the totality of the circumstances pointed to a sort of contributory negligence in the gestalt. This analysis is, respectfully, illogical: if each of the seven points could reasonably be resolved in the Plaintiff's favor, then all seven could

reasonably be resolved in the Plaintiff's favor. In this section, VTLA briefly examines each of the seven points and shows why the point does not lead to the court's conclusion.

First, the court notes that Mr. Evans operated the lift truck "with full knowledge that he was neither certified nor fully trained to do so, and had in fact unilaterally elected to terminate his training regarding the safe and proper use of lift trucks." (JA 221.) This criticism does not support the court's conclusion because it lacks any connection with proximate causation. The court never shows how certification or "full" training would have resulted in Mr. Evans doing anything differently or any different result in this case.

Second, the court notes that Mr. Evans never discovered any defect in the park brake before or during operation of the lift truck. (JA 222.) It is unclear what the court is getting at here. If the court is accusing Mr. Evans of not performing a pre-operation inspection, that accusation is not conclusively supported by the record. The record suggests that Mr. Evans was trained by Mr. Lindsay, and that Mr. Lindsay typically would not fill out any paperwork after a pre-operation inspection unless he found something wrong. (JA 735.) Thus, in the absence of any conclusive evidence that Mr. Evans did not conduct a pre-operation inspection, the permissible inference

for the jury was that he did conduct a pre-operation inspection, found nothing wrong, and thus did not document anything per his training.

On the other hand, if the court is saying that Mr. Evans would have discovered the defect had he done some kind of inspection, that point certainly is not supported by the court's analysis. Among the various analytical flaws with this point, the most glaring is that it assumes that Mr. Evans could have detected the defect before the incident in question. But that assumes that Mr. Evans could have, and indeed should have, tested the park brake under the exact unique circumstances in existence when it failed and killed him. This Court's case law on accident reconstruction is premised upon the idea that it is often impossible to create the exact same circumstances even after we know what happened, much less in advance of an unforeseen event happening.

The court's point also assumes that even if Mr. Evans had been able to create the exact kinds of pressures and forces at play when the brake failed, the brake would have in fact failed. This lift truck had been in use for quite some time. But absence of prior failures is not absence of a defect for the very reason that machines react differently under different circumstances. *See, e.g.*, *Goins v. Wendy's Int'l, Inc.*, 242 Va. 333, 335 (1991). There is no indisputable basis to conclude that Mr. Evans would

have discovered this defect even if he had done some sort of additional inspection. Thus, to the extent that the court finds fault with Mr. Evans's not discovering the defect earlier, nothing in the court's Letter Opinion explains how he could have discovered the defect or that the failure to do a pre-operation inspection was a proximate cause of his death.

Third, the court notes that Mr. Evans drove the lift truck into a gap, which "effectively disabled the lift truck." In essence, the court appears to be saying that if Mr. Evans had not driven the truck into the gap, then the chain of events that culminated in his death would never have happened. The problem here is that the court overlooks the longstanding principle that contributory negligence bars recovery only when it concurs with the defendant's negligence rather than remotely precedes it. *See, e.g.*, *Sawyer v. Comerci*, 264 Va. 68, 75 (2002) ("[I]n order for contributory negligence to bar a plaintiff's recovery in a medical negligence action, the plaintiff's negligence must be concurrent with the defendant's negligence."); *Meade v. Saunders*, 151 Va. 636, 643 (1928) ("If the continuing negligence of a plaintiff, up to the time of the injury, concurs with the negligence of the defendant in causing the injury, the plaintiff cannot recover.").

So, if someone is acting like a fool and breaks his arm, the doctor who is subsequently negligent in the repair of the fracture cannot point to

the plaintiff's own foolishness as contributory negligence. Or assume a driver is speeding, loses control, runs into a curb and gets a flat tire. When the driver pulls over to change the tire, the car falls on him and crushes him because the jack was defective. The jack manufacturer cannot point to the driver's speeding as contributory negligence because it was not concurrent with the jack's failure, and was instead already baked into the circumstances.

That is exactly the situation in the present case. Assuming, *arguendo*, that it was negligent for Mr. Evans to drive into the gap and get stuck, that act of negligence was over and done with well before the park brake failed. It therefore was not concurrent with NACCO's causative negligence, and cannot bar Ms. Evans's claim against NACCO.

Fourth, the court notes that after getting stuck, Mr. Evans did not report the incident to a supervisor or get supervisory assistance. Again, this observation is essentially a *non sequitur* because the court never explains how this alleged negligence proximately caused the incident that killed Mr. Evans. The court does not identify any evidence—and certainly no uncontradicted evidence that the jury was required to accept as true—that reporting the incident to a supervisor or getting supervisory assistance

would have resulted in any different chain of events, or that a supervisor would have discovered the park brake's inability to hold.

Fifth, the court observes that, after getting towed, Mr. Evans parked his lift truck on an incline as opposed to level ground a short distance away. This assumes that Mr. Evans and Mr. Lacy had a lot of room to maneuver. (*But see* JA 1315-28 (Pltfs Ex. 36).) But even if they did, the court's point here is the essence of 20-20 hindsight. In just about every negligence case it can be said that either the plaintiff or the defendant, or both, could have acted with greater care to avoid this whole mess. These are common themes in closing arguments to juries. It is quintessentially the jury's job to determine whether—under the circumstances at the time, as opposed to using hindsight—the failure to act with greater care rises to the level of a failure to act with ordinary care.

Here, even assuming that in hindsight Mr. Evans could have used greater care, the court points to absolutely no evidence that would compel a jury to conclude that parking the lift truck on an incline as opposed to level ground was a failure to use ordinary care. Indeed, in footnote 11 of the Letter Opinion the court recognizes the regulations indicating that these lift trucks are supposed to be able to be parked on an incline. How could it possibly be negligent, as a matter of law, for an operator to use a piece of

equipment under circumstances in which the piece of equipment is meant to operate? Perhaps the jury could come to that conclusion, but there is no basis for a court to find contributory negligence here as a matter of law.

Sixth, the court claims that Mr. Evans ignored an "explicit and prominently displayed" warning and left the "unattended" lift truck without lowering the clamp attachment or chocking the wheels. There are several problems with this accusation. It assumes that chocks were even available to Mr. Evans, an assumption that is contradicted by the evidence, (JA 645), and which even the circuit court recognizes to be in dispute. (JA 223 n.12.) It also assumes that the lift truck was "unattended" as that term is used in the industry. *See* 29 C.F.R. § 1910.178(m)(5)(ii) (defining "unattended" to mean when the operator is more than 25 feet away or the truck is not in the operator's view). But the lift truck was not "unattended." Mr. Evans was right behind the truck trying to remove the tow chain. The accusation also assumes that lowering the clamp attachment on the <u>front</u> of the truck would have prevented the truck from rolling <u>backwards</u>.[2] A reasonable jury could conclude that lowering the clamp on the front of the vehicle might prevent it from rolling forward toward the clamp attachment, but not backward.

[2] It also ignores that there was evidence in the record that operators were instructed not to lower the clamp. (JA 644-45.)

Finally, the court's accusation ignores that whether a warning is adequate is itself a question for the jury. Indeed, there is an entire model jury instruction devoted to this question. VMJI (Civil) 34.150. Here, the jury easily and reasonably could have concluded that the warning on this particular truck, (JA 1751), was so obscured, obliterated, and buried that it was not an adequate warning and that a reasonable person in Mr. Evans's position would have paid it no mind. The court's sixth point simply makes too many assumptions and invades too far into the jury's province to qualify as a basis to find contributory negligence as a matter of law.

Seventh, the court notes that Mr. Evans "placed himself on the downhill side of his unattended lift truck." This point suffers many of the flaws discussed above. It again insinuates that the truck was "unattended" when in fact it was not. It again conflates the ability, in hindsight, to have used greater care with the duty to use ordinary care at the time. And then, on top of that, the court's seventh point assumes that Mr. Evans had any other option. He had been towed downhill, so the tow chain was attached to the downhill side of the truck. Someone had to remove the tow chain, and the only way to do so was to get on the downhill side of the truck. The whole point of this case is that these trucks are supposed to be able to be parked on an incline greater than or equal to the incline where Mr. Evans

had parked his truck. That is exactly what the jury found. The jury could thus easily and reasonably conclude that it was not unreasonably dangerous for Mr. Evans to assume that the truck's brake would hold under circumstances in which it should have held and while he was just trying to do his job. Again, the court's seventh point does not support its conclusion of contributory negligence as a matter of law.

Not a single one of the court's "seven points of negligence," standing alone, would justify setting aside this jury's verdict, and the court essentially concedes as much. Thus, the court is left with a "sum of the parts" type of reasoning. But the reasoning itself also does not hold up. If this jury could resolve every single fact in question in the plaintiff's favor—and where there is no reason to believe that this was an unreasonable jury—it cannot follow that a reasonable jury must nevertheless resolve the totality of the circumstances against the plaintiff. The circuit court may very well be convinced that Mr. Evans was contributorily negligent. But the court's analysis of why every other rational person must see it the same way is not convincing. Thus, because a reasonable jury could, and did, resolve the question of contributory negligence in Ms. Evans's favor, the court's judgment should be vacated and judgment entered on the jury's verdict.

2. The trial by jury is a historical and meaningful feature of our civil justice system, and was not respected by the circuit court's decision.

This case also presents the Court with an opportunity to reinforce a broader point: the civil jury remains a central feature of our system, and courts should not read too much into recent decisions by this Court that overturned jury verdicts for case-specific reasons. Virginia law is full of broad exhortations extolling the virtues of the civil jury. The Constitution admonishes that "in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." *See, e.g.*, *Heinrich Schepers GmbH & Co., KG v. Whitaker*, 280 Va. 507, 512 n.2 (2010) (quoting VA. CONST. art. I, § 11); *see also* VA. CODE § 8.01-336(A) ("The right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by statutes thereof shall be preserved inviolate to the parties.") This Court has also often observed that the recipient of a jury's verdict approved by the trial court occupies the "most favored position known to the law." *See, e.g.*, *RGR, LLC v. Settle*, 288 Va. 260, 283 (2014).

The problem with such lofty language is that it has no force on its own. Saying that the jury trial is sacred or that the recipient of a jury verdict is in a good position means nothing if judges are nevertheless free to do their own "justice" with impunity, or if the jury's work is seen more as a

suggestion than as a conclusion. The question is always whether courts will enforce these broad pronouncements as meaningful principles of limitation.

Historically, this Court has never diminished the trial judge's traditional role in policing the outer bounds of litigation and ensuring that only true and meaningful disputes of fact are put to the jury. But this Court has also, from time to time, reminded the trial courts that when deciding whether an issue presents a dispute of fact or a question of law, courts should always err on the side of, and resolve any doubt in favor of, seeing a dispute of fact that must be resolved by a jury.

For example, this Court had a line of cases, known colloquially in the bar as the "short circuiting cases," in which the Court repeatedly admonished and reversed trial courts for making "matter of law" rulings that took legitimate questions of fact away from the factfinder. *See, e.g.*, *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 618 (2005) (admonishing and reversing a trial court for using summary judgment to "short-circuit litigation by deciding disputed facts without permitting the parties to reach a trial on the merits"); *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93, 95 (1997) (admonishing and reversing trial court for granting motion to strike at the

conclusion of opening statements); *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993) ("This is another case in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits."); *Renner v. Stafford*, 245 Va. 351, 352 (1993) ("With increasing frequency, we are confronted with appeals of cases in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits. This is such a case.")[3] Although each of these cases was decided on its specific facts, it was clear that the opinions were also drafted to send a broader message. Questions that the trial court may see as one-sided are often nevertheless questions of fact that can only be decided by the factfinder. Thus, whenever there is any doubt about which side of the question-of-fact versus question-of-law line an issue might fall on, in Virginia our tradition is to permit the factfinder to resolve the question.

The circuit court's decision in this case does not respect that tradition. The court's September 2, 2016 Letter Opinion begins its analysis with a tip

[3] *See also Rascher v. Friend*, 279 Va. 370, 377 (2010) ("[W]e take the opportunity to again stress the principle of tort litigation that issues of negligence and proximate cause ordinarily are questions of fact for the jury to determine, rather than questions to be determined by the trial court as a matter of law.").

of the hat to the notion that setting aside a jury verdict is an extraordinary exercise of judicial power. But then, in a footnote, the court immediately creates room for itself to exercise this extraordinary power by suggesting that "it is relevant to note that a trial court can determine that a verdict is 'plainly wrong' even if there is some evidence to support it." (JA 220 n.3 (citing *Braswell v. Va. Elec. Co.*, 162 Va. 27, 38-39 (1934)).[4]

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[4] It is worth noting that the ability to declare a jury's verdict plainly wrong despite there being evidence to support it usually arises in situations where there is evidence, separate and apart from the evidence supporting the jury's verdict, that so clearly preponderates against the jury's verdict as to render the evidence supporting the verdict essentially incredible. *See, e.g.*, *Early v. Mathena*, 203 Va. 330, 334-35 (1962) (reversing a jury's verdict as plainly wrong because the uncontroverted physical evidence clearly and dispositively preponderated against the evidence supporting the jury's verdict); *Noland v. Fowler*, 179 Va. 19, 23 (1942) ("[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."). The circuit court in this case pointed to no independent, uncontrovertible evidence that clearly preponderated over the evidence that the jury resolved in the plaintiff's favor. Rather, the court simply disagreed with how the jury resolved that evidence. It is also worth noting that the circuit court had to look all the way back to 1934 to find its authority to deem a verdict plainly wrong despite being supported by evidence. Indeed, the most recent case that VTLA can find endorsing and relying upon this proposition is *Whittaker v. Calfee*, 214 Va. 301, 303 (1973), which, again, was a case where uncontroverted physical evidence rendered the jury's verdict plainly wrong despite being supported by some testimonial evidence. So, it certainly cannot be said that this "plainly wrong despite being supported by evidence" doctrine is a robust aspect of modern Virginia jurisprudence.

It is this wriggle room to deem a verdict "plainly wrong" even if supported by evidence that the court ultimately uses to set the jury's verdict aside. VTLA's concern is that this view of a court's ability to disregard the jury's work was erroneously influenced by a perceived trend in recent decisions from this Court. There can be no denying that it has been a rough couple of years for prevailing plaintiffs in products liability cases in Virginia. *See, e.g.*, *Holiday Motors Corp. v. Walters*, 292 Va. 461 (2016) (vacating jury verdict in favor of the plaintiff in products liability case); *Hyundai Motor Corp. v. Duncan*, 289 Va. 147 (2015) (same). Taken together, one might be inclined to see a trend. But VTLA does not read this Court's recent work in products liability cases as being intended to send a broader message or announce any fundamental change in the law, and thus urges the Court to use this opportunity to clear up any misunderstandings among the bench and bar. Both *Holiday Motors* and *Hyundai* were decided on their own, unique factual records. Neither opinion questions or even mentions the role of the jury in resolving factual disputes, and the opinions do not have the kind of refrain that was present, for example, in the "short circuiting" cases that would suggest something larger is afoot.

This is another reason for the Court to reverse the circuit court's decision. A reversal would make clear that jury verdicts are still meaningful events in products liability cases, and that there is no systemic effort to cut the jury out of the process. Thus, the Court should reverse and enter judgment on the jury's verdict to reinforce the integral role of juries in our civil justice system generally, and in products liability cases specifically.

CONCLUSION

The Court should reverse the circuit court and enter judgment on the jury's verdict, both to correct the error below and to reaffirm that the jury's time and conclusion must be respected.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 30, 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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