IN THE

Supreme Court of Virginia

RECORD NO. 161788

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

Petitioner,

v.

NACCO MATERIALS HANDLING GROUP, INC.,

Respondent.

BRIEF IN OPPOSITIONTO PETITION FOR APPEAL AND ASSIGNMENTS OF CROSS-ERROR

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INTRODUCTION

In this wrongful death action, the Circuit Court correctly ruled that the decedent's acts and omissions – which violated applicable Federal regulations and on-product warnings, and which placed him in obvious peril – constituted contributory negligence as a matter of law, barring any recovery. Moreover, based on *Holiday Motor Corp. v. Walters*, ___ Va. ___, 790 S.E.2d 447 (2016), which was decided six days after the Circuit Court issued its letter opinion, the Circuit Court also should have entered judgment for NACCO Materials Handling Group ("NMHG") on two additional grounds: (1) the evidence, which showed that NMHG's design complied with applicable government regulations, published industry standards, and the custom and practice in the industry, was insufficient to support the Petitioner's negligent design claim (the sole basis for the jury's verdict in favor of the plaintiff); and (2) the testimony of Petitioner's design expert should have been excluded. The Petition should therefore be denied.

STATEMENT OF THE CASE

Petitioner, as Administrator of the Estate of Jerry Wayne Evans ("Mr. Evans"), brought suit against NMHG (and others) alleging the Hyster S120XMS lift truck NMHG manufactured and sold in 2003 was unreasonably dangerous because its park brake design caused fatal injuries to Mr. Evans in a workplace accident in

the early morning hours of January 22, 2010. (R. 1-13.)[1] She ultimately proceeded to trial against NMHG on theories of negligence and breach of the implied warranty of merchantability. (R. 1785-86, 1798-99, 1803, 1817-18.)

NMHG moved pretrial to exclude the testimony of the Administrator's design expert, Frederick Mallett, on the grounds that he lacked the necessary qualifications to render opinions on the design of the lift truck's park brake, and that his opinions lacked adequate foundation. (R. 386-405, 4046-49). The Circuit Court took the motion *in limine* under advisement (R. 4053-54), and NMHG then raised the same objections at trial. (R. 2456-60, 2479). Stating that it was "troubled" by Mallett's "lack of stated expertise regarding design or redesign," the Circuit Court nonetheless qualified Mallett "as an expert in the area of design and evaluation of park brake systems." (R. 2467-68.)

At the conclusion of the Administrator's case-in-chief, and again at the conclusion of all the evidence, NMHG moved to strike the Administrator's claims on the grounds that her evidence was insufficient to permit a jury to conclude that the park brake design was unreasonably dangerous. (R. 2947-51, 3802-03.)[2] The Circuit Court denied these motions. (R. 2971-72, 3812.) The Circuit Court took under

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[1] References are to the pages of the record transmitted from the Circuit Court.
[2] NMHG's motions raised numerous other grounds on which some or all of the Administrator's claims should have been struck. (R. 2951-54; 3803-3809.)

advisement the portion of NMHG's motion to strike which asserted that Mr. Evans was guilty of contributory negligence as a matter of law. (R. 3812.)

The case was submitted to the jury with an agreed verdict form that asked the jury to render a verdict on the Administrator's negligent design claim and her claim for breach of the implied warranty of merchantability (but *not* her negligent failure to warn claim). (R. 1837.) The jury returned a verdict for the Administrator on her claim of negligent design only[3], and awarded total damages of $4,200,000.00. (*Id.*)

NMHG moved to set aside the verdict and enter judgment in its favor on numerous grounds, including that the evidence was insufficient to support any claim of negligent design, and that Mallett's testimony should not have been admitted and, without it, the Administrator could not establish her negligent design claim. (R. 2019, 2022-61.)[4] After extensive briefing and oral argument, the Circuit Court issued a letter opinion ruling that the evidence showed Mr. Evans engaged in "a collective series of actions (and inactions) which, although in some instances instigated and perpetuated by International Paper [his employer], defied common sense, violated internal procedures and federal regulations, and was plainly careless and contrary to his own safety." (R. 2166-69.) Ruling that Mr. Evans was

[3] The jury did not find for the Administrator on her breach of implied warranty claim (R. 1837) and the Administrator has not challenged that result.
[4] NMHG also raised other issues which supported setting aside the verdict.

guilty of contributory negligence as a matter of law, the Circuit Court set aside the jury verdict and entered judgment for NMHG. (R. 2169, 2178-81). (NMHG specifically objected to the Circuit Court's failure to rule in its favor on the other issues raised in its post-trial motion. R. 2181-82.) This appeal followed.

ASSIGNMENTS OF CROSS-ERROR

I. **The Circuit Court Should Have Entered Judgment for NMHG as a Matter of Law Because the Administrator's Evidence Was Insufficient to Support Her Negligent Design Claim.** (Preserved at R. 2947-51, 2469 & 3802-03, 3813-14 [Trial Transcript]; R. 2035-40, 2136-39 & 4126-30 [Post-Trial Motions]; R. 2181-82 [Objections to Final Order].)

II. **The Circuit Court Erred in Permitting the Administrator's Design Expert, Frederick Mallett, to Testify Because He Lacked the Necessary Qualifications and His Opinions Lacked Adequate Foundation.** (Preserved at R. 386-406 & 4046-49 [*Motion in Limine*]; R. 2456-60, 2469, 2479 & 2948, 3803-04 [Trial Transcript]; R. 2040-44, 2139-41, 4126 & 4128-30 [Post-Trial Motions]; R. 2181-82 [Objections to Final Order].)

III. **The Circuit Court Erred in Failing to Strike the Administrator's Failure to Warn Claim for Lack of Causation.** (Preserved at R. 2951-52, 2969-70 & 3803-04 [Trial Transcript]; 2058-60, 2148-50, 4137-39 [Post-Trial Motions]; R. 2181-82 [Objections to Final Order].)

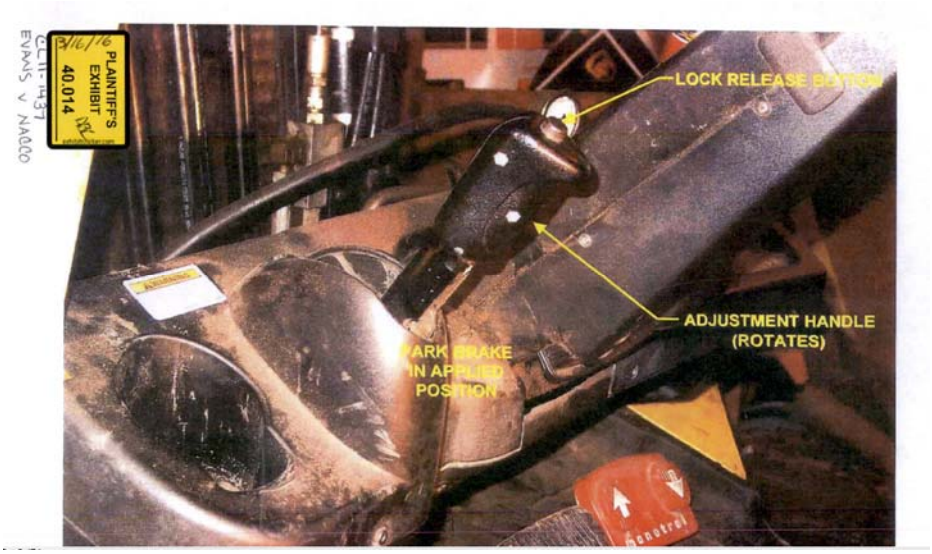
STATEMENT OF FACTS

A. The Hyster S120XMS Lift Truck.

This case involves an industrial lift truck, the Hyster S120XMS, sold to the predecessor of Mr. Evans' employer in March 2003. (R. 5382-83, 5386; *see* R.

2610, 3414.) At the time of the accident, the lift truck had been used for nearly seven years and had recorded more than 11,000 hours of operation (R. 2610, 5365).

The Hyster S120XMS is equipped with an over-center, operator-adjustable park brake. (R. 2482-83.) The operator applies the brake by manually moving a handle located to the left side of the steering column. Plaintiff's Exhibit 40.014 (R. 4802) shows the park brake handle:



The operator applies the brake by pulling it back, and when the lever rotates past center, the brake locks. (R. 2482-83.) The operator can also adjust the tension on the park brake cables. Turning the handle clockwise tightens the brake, while turning it counterclockwise loosens the brake. (R. 3162-63.) This allows the operator to make adjustments to the park brake to ensure that the brake is operational without having to take the lift truck out of service or forcing the operator to use a lift truck

with a park brake in an unsafe condition. (R. 2549-50, 3164.) As industrial products, lift trucks are subject to Federal regulations which require (among other things) that lift truck operators to be trained and certified with the training to include instruction on "[t]ruck controls and instrumentation: where they are located, what they do, and how they work." 29 C.F.R. §§ 1910.178(l)(1) & (l)(3)(i)(C). The regulations also require the lift truck to be inspected before operation to ensure it is in safe operating condition. 29 C.F.R. § 1910.178(q)(7).

B. Mr. Evans' Accident.

It is undisputed that, on the night of the accident, Mr. Evans was operating the Hyster S120XMS lift truck in violation of Federal law, because he had not completed the required training and did not have the required operator certification. (R. 2634.) The Administrator's own expert, Mallett, told the jury that operation of a lift truck by an operator who is not fully trained and certified, like Mr. Evans, is not an intended use of the lift truck and in fact constitutes a misuse. (R. 2634). Mr. Evans knew he was not fully trained and certified, having voluntarily stopped the training program because he was not being given adequate time to train in the job duties or on the Hyster S120XMS. (R. 3045-47.)

On the date of the accident, Mr. Evans was unloading large paper rolls from a tractor trailer, which required him to drive up and down an inclined loading dock ramp, across the manually positioned dock plate which bridges the gap between the

end of the loading dock and the edge of the trailer, and into the trailer. (*See* R. 2769-70, 4862, 5355, 5366.) He would use the lift truck equipped with a clamp attachment to grab one of the rolls and back out of the trailer, across the dock plate, and down the ramp to place the roll in the staging area. (R. 3040.) After he had completed unloading the trailer (R. 2756-57), Mr. Evans attempted to drive back into the trailer, supposedly to check for a leak because one of the rolls he unloaded was wet. (R. 2739-40.) When Mr. Evans drove the lift truck up the ramp and attempted to drive into the trailer, the dock plate was not in place so the front wheels of the lift truck crashed into the gap between the edge of the loading dock and the edge of the trailer and the lift truck became stuck. (R. 2740.) There was no evidence that anyone other than Mr. Evans raised the dock plate, or that Mr. Evans would have been unable to see the gap created by the missing dock plate.

Mr. Evans did not summon a supervisor after this accident, but instead engaged the assistance of the other lift truck operator on duty, Lamont Lacy. (R. 2740-41.) Rejecting Mr. Lacy's instruction that they should summon a supervisor (*id.,* R. 2752), Mr. Evans instead convinced Mr. Lacy to assist him in freeing the lift truck using a chain that Mr. Evans obtained from the maintenance area. (R. 2741-42.) There was no evidence that Mr. Evans or Mr. Lacy had any training or experience in how to free a stuck lift truck.

With Mr. Evans seated in his lift truck and the chain attaching the two lift trucks together, Mr. Lacy used his lift truck to pull the wheels of the stuck lift truck out of the gap and free it. (R. 2742.) Once freed, Mr. Evans chose to stop the truck on the incline rather than riding it another 10 feet back down to the flat floor of the plant. (R. 2742; *see* R. 5355.) He then dismounted the lift truck. (R. 2743.) According to the only eyewitness, Mr. Evans engaged the park brake before dismounting the lift truck. (*Id.*) However, the brake had been effectively disabled; Julian Lindsay – another clamp truck operator who was asked to operate the lift truck after the accident – testified that when he touched the park brake after the accident it was so loose he instantly knew the brake would not hold on the ramp. (R. 3053-54.)

The evidence did not show any reason why Mr. Evans needed to stop the lift truck on the incline rather than riding it down to the plant floor. If for some reason Mr. Evans needed to leave the lift truck parked on the incline, Federal regulations required that Mr. Evans lower the clamp attachment to the ground before dismounting and that the wheels be blocked. 29 C.F.R. 1910.178(m)(5)(i)-(iii). A warning decal, in plain view in the operator's compartment where Mr. Evans was sitting, repeated these requirements. (R. 3179-80, 5139, 5140.) Yet Mr. Evans did not lower the attachment or block the wheels.[5] With his lift truck behind him on the

[5] Lowering the attachment to the ground creates friction that helps prevent the lift truck from moving. (R. 3184-85.) The Administrator's expert, Mallet, agreed that lowering the attachment to the ground is "a universal requirement." (R. 2570.)

ramp, Mr. Evans proceeded to the rear of Mr. Lacy's lift truck in order to remove the chain. (R. 2743.) While he was attempting to do so, Mr. Evans' lift truck rolled backwards, crushing him between the two lift trucks and killing him. (R. 2742-43, 2758.)

C. The Negligent Design Claim.

The Administrator's theory at trial was that the park brake design was unreasonably dangerous because it was operator adjustable. (R. 2499-2500, 2530, 2585.) Her design expert, Frederick Mallett, was a former employee of another lift truck manufacturer, Mitsubishi Caterpillar Forklift America ("MCFA"), and his work experience formed the entire basis for his expertise and opinions.

Mallett had no personal experience in the design or safety assessment of park brake systems. He had never designed a park brake, nor had he ever been responsible for testing of park brakes on any Class IV or V lift trucks (the type involved in this case) or for certifying their compliance to any safety standard. (R. 2432, 2436, 2438, 2445-46.) His work experience consisted only of tearing down competitor and MCFA lift trucks to evaluate function and performance. (R. 2411-18, 2421-22.) The Circuit Court stated that it was "troubled" by Mallet's "lack of stated expertise regarding design or redesign." (R. 2468.) Nonetheless, the Circuit Court recognized Mallett "as an expert in the area of design and evaluation of park brake systems" and permitted him to testify over NMHG's objection. (*Id.*)

Mallett testified that NMHG should have utilized a "set screw" design for the park brake handle that had been used by his former employer, MCFA. (R.2523-24, 2528-29.) He claimed that drilling a hole in the handle and inserting a screw to hold the handle in place would prevent lift truck operators from adjusting the park brake and ensure that only mechanics made the adjustments. (R. 2524.) After initially testifying that MCFA was using the "set screw" design in 2003 (when the lift truck at issue was manufactured and sold), Mallett later conceded on cross examination that he was uncertain when this design was introduced. (R. 2574.)

More importantly, Mallett also conceded that the "set screw" design was fully operator adjustable – it simply required the operator to use a tool to loosen the set screw. (R. 2558-59, 2590-91.) After being confronted with MCFA's product manuals, which specifically instructed lift truck operators how to adjust the park brake, Mallett conceded that MCFA in fact intended the "set screw" design to be operator adjustable and that MCFA knew that operators were making adjustments to the park brake. (R. 2596-97, 2598-99.)[6] He agreed that, since certified lift truck operators are trained to check and adjust the park brake, MCFA did not consider an operator-adjustable park brake to be unreasonably dangerous. (R. 2598-99.) So af-

[6] Mallett also mentioned a design which would not allow for any adjustment at the handle, but instead required removal of a cowl below the steering wheel to adjust the tension on the park brake. (R. 2526.) But he later conceded that the park brake design on *all* of the Class IV and Class V lift trucks manufactured by MCFA through 2010 was operator adjustable. (R. 2596-99.)

ter telling the jury his opinion was "that the operator should not be required to make adjustments" (R. 2530), in the end he told jury only that NMHG was somehow negligent for not replacing its operator-adjustable park brake design with another type of operator-adjustable park brake design.

Mallett was also permitted to testify, over NMHG's continuing objection to testimony about alternative designs, to another proposed alternative design – the "one-way ratchet." (R. 2530-32, 2552.) According to Mallett, it was conceptually possible to design a park brake system whereby the operator could rotate the handle in only one direction, so that an operator could tighten the tension on the park brake but could not loosen it. (*Id.*) But Mallett conceded that the "one-way ratchet" design had never been used on any Class IV or Class V lift truck in the 2003 timeframe. (R. 2553-54.) The design existed only as a "concept" (R. 2553) which Mallett had not even attempted to sketch out, let alone design or test. (R. 2552.)

Mallett conceded that, as designed, the park brake on the Hyster S120XMS complied with the ANSI B56.1 standard, which has been incorporated into Federal law through Occupational Safety & Health Administration regulations. (R. 2446, 2604.) As explained above, by the time he was through making concessions on cross examination, Mallet agreed that the industry standard was to provide fully operator adjustable park brakes on Class IV and Class V lift trucks. Other evidence confirmed this industry standard. (R. 3494-95 [60% of Class IV and Class V lift

trucks used over-center, operator-adjustable park brakes; the remaining 40% used other styles of park brakes which were also operator-adjustable]).

D. The Failure to Warn Claim.

In an effort to support her failure to warn theory, the Administrator presented the testimony of one expert witness, Kenneth Laughery, who testified that *one* warning decal on the lift truck, a decal telling the operator that if he attempted to dismount the vehicle without setting the parking brake an alarm would sound, was misleading and inadequate. (R. 2812-14, 4323.) Laughery did not review any other warning labels or decals on the lift truck, and did not offer any opinions that any of those warnings were misleading or inadequate. (R. 2816-17, 4856-60.) He specifically ***did not*** criticize or offer any testimony about the warning decal that was admitted as NMHG-112 (R. 5139), which instructed Mr. Evans to lower the clamp to the ground before dismounting and to block the wheels on inclines.

The Administrator conceded that she presented no ***facts*** supporting causation on her failure to warn claim, but argued that she was entitled to proceed based on a "heeding presumption." (R. 2964-65). Ultimately, the failure to warn claim was not included on the agreed verdict form. (R. 1837.)

ARGUMENTS AND AUTHORITIES

I. THE TRIAL COURT CORRECTLY RULED THAT MR. EVANS' ACTS AND OMISSIONS CONSTITUTED CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

A. Standard of Review.

Because the trial court set aside the jury verdict, that verdict is not entitled to the same weight as a verdict approved by the trial court. *Kendrick v. Vaz, Inc.*, 244 Va. 380, 384 (1992). 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) (quoting *Walton v. Walton*, 168 Va. 418, 423 (1937)). "[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. Mr. Evans Repeatedly Left Locations of Safety and Placed Himself Directly in Peril, Failing to Exercise Reasonable Care for His Own Safety.

The fact that Mr. Evans had received classroom training and some practical training – touted by the Administrator as evidence that Mr. Evans' conduct should be excused – in fact makes his conduct all the more unreasonable. Mr. Evans knew that only fully trained and certified operators were permitted to operate lift trucks,

and that this training was required in order to operate the equipment safely. He quit the training because he wasn't being given enough time to train on the lift truck itself – so he knew he was not familiar with all the rules of safe operation. This makes his conduct in attempting a maneuver for which he had no training or experience all the more inexplicable.

On at least three occasions, Mr. Evans left a place of safety and – by his own acts or omissions – placed himself in peril. After driving the front wheels of the lift truck off the dock and getting it stuck, Mr. Evans went and located his co-worker, Mr. Lacy. Instead of summoning a supervisor (as Mr. Lacy urged), Mr. Evans convinced Mr. Lacy to assist him in trying to free the lift truck. He then intentionally placed himself in peril by getting back up onto the lift truck while Mr. Lacy towed it out of the gap.

Once the lift truck was freed, instead of remaining on the lift truck and riding it another 10 feet down the ramp to the flat plant floor – where it could not have rolled – Mr. Evans chose to stop the lift truck on the incline. There was no reason that Mr. Evans needed to stop the truck on the incline, and he did so in violation of the warning decal that was in plain view in the operator's compartment. Mr. Evans then dismounted the lift truck again while it was on the incline, but did not lower the attachment or block the wheels – in violation of clear warnings and instructions on the lift truck *and* applicable Federal regulations.

Mr. Evans then placed himself in peril yet a third time by positioning himself directly between the two lift trucks while one of them was still on the incline. That would have been a reckless thing to do even if the park brake was in proper adjustment (because of the possibility of a mechanical malfunction). It was even more reckless when the lift truck had just been involved in an accident and he had no way of knowing whether it had suffered damage that would affect its operation.

The Circuit Court correctly determined that ***even if*** the reasonableness of an individual act or omission by Mr. Evans might be disputed, the totality of his actions constituted contributory negligence. Mr. Evans somehow avoided injury when he placed himself in peril on the first two occasions; but placing himself between the two lift trucks with one of them sitting on an incline – with the attachment raised, the wheels unblocked, and without knowing its operational condition after the accident – was contributory negligence in and of itself.

The Administrator's reliance on *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370 (4th Cir.1983), is entirely misplaced. The assertion that "an employee who is injured while performing a job in accordance with instructions provided by the employer is not guilty of contributory negligence unless the danger is so apparent that no reasonable person would encounter it," *id.* at 372, has no application to this case because there is no evidence that Mr. Evans' employer gave him ***any***

instruction whatsoever on how to free the lift truck. The Administrator repeatedly argues that the jury could have concluded "that it was reasonable for Mr. Evans to operate the lift truck as instructed" (Petition, p. 13) – wholly ignoring the fact that Mr. Evans ***was not given any instruction*** on how to perform the maneuver that resulted in his death and that he ***specifically rejected*** the suggestion to summon a supervisor. Instead, he set about freeing the lift truck using his own plan. No one forced Mr. Evans into any of his acts or omissions; he made his own decision to proceed without assistance from a supervisor and he made his own decisions on *how* to proceed, and he is therefore responsible for his own conduct.[7]

Ironically, having argued that Mr. Evans' conduct should be excused because his employer told him to operate the lift truck, the Administrator then argues in the next breath that his conduct should be excused because "there was no evidence that Evans was trying to 'operate' the lift truck in any meaningful sense, as opposed to simply towing it out of a position of obvious danger." (Petition, p. 17.) But neither Mr. Evans nor Mr. Lacy had any training or experience in how to tow a lift truck, and there was no evidence that the lift truck presented any obvious danger or that there was any urgent need to move it. (Indeed, as noted above, Mr. Evans had

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[7] The Administrator's suggestion that Mr. Evans' negligence is excused because his employer told him to operate the lift truck in the first place (Petition, p. 11) is not supported by *Jones* or any other authority, and in fact would result in excusing *any* negligent workplace conduct. That is not the law of Virginia. *See, e.g., Reed v. Carlyle & Martin, Inc.*, 214 Va. 592, 594-95 (1974), *cert. denied*, 419 U.S. 859 (1974).

already completed unloading the trailer so there was no indication that he – or anyone else – needed to use the lift truck for any other purpose at that point.)

The Administrator argues at length that it was reasonable for Mr. Evans to ignore the warning decal (Ex. NMHG-112 [R. 5139]), which told Mr. Evans to lower the carriage before dismounting the equipment and to block the wheels if the lift truck was on an incline. But the argument that the jury could have determined this warning was inadequate rests on sheer speculation, because the Administrator's warnings expert ***never looked at this warning decal*** and ***offered no testimony whatsoever about it.*** Moreover, the training mandated by applicable Federal regulations, which Mr. Evans failed to complete, specifically requires that operators be trained on the "operating instructions, warnings and precautions" for the operation of the equipment. 29 C.F.R. § 1910.178(1)(3)(i)(A).[8] And those Federal regulations required the very actions Mr. Evans failed to perform.

Mr. Evans' conduct violated Federal regulations, the on-product warnings and common sense. It is precisely the type of conduct this Court has held to constitute contributory negligence as a matter of law. *See, e.g., Kelly v VEPCO,* 238 Va. 32, 40 (1989) (maneuvering aluminum ladder in close proximity to overhead power line was contributory negligence as a matter of law, because even if the line had

[8] The Administrator also seeks to excuse Mr. Evans' conduct by pointing to a supposedly "inaccurate" page of the operator's manual. (Petition, p. 7.) But there is no evidence Mr. Evans ever saw that operator's manual. (R. 2541-42, 2846-47.)

been insulated running the risk of touching it with a metal ladder was reckless conduct in itself); *Sadler v. Lynch*, 192 Va. 344, 348 (1951) ("When a proper warning has been given, a defendant is relieved from liability for injuries received by one who does not heed it; and failure to heed it is usually contributory negligence.").

ON CROSS-ERROR

II. THE EVIDENCE DID NOT DEMONSTRATE ANY VIOLATION OF APPLICABLE GOVERNMENT REGULATIONS, INDUSTRY STANDARDS OR CUSTOMER EXPECTATIONS, AND THEREFORE FAILED TO ESTABLISH ANY UNREASONABLY DANGEROUS CONDITION.

(NMHG's Assignment of Cross-Error I.)

A. Standard of Review.

Whether the evidence was sufficient to support the Administrator's negligent design claim presents a question of law which this Court reviews *de novo*. *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251 (1975); *see Holiday Motor Corp. v. Walters*, ___ Va. ___, ___ n.14, 790 S.E.2d 447, 455 n.14 (2016).

B. The Evidence Failed to Show that the Design of the Park Brake on the Hyster S120XMS Violated Any Established Safety Standard.

The Circuit Court issued its letter opinion before this Court issued its decision in *Holiday Motor* holding that, "To 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." ___ Va. at ___ n.14, 790 S.E.2d at

455 n.14. In making that determination, a court looks to applicable government regulations, applicable industry standards, and reasonable customer expectations. *Id.*

Thus, to establish her negligent design claim, the Administrator was required to come forward with evidence that the design of the park brake system on the Hyster S120XMS violated some objective standard of safety. But the evidence in this case failed to establish the violation of any governmental regulation, industry standard or customer expectation. The governing ANSI B56.1 design standards have been adopted into federal law. (R. 2446). There is no dispute that the design of the S120XMS, including its park brake, satisfied ANSI B56.1. (*Id.*) And the evidence at trial established that the custom and practice in the lift truck industry was to make park brakes operator adjustable "to promote safety." (R. 2598-99, 3494-95; R. 5278 [ASME B56.1-2000; Part I, §2].)

If the Administrator's evidence and theory were accepted as sufficient to establish a defect, then every Class IV and Class V lift truck manufactured in the 2003 timeframe was negligently designed and unreasonably dangerous. (Mallett in fact conceded this. R. 2598-3000.) The Administrator did not point to a single regulatory requirement, published industry standard, industry norm or custom, or other evidence ***anywhere in the world*** that either criticized the operator-adjustable park brake design or endorsed any alternative that her expert considered reasonably

safe. (R. 2609-10.) Nor was there any evidence that customers were demanding park brake designs that were not operator adjustable. To the contrary, Mallett conceded on cross examination that the *existing* alternative design(s) he touted to the jury were in fact fully operator adjustable (just like the park brake design on the Hyster S120XMS), and he could not point to a lift truck anywhere that had a park brake that was ***not*** fully operator adjustable.

Likewise, there was no evidence that the park brake design on the Hyster S120XMS was less safe than the design on any other lift truck existing at the time of manufacture, or that the "set screw" design advocated by Mallett would have somehow made it impossible to disable the park brake.

The Administrator offered nothing more than Mallett's personal, subjective opinion that more should have been done, and a purely "conceptual" alternative design that not only had never been developed or tested, but did not even exist in the form of a design sketch. This evidence was wholly insufficient to support a claim of negligent design. *Holiday Motor*, ___ Va. at ___ n.14, 790 S.E.2d at 455 n.14; *Turner*, 216 Va. at 251 (evidence of industry custom "may be conclusive when there is no evidence to show that [the product] was not reasonably safe"). The Circuit Court, accordingly, should have granted NMHG's motion to strike on this basis, or else should have granted NMHG's motion to set aside the verdict and entered judgment for NMHG on this basis.

III. MR. MALLETT SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY, BECAUSE HE LACKED THE NECESSARY QUALIFICATIONS AND HIS OPINIONS LACKED ADEQUATE FOUNDATION. (NMHG's Assignment of Cross-Error II)

A. Standard of Review.

The Circuit Court's decision to admit Mallett's testimony is reviewed for abuse of discretion. *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 155 (2015). However, a Circuit Court "has no discretion to admit clearly inadmissible evidence." *Id.* (quoting *Harman v. Honeywell Int'l, Inc.*, 288 Va. 84, 92 (2014)). "The fact that a person is a qualified expert in one field does not make him an expert in another field, even if they are closely related." *CNH America LLC v. Smith*, 281 Va. 60 (2011) (citing *Combs v. Norfolk & W. Ry.*, 256 Va. 490, 496 (1998)). And "a circuit court should not admit expert opinion 'which is connected to existing data only by the *ipse dixit* of the expert.'" *Hyundai*, 289 Va. at 156 (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

B. Mallett Had No Experience or Qualifications in the Design of Park Brake Systems or in Evaluating Their Safety, and Therefore Should Not Have Been Permitted to Criticize NMHG's Design or to Opine that NMHG's Design Was Unreasonably Dangerous.

Mallett was admitted as an expert in the "design and evaluation of park brake systems." (R. 2468.) But his experience did not include any particularized experience in designing park brake systems or in analyzing or evaluating the safety

of park brake designs. The Circuit Court noted the conspicuous absence of any personal experience with design, safety or hazard analysis for park brake systems, but permitted him to testify anyway. As a result, Mallett was allowed to criticize NMHG's design without having any personal experience in the choices and considerations involved in such a design.

In *CNH America LLC v. Smith*, 281 Va. 60 (2011), a farmer was injured when a hose on his hay mower exploded and injected hydraulic fluid into his hand. At trial he offered the opinion of Dennis L. Heninger, a "hydraulics systems expert." 281 Va. at 62-63. Heninger had no experience with the particular type of mower involved in the case. *Id.* The trial court initially limited Heninger's opinions to testimony regarding general hydraulics but his actual trial testimony went beyond those limitations to extend to alleged defects in the hay mower. *Id.* at 68. This Court held the admission of Heninger's testimony was an abuse of discretion because Heninger was not qualified to render opinions on the mower. *Id.* at 68-69.

Similarly, Mallett's experience and expertise was limited to comparing the *performance* of parts and systems in lift trucks from different manufacturers. He lacked experience and expertise in ***designing*** park brake systems and ***evaluating their safety*** – yet the Circuit Court permitted him to offer opinions on these topics. The admission of that testimony was error.

C. Mallett Should Not Have Been Permitted to Testify About a Purely "Conceptual" Alternative Design Which Did Not Exist, and Which He Had Never Tested or Evaluated.

Mallett did not generate any data or analysis to support his claim that there were safer alternative designs available in 2003 when the lift truck was manufactured and sold. *See Hyundai*, 289 Va. at 156-57; *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430 (1982).

In *Hyundai*, the plaintiff sustained closed-head injuries when his 2008 Hyundai Tiburon struck a tree and the side airbag did not deploy. *Id.* at 150. Plaintiff's design expert, relying exclusively on "industry experience," testified that if the sensor for the side airbag system had been located on the "B-pillar" four to six inches from the floor, then the airbag would have deployed in the accident. *Id.* at 151. However, the expert conducted no testing to verify that the side airbag in fact would have deployed if the sensor had been placed in his suggested location, or any other location. On these facts, this Court held the expert's opinion lacked sufficient evidentiary support and should have been excluded. *Id.* at 156.

Here, after initially testifying that an alternative "set screw" design was available in 2003, Mallett conceded he was not sure when it was introduced in the United States, and further admitted that *the set screw design was also operator adjustable*. As a result he could not identify one lift truck anywhere in the world in the 2003 timeframe that was not unreasonably dangerous by his criteria. (R. 2598-

3000.) He merely proposed a "concept" (a one-way, tighten-only ratchet design) that he claimed was economically feasible and was a safer alternative that could have been employed in 2003. For that "concept" he made no design drawings, conducted no testing, performed no failure mode and effects analysis and assembled no field data. (R. 2552.) He could produce no evidence that this "conceptual" design existed or had ever been used by anyone in 2003 (or even at the time of trial in 2016) (R. 2553-54.) His opinions were nothing more than *ipse dixit* assumptions which should have been excluded.

* * *

Mallett's testimony offered the only support for the Administrator's negligent design claim, which was the sole basis for the verdict. Because that testimony was improperly admitted, NMHG was entitled to judgment as a matter of law. *Holiday Motor,* ___ Va. at ___, 790 S.E.2d at 459; *Hyundai,* 289 Va. at 157-58.

IV. THERE WAS NO CAUSATION EVIDENCE TO SUPPORT THE ADMINISTRATOR'S NEGLIGENT FAILURE TO WARN CLAIM. (NMHG's Assignment of Cross-Error III)

A. Standard of Review.

Whether the evidence was sufficient to support the Administrator's negligent failure to warn claim presents a question of law which this Court reviews *de novo*. *Ford Motor Co. v. Boomer*, 285 Va. 141, 161-62 (2013).

B. The Administrator Conceded Her Warnings Claim Was Dependent on the "Heeding Presumption" Which is Not Recognized in Virginia.

The Administrator pointed to no evidence that would support causation on her failure to warn claim, but instead argued she was entitled to proceed based on the "heeding presumption." But Virginia recognizes no such presumption. *Boomer*, 285 Va. at 160 ("Virginia does not observe a heeding presumption."). Even if the Administrator could somehow argue that this issue was presented to the jury, she cannot rely on the failure to warn claim to preserve the judgment.

CONCLUSION

The Circuit Court correctly ruled that Mr. Evans' acts and omissions constituted contributory negligence as a matter of law. Moreover, in light of *Hyundai* and *Holiday Motor,* it is clear that the evidence was insufficient to establish the Administrator's negligent design claim. For all of these reasons, the Petition should be denied. Should the Court grant the Petition, however, then NMHG respectfully requests that the Court also grant its assignments of cross-error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2017, seven true and accurate copies of this Brief in Opposition were hand-filed with the Supreme Court of Virginia, and true copies have been served, by first class mail, upon the following:

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