IN THE
Supreme Court of Virginia

RECORD NO. 161788

RONDA MADDOX EVANS, ADMINISTRATOR
of the ESTATE of JERRY WAYNE EVANS,

Appellant,

v.

NACCO MATERIALS HANDLING GROUP, INC.,

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION

The Circuit Court properly held that the decedent's conduct "defied common sense, violated internal procedures and federal regulations, and was plainly careless and contrary to his own safety." (JA 224.) The Court therefore ruled the decedent was guilty of contributory negligence as a matter of law.

Contributory negligence should have been immaterial, because the Administrator wholly failed to prove any primary negligence. Her negligent design claim (the sole basis for the jury's verdict) rested on the testimony of an expert who had no "expertise in design or redesign" (JA 333-334) but who was nonetheless permitted to opine that the design of the parking brake on the lift truck at issue was unreasonably dangerous because it was operator-adjustable. (JA 398, 453.) His testimony did not establish the violation of any objective safety standard. To the contrary, the design complied with applicable governmental and industry standards and with the industry custom. (JA 472-473, 477-478, 1035, 1115-1116.) The expert conceded that all of the existing alternative designs he identified were also operator-adjustable (and therefore also unreasonably dangerous according to his criteria). (JA 458-459, 466-468, 507-508.) That left only the *ipse dixit* of the expert that a "conceptual" design –which had never been tested, developed or used on any lift truck – would have somehow been safer. (JA 420-422.) This testimony should not

have been admitted, and in any event it was insufficient to impose liability for negligent design.

STATEMENT OF THE CASE

A. Background – The Early Morning Workplace Accident.

The case stems from a workplace accident in the early morning hours of January 22, 2010. The Administrator's decedent, Jerry Wayne Evans ("Mr. Evans") was operating a Hyster S120XMS lift truck manufactured by NACCO Materials Handling Group, Inc. ("NMHG"), even though he was not trained and certified to do so. (JA 658, 664, 1229-1230.) His operation of the lift truck therefore violated Federal law. 29 C.F.R. § 1910.178(l)(1).

Mr. Evans' lack of knowledge and experience with the equipment resulted in his making a series of careless decisions. When he attempted to drive the lift truck into a trailer without the dock plate in position, the front wheels of the lift truck became stuck in the gap between the dock and the trailer. (JA 539.) Mr. Evans then rejected his co-worker's suggestion to summon a supervisor. (JA 540.) Instead, he and the co-worker, Lamont Lacy, used a chain to tow the stuck lift truck from the gap using Mr. Lacy's lift truck. (JA 540-541.) Mr. Evans then stopped his lift truck on an inclined ramp (rather than moving it down to the flat plant floor), turned off the engine and dismounted – without recognizing the lift truck's park brake was disabled, without lowering the lift truck's 2,800 pound attachment, and without

blocking the wheels to stop it from rolling down the incline. (JA 541-542.) All of these disregarded safety steps were required by Federal regulations and NMHG's warnings and instructions.

Mr. Evans then walked down the incline behind his lift truck and into the space between his lift truck and Mr. Lacy's lift truck. (JA 542.) When Mr. Evans' lift truck rolled down the ramp, he was not facing it and could not hear the warning shouts from Mr. Lacy. (*Id*.) The lift truck he had left on the incline pinned him against Mr. Lacy's lift truck, causing fatal injuries. (JA 542-543.)

B. The Administrator's Claims.

The Administrator's Complaint alleged claims of negligence and breach of warranty. (JA 1-13.) At trial, the Administrator's theory (articulated repeatedly by her expert) was that the design of the parking brake was unreasonably dangerous because it allowed the lift truck operator to tighten or loosen the brake. As her expert, Frederick Mallett, stated his opinion, "My objection is to the operator adjustability of the over-center parking brake." (JA 453.)

Mallett ultimately conceded, however, that all of the existing park brake designs he offered as alternatives were ***also*** operator adjustable, just like the one on the Hyster lift truck that Mr. Evans operated. (JA 458-459, 466-468.) The Circuit Court, however, also permitted Mallett to opine that it was "possible" to use an alternative design that would have permitted the operator to tighten the parking

brake, but not to loosen it. (JA 398-400). So after conceding that his other proposed alternatives were also operator-adjustable (and therefore also unreasonably dangerous in his opinion, JA 507-508), Mallett – and the Administrator – were left with nothing more than a "conceptual" design that had never been used by any lift truck manufacturer (even up to the time of trial) (JA 421-422); that had not been tested on any lift truck (JA 420-421); and that did not exist even in the form of a design sketch. (*Id*.) No lift truck in existence at the time of manufacture in 2003 – or at the time of trial in 2016 – met Mallett's conceptual requirements.

The Administrator conceded she offered no evidence of proximate causation on her failure to warn claim, arguing instead that she was relying on the "heeding presumption." (JA 694-695.) But there is no such presumption under Virginia law. *Ford Motor Co. v. Boomer*, 285 Va. 141, 160 (2013) ("Virginia does not observe a heeding presumption.") Ultimately, the negligent failure to warn claim was not included in the agreed finding instruction or the agreed verdict form, and thus was never submitted to the jury for decision. (JA 91-92, 109.) The jury found for the Administrator only on the negligent design claim, and awarded damages in the total amount of $4,200,000.00. (*Id*.) The jury found for NMHG on the claim for breach of implied warranty. (*Id*.)[1]

[1] The evidence at trial showed that NMHG had provided an express written warranty on the lift truck which excluded all implied warranties, and which had expired long before Mr. Evans' accident. (JA 1197-1198, 1201-1202, 1875-1876.)

C. The Circuit Court's Rulings and Relevant Motions.

During the trial, the Circuit Court permitted the negligent design claim to go to the jury over NMHG's objection. (JA 1279, 1281.) NMHG argued the evidence showed the design of the parking brake complied with the applicable governmental regulations, industry standards and industry custom and practice. (JA 677-681, 698-699, 1269-1270.) NMHG also moved to strike the Administrator's negligence claims on the grounds that Mr. Evans was guilty of contributory negligence as a matter of law. (JA 1273-1274.) The Circuit Court took this motion under advisement. (JA 1279.)

NMHG filed post-trial motions, and the Circuit Court ruled the jury's verdict was "plainly wrong on the issue of contributory negligence and must be set side." (JA 219.) The Court accordingly entered judgment for NMHG (JA 226-229), ruling 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." (JA 223-224.)

NMHG also argued that the court should have set the verdict aside and entered judgment for NMHG on other grounds, including that the evidence was insufficient to support the negligent design claim, and that the court should not have

permitted Mallett's testimony because he lacked sufficient qualifications and his testimony lacked adequate foundation. (JA 123-132, 209-214, 1299-1303.) The Circuit Court did not revisit these other grounds, but the Final Order preserves NMHG's arguments on these issues. (JA 218-224; JA 229-230.)

The Administrator appealed the contributory negligence ruling. NMHG assigned cross-error relating to the underlying negligent design claim – because contributory negligence does not even come into play unless primary negligence has been established. Notably, this Court handed down *Holiday Motor Corp. v. Walters*, 292 Va. 461 (2016), which is highly relevant to the negligent design claim and the expert testimony issue, six days *after* the Circuit Court issued its decision.

NMHG'S ASSIGNMENTS OF CROSS-ERROR

1. **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 JA 677-681, 698-699, JA 1269-1270, 1280-81 [Trial Transcript]; JA 111, 123-128, 209-212, 1299-1303 [Post-Trial Motions]; JA 229-230 [Objections to Final Order].)

2. **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 27-46, 239-242 [*Motion in Limine*]; JA 324-328, 337, 347, 678 [Trial Transcript]; JA 111, 128-132, 212-214, 1299, 1301-1303 [Post-Trial Motions]; JA 229-230 [Objections to Final Order].)

3. **The Circuit Court Erred in Failing to Strike the Administrator's Failure to Warn Claim for Lack of Causation.** (Pre-

served at JA 681-682, 699-700, 1269-1270 [Trial Transcript]; JA 111, 136-138, 1304-1306 [Post-Trial Motions]; JA 229-230 [Objections to Final Order].)[2]

THE ADMINISTRATOR'S ASSIGNMENT OF ERROR

1. **The trial court erred by setting aside the jury's verdict and entering judgment in favor of the Defendant on the ground that the Plaintiff's decedent was guilty of contributory negligence that proximately caused his accident and death.** [The Administrator asserts in her Opening Brief that her assignment of error was preserved at "JA 139-40, 144-64, 231; H'rg Tr. 23-25, Aug. 19, 2016."]

COUNTER-STATEMENT OF THE FACTS

A. The Hyster S120XMS Lift Truck.

This case involves an industrial lift truck, the Hyster S120XMS, sold to Weyerhaeuser, the predecessor of Mr. Evans' employer, in March 2003. (JA 1783-1785; *see* JA 478, 1035.) The sale was made under a national account agreement between Weyerhaeuser and Hyster (now NMHG) through which Weyerhaeuser purchased 450 to 500 lift trucks from Hyster every year. (JA 1190-1194.) The terms of the agreement – including the specifications of the lift trucks to be purchased – were jointly negotiated between Weyerhaeuser and Hyster. (JA 1192.)

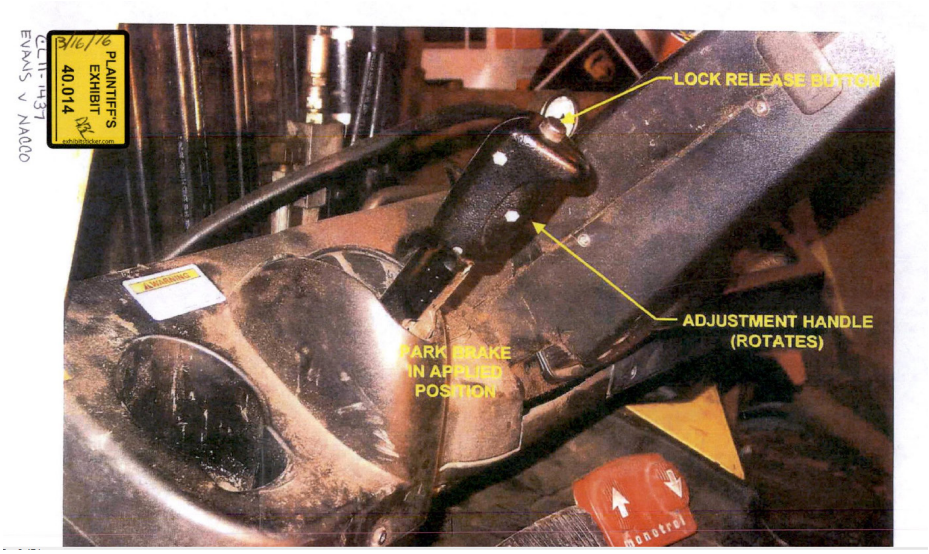
Weyerhaeuser negotiated a special warranty arrangement with Hyster so that it received an express warranty on each of its lift trucks extending for 5 years or

[2] NMHG believes the failure to warn claim was never presented to the jury (*see* Section III.B.2, *infra*.), but assigned error to this ruling out of an abundance of caution because it anticipated the Administrator would attempt to raise it on appeal.

10,000 hours of operation (standard is 1 year or 2,000 operating hours). (JA 1195, 1197-1200, 1202-03.) At the time of Mr. Evans' accident, the lift truck had been in service for nearly 7 years and had recorded over 11,000 hours of operation (JA 478, 1030), so the express warranty had expired. (JA 1195-1196.) There was no evidence of any prior complaints about the design or function of the parking brake, or of any prior, similar accidents.

The development process for the Hyster S120XMS involved numerous levels of design and engineering review, as well as extensive field testing of prototypes. (JA 814-818, 823-827.) The Hyster S120XMS weighed approximately 20,000 pounds. (JA 388, 495, 707, 794.) The subject lift truck was equipped with a clamp attachment (allowing it to grab, manipulate and stack paper rolls) which weighed approximately 2,800 pounds. (JA 861, 1022, 1049.)

B Design of the Park Brake.



The Hyster S120XMS is equipped with an over-center, operator-adjustable park brake. (JA 350-51, 843-44.) The operator applies the brake by grasping the handle shown in the above photograph (JA 1366) and pulling it back toward him; when the lever rotates past center the brake locks into the applied position. (JA 350-351, 843-44.) The brake design also allows the operator to adjust the tension on the park brake cables. Turning the handle clockwise tightens the brake; turning it counterclockwise loosens the brake. (JA 839-840.) This allows the operator to make adjustments to the park brake so that it remains in safe operating condition at all times. (JA 841-844, 1035-38.)[3]

During the development of the Hyster S120XMS, prototypes were tested by fully-trained, certified operators at customer workplaces, so Hyster could obtain feedback on the design and performance of the lift truck. (JA 816-818.) There was no criticism at all of the design or performance of the over-center, operator-adjustable park brake; the only feedback was positive. (JA 820, 1431.)

In her Opening Brief, the Administrator claims her theory at trial was that the design of the parking brake was unreasonably dangerous because "the parking brake's tension adjustment was on the top of the handle, and it was unmarked"; and because "[t]he parking brake could be adjusted or even inadvertently disabled by

[3] The operator can adjust the parking brake for specific operator preferences or for specific applications, and can also adjust it as brake cables and brake drums wear during use. (JA 841-844, 1035-38.)

an operator (not a maintenance worker) without any tools." (Appellant's Br., p. 10.) But these were not the theories she or her expert advanced at trial. Rather, the Administrator's sole theory at trial was that the over-center, operator-adjustable park brake was unreasonably dangerous ***because it was operator-adjustable – period.***

Mallett plainly stated this theory on direct examination: "The opinion is that the operator should not be required to make adjustments." (JA 398.) And again on cross-examination: "I can cut to the chase here and say that my objection is to the operator adjustability of the over-center parking brake." (JA 453.) Through his direct and cross examinations Mallett repeated this "operator adjustability" criticism at least eight times.[4] The Administrator is now trying to change her theory because – as set forth in more detail below in Section F – the theory Mallett articulated collapsed on cross-examination when Mallett was forced to concede that all of the ***ex-***

[4] JA 346 (criticizing design because "There is a control on – on the control handle of the parking brake there is a device whereby the operator or any person using that machine can readjust, reset the setting of the parking brake" and "I cannot think of any valid reason why you would deliberately put a device on there that can disable the effectiveness of the parking brake."); JA 348 (advocating the "set screw" design because it would supposedly "deter the operator from making manual adjustments"); JA 367 ("It should not be the operator's responsibility to ensure the correct operation of the parking brake"); JA 391 (asserting that Caterpillar "eliminated the use [of the parking brake adjustment] by the operator by inserting a setscrew in the side of the knob that locked the knob against the metal column inside"); JA 392 ("[T]he contention here is that without that screw in place, the operator has free access to the adjustment."); JA 396 (agreeing that the "set screw" design is "a system that prevents operator adjustments"); JA 454-455 (agreeing that his opinion is that the "set screw" design "makes the truck safe because it requires a mechanic to adjust the park brake"); JA 465 (agreeing his opinion is "the design intent of this ["set screw"] design was to prevent operators from adjusting this park brake.").

isting alternative designs he identified (including the "set screw" design which he primarily advocated) were intended to be operator-adjustable and were in fact operator-adjustable. (JA 458-459, 466-468.) As a result, he criticized those designs as also being unreasonably dangerous (JA 507-508) – leaving the Administrator with nothing but a "conceptual" alternative design and no evidence of any existing or tested design that Mallett considered reasonably safe.

There was likewise no evidence that the parking brake was "inadvertently" disabled or that the design was capable of being "inadvertently" disabled. This is a new theory of liability, advanced in the Administrator's Opening Brief. In the over 240 transcript pages of his trial testimony, Mallett never once mentioned the possibility that the over-center, operator-adjustable park brake design could be "inadvertently" or "accidentally" disabled, and never once criticized the design on this ground. In fact, the evidence confirmed it is not possible for the park brake to become inadvertently disabled. (JA 845, 1042-43.)

C. The Park Brake Design Complied with the Applicable Industry Standards.

The design of the over-center, operator-adjustable park brake complied in all respects with the applicable industry standards. ANSI B56.1-2000 is the governing standard for the design, performance and use of the Hyster S120XMS. (JA 314, 828-29.) The B56.1 standard has been adopted into federal law. 29 C.F.R. 1910.178(a)(2). (JA 1768.)

The ANSI B56.1 standard requires, in Section 7.16.1, that the park brake be "capable of holding the truck on the maximum grade that the truck can climb with rated capacity load, or on" a specified grade (in this case 15%) "whichever is the lesser." (JA 1837.)[5] Mallett conceded that the design of the park brake complied with the ANSI Standard and that nothing in the ANSI standard (or in any other standard) prohibited operator-adjustable parking brakes. (JA 472-473.) Likewise, nothing in the ANSI standard (or any other standard) required a design which could only be adjusted by mechanics. (JA 473, 477-478.)

The uncontradicted evidence likewise established that it was the custom and practice in the lift truck industry in 2003 for Class IV and Class V lift trucks to be designed and manufactured with operator-adjustable parking brakes, like the one on the Hyster S120XMS. In 2003, roughly 60 percent of the Class IV and Class V lift trucks used an over-center, operator-adjustable park brake. (JA 1035.) Another

[5] The Administrator's claim that ANSI B.56.1 "required the parking brake to hold under a full load on a 15% incline" (Appellant's Br., p. 5) is patently false. The standard plainly states the parking brake must be "***capable of holding*** the truck" on the specified incline. (JA 1837, emphasis added.) The Administrator's assertion that "[b]oth parties treated this as a requirement that the brake hold under full load on a 15% grade" (Appellant's Br., p. 5 n.1) is also false. The appendix pages cited by the Administrator do not support her claim; to the contrary, all parties acknowledged that the standard required the park brake to be ***capable*** of holding on a 15% incline. (JA 472, 938, 1151.) A parking brake which is damaged, or which has been intentionally disabled (as in this case), obviously cannot hold the required load on the specified incline, nor does the standard require that it do so. NMHG is not an insurer. *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251 (1975) ("The manufacturer is not an insurer and is not required to design and market an accident-proof product.").

roughly 40% used other types of brakes which were also operator-adjustable. (JA 1115-1116.) No one identified any Class IV or Class V lift truck manufactured in this timeframe that did not have an operator-adjustable parking brake. Indeed, by the time he was through making concessions on cross-examination, Mallett had conceded the park brakes on the Class IV and Class V lift trucks manufactured by his former employer – which he had initially held out as the preferable alternative design – were operator-adjustable through 2010. (JA 464-467.)

D. Federal Regulations Governing the Operation of Forklifts.

Lift trucks are complex industrial products. Operators must have knowledge, training and skill to operate them safely, so Federal law requires lift truck operators be trained and certified. Training "shall consist of a combination of formal instruction (e.g., lecture, discussion, interactive operator learning, video tape, written material), practical training (demonstrations performed by the trainer and practical exercises performed by the trainee), and evaluation of the operator's performance in the workplace." 29 C.F.R. § 1910.178(l)(2)(B)(ii). (JA 1775.) Trainees may operate a lift truck only "[u]nder the direct supervision of persons who have the knowledge, training, and experience to train operators and evaluate their competence." 29 C.F.R. § 1910.178(l)(2)(i)(A) (JA 1775.)

The regulations also specify the content of the required training, including:

- "Operating instructions, warnings, and precautions for the types of truck the operator will be authorized to operate"
- "Truck controls and instrumentation; where they are located, what they do, and how they work"
- "Any vehicle inspection and maintenance that the operator will be required to perform"
- "Any other operating instructions, warnings, or precautions listed in the operator's manual for the types of vehicle that the employee is being trained to operate."

29 C.F.R. § 1910.178(l)(3)(i)(A), (C) and (J) (JA 1775).

The regulations also include specific requirements for the operation of lift trucks, including provisions in 29 C.F.R. § 1910.178(m)(5) which provide that:

> (i) When a powered industrial truck is left unattended, load engaging means shall be fully lowered, controls shall be neutralized, power shall be shut off, and brakes set. Wheels shall be blocked if the truck is parked on an incline.
>
> (ii) A powered industrial truck is unattended when the operator is 25 ft. or more away from the vehicle which remains in his view, or whenever the operator leaves the vehicle and it is not in his view.
>
> (iii) When the operator of an industrial truck is dismounted and within 25 ft. of the truck still in his view, the load engaging means shall be fully lowered, controls neutralized, and the brakes set to prevent movement.

(JA 1777.) The regulations also require a pre-operation inspection of the lift truck by the operator to ensure it is in a safe condition for operation, or that it be removed from service if not in a safe operating condition. 29 C.F.R. § 1910.178(q)(7), (p)1 and (q)(1) (JA 1779).

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 is not an intended use of the lift truck and in fact constitutes a misuse. (JA 502.)

E. Mr. Evans' Accident.

1. Mr. Evans Fails to Complete the Required Training.

Mr. Evans started training to become a lift truck operator, but quit the training program in 2009, prior to the accident, because he was not being given enough time to train on the lift truck. (JA 658, 664, 1229-1230; *see* JA 649).

The Administrator tries to downplay Mr. Evans' lack of required training by claiming "training and certification could be completed in a single day." (Appellant's Br., p. 16.) But the testimony the Administrator cites relates to classroom training and demonstrations. This ignores the practical training and evaluation where a trainee operates the lift truck under the supervision of a certified operator to ensure the trainee can operate the equipment safely. Julian Lindsay, the certified lift truck operator tasked with training Mr. Evans, testified that Mr. Evans "was

supposed to have had a minimum of two weeks training with me. That's full-time, the eight hours per day" – not the mere one day the Administrator claims. (JA 723.)

Mr. Evans had received only a small portion of this training because International Paper kept pulling Mr. Evans back to his machine operator job. As a result, Mr. Lindsay explained that Mr. Evans' training with him "was very minimal." (*Id.*) Because Mr. Evans had failed to complete the required training, and was not certified, his operation of the lift truck on the date of the accident was a violation of Federal law.

2. The First Accident.

Despite the fact that it was illegal for him to operate the lift truck, Mr. Evans did so anyway, using it to unload paper rolls from a tractor trailer. (JA 538-539.) He would drive the lift truck up an inclined loading dock ramp so he could enter the trailer and retrieve the rolls and then down the same inclined ramp to the warehouse floor where the roll would be placed in a staging area. (JA 717, *see* JA 1744-1745.) Entering and exiting the trailer required Mr. Evans to drive across a manually positioned dock plate which bridged the gap between the loading dock and the trailer. (*See* JA 568-569, 1320, 1749, 1879.)

International Paper's loading dock utilized a dock light system. The lift truck operator would push a button to lift the dock plate, then push another button to extend the dock plate into the trailer. (JA 727.) If the dock plate is down and in place,

the system displays a green light indicating it is safe to proceed. (JA 726-727.) Otherwise, the system displays a red light indicating the dock plate is not in place and it is not safe to proceed. (*Id*.; *see* JA 1319.)

Mr. Evans had finished unloading the trailer and left the loading dock area to advise the shipping clerk he had finished unloading. (JA 555-556). He then returned to the dock area and told his co-worker, Lamont Lacy, that one of the rolls he unloaded was wet and he was going back into the trailer to determine why. (JA 538-539.) Mr. Evans drove the lift truck up the ramp and attempted to drive into the trailer, but 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, causing the lift truck to become stuck. (JA 539.)

The Administrator tries to excuse Mr. Evans' conduct by arguing the dock light system was broken and stuck on "red." (Appellant's Br., p. 7.) There is no evidence the dock light system was malfunctioning *before* Mr. Evans had his first accident.[6] Assuming it was, there is no evidence Mr. Evans (who had left the dock area for some period of time and then returned) made any physical inspection to ensure the dock leveler was in place before attempting to drive into the trailer. In-

[6] The evidence the Administrator points to is testimony that the dock light system was not functioning properly *after* Mr. Evans had crashed the 20,000 pound lift truck into the gap and contacted the rear of the trailer. (JA 260-62.)

stead, he attempted to drive back into the trailer despite the red light telling him not to proceed.

3. Mr. Evans Refuses to Notify a Supervisor.

Mr. Evans failed to notify a supervisor about his first accident, as required by International Paper's policies. (JA 571, 671, 726.) Instead, he left the lift truck and found his co-worker, Mr. Lacy. (JA 539.) Upon being told of the accident, Mr. Lacy immediately told Mr. Evans they needed to notify a supervisor. (*Id*.) Mr. Lacy was particularly concerned about getting a supervisor because he had never freed or towed a stuck lift truck in the manner suggested by Mr. Evans and wanted a supervisor to advise on the situation. (JA 539-540.) But Mr. Evans disagreed and instead convinced Mr. Lacy to assist him in trying to free the lift truck on their own. (JA 540.) (There was no evidence that Mr. Evans had any training or experience in towing or freeing a stuck lift truck either.)

4. Mr. Evans Decides to Stop the Lift Truck on the Ramp Even Though There Was No Reason He Needed to Do So.

Mr. Evans went to the maintenance area and got a chain. (JA 540-541.) He and Mr. Lacy attached one end to Mr. Evans' disabled lift truck and the other end to Mr. Lacy's lift truck. Mr. Lacy then used his lift truck to tow the front wheels of Mr. Evans' disabled lift truck out of the gap. (JA 540-41.) Mr. Evans was sitting in the operator's seat of his disabled lift truck during the tow. (JA 541.) After the wheels were freed, Mr. Evans, for some reason, chose to stop the lift truck on the

inclined ramp. (*Id*.) Nothing prevented him from riding the lift truck another few feet back down to the flat floor of the plant. (*See* JA 174, 1879.)

There was no reason Mr. Evans needed to stop the lift truck on the incline. The Administrator argues there was some urgency or some operational need to leave the truck on the incline (Appellant's Br., p. 19) – but this is pure speculation unsupported by any evidence. Mr. Evans had completed unloading the trailer. There was no evidence he had any other urgent task to perform; no evidence the loading ramp was needed to unload another waiting truck; and no evidence the lift truck was needed for any other purpose during the shift.[7]

5. Mr. Evans Then Dismounts the Lift Truck But Fails to Block the Wheels or Lower the Carriage, in Violation of Federal Regulations and NMHG's Warnings and Instructions.

With the lift truck stopped on the incline, Mr. Evans pulled the parking brake to the applied position. (JA 542.) But in doing so Mr. Evans failed to recognize the parking brake was almost completely disabled – a fact that was discovered post-accident by Julian Lindsay, the certified operator who examined it after the accident and knew immediately upon touching the brake handle that the brake was

[7] After arguing at length that the Circuit Court erred in holding the lift truck was disabled, the Administrator tries to excuse Mr. Evans' conduct by pointing to testimony International Paper's internal rule was no stopping on an incline "unless you have a disabled vehicle." (Appellant's Br., p. 21 n. 6.) The Administrator plainly cannot have it both ways, and there was no evidence that the lift truck was incapable of making it the additional few feet down to the flat plant floor.

so loose it would never hold on an incline. (JA 730-731.) Mr. Evans then dismounted the lift truck. (JA 542.)

Parking a lift truck on an incline should only be done if absolutely necessary – which was not the case here. As Mallett, stated, "It's never a good idea" to park a 20,000 pound piece of rolling equipment on an incline. (JA 438.) In cases where it is absolutely necessary, the Federal regulations require precautions to ensure the lift truck cannot roll. Those regulations require that the operator lower the carriage (clamp attachment) to the ground (which creates friction that helps hold the lift truck in place). 29 C.F.R. § 1910.178(m)(5); JA 861-82, 1074. And if the lift truck is "unattended" (i.e., the operator is more than 25 feet away, or is less than 25 feet away but the lift truck is not in his view) the regulations require the wheels to be blocked. 29 C.F.R. § 1910.178(m)(5)(ii). A warning decal in the operator's compartment repeated these warnings and instructions (JA 856-857, 1762) and warned that "FAILURE to follow these instructions can cause SERIOUS INJURY OR DEATH!" Whether the Administrator argues the warning decal was readable enough to attract Mr. Evans' attention (even though she had no evidence on this point) or not, Mr. Evans was required to be trained on and understand the on-product warnings and instructions – which are repeated and shown in the product manual (*e.g.*, JA 1647) – before ever operating the lift truck.

Mr. Evans never lowered the carriage or blocked the wheels. He instead dismounted his lift truck and placed himself between his 20,000 pound lift truck on the ramp and Mr. Lacy's lift truck.

6. The Lift Truck Rolls Because the Parking Brake Had Been Disabled.

Mr. Evans then began to remove the tow chain from Mr. Lacy's lift truck. (JA 542.) During this process, Mr. Evans' lift truck rolled down the ramp, crushing Mr. Evans between the two lift trucks and killing him. (JA 542-543, 557-558.)

Mr. Lacy saw Mr. Evans' lift truck begin to roll down the incline and screamed to Mr. Evans, but the work area was too loud for Mr. Evans to hear him. (JA 542.) This means Mr. Evans necessarily had his back turned to his lift truck, so it was out of his view and therefore "unattended" (or else that Mr. Evans somehow failed to see the 20,000 pound lift truck rolling toward him down the ramp).

F. The Testimony of Frederick Mallett.

The Circuit Court qualified Mallett as an expert on the "design and evaluation of park brake systems." (JA 336.) The entire basis for Mallett's "expertise" and opinions was his work experience with another lift truck manufacturer, Mitsubishi-Caterpillar Forklift America ("MCFA"). (JA 418, 428.) Mallett's testimony was clear that while employed by MCFA he had experience tearing down MCFA and competitor lift trucks to evaluate function and

performance. (JA 288-289.) But he had no personal experience with design, safety or hazard analysis for park brake systems, or any lift truck system.

Mallett never designed a park brake. (JA 300, 303-304, 306.) Indeed, he never claimed to have designed ***any*** piece of industrial equipment or any system for a piece of industrial equipment. He was not personally responsible for park brake testing of Class IV or V lift trucks or certifying their compliance to any safety standard. (JA 313-314.) The Circuit Court flatly stated, "I'm not sure that I've heard any testimony about his expertise in design or redesign" (JA 333-334) – but nonetheless qualified Mallett "as an expert in the area of design and evaluation of park brake systems" and permitted him to testify over NMHG's objection. (JA 336.)

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. (JA 348-349, 391-392, 396.) 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. (JA 396, 465; *see* JA 367-368.) 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 that he was not certain when this design was introduced. (JA 442.)

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. (JA 458-459.) When confronted with MCFA's product manuals, which specifically instructed lift truck operators how to adjust the park brake, Mallett conceded that MCFA intended the "set screw" design to be operator adjustable and that MCFA knew operators were making adjustments to the park brake. (JA 466-468.)[8] He agreed that, since certified operators are trained to check and adjust the park brake, MCFA did not consider an operator-adjustable park brake to be unreasonably dangerous. (JA 466-67.) But Mallett did. (JA 507-508.) So after telling the jury his opinion was "that the operator should not be required to make adjustments" (JA 398), 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 objection, about another proposed alternative design – the "one-way ratchet." (JA 398-400.) 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

[8] 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. (JA 394.) But he later conceded that this design, like the park brake design on *all* of the Class IV and Class V lift trucks manufactured by MCFA through 2010, was also operator adjustable. (JA 466-467.)

tighten the tension on the park brake but could not loosen it. (*Id*.) The design exists only as a "concept." (JA 421.) Mallett never attempted to sketch it out, let alone design or test it. (JA 420-421.) It has never been field-tested – or tested at all – so that it could be analyzed for risks or benefits. (JA 420.) The "concept" has never been used on any lift truck anywhere in the world. (JA 421-422.)

Mallett ***did not*** opine that the design of the parking brake violated any governmental standard, industry standard, or custom and practice in the industry. He ***did not*** point to any standard from outside the United States that prohibited operator-adjustable parking brakes. He ***did not*** point to any published studies or literature criticizing the design or calling it into question. And despite the fact that his job at MCFA for four years involved soliciting and receiving customer feedback (JA 284-87), Mallett ***did not*** testify to a single customer complaint about operator-adjustable parking brakes or to a single customer request that the design be changed or the feature eliminated.

G. The Supposed "Massive Concessions" by NMHG Described by the Administrator Provide No Support for Her Negligent Design Claim.

The Administrator claims NHMG made "massive" and "enormous" concessions about its design. But conceding that a lift truck parked on an incline presents a hazard simply acknowledges the obvious – a more than 20,000 pound piece of equipment stopped on an incline presents a hazard even if its brakes are properly adjusted. That is why the applicable Federal regulations, along with NMHG's

warnings and instructions, require that the operator avoid stopping on an incline or, if he must stop on an incline, that he lower the carriage and block the wheels.

Similarly, the Administrator cites to David Couch's acknowledgement that it was possible to design a parking brake that was not operator-adjustable, while wholly ignoring his explanation for why such a design was not desirable and was in fact ***more likely*** to result in operation of the lift truck with the parking brake out of adjustment. (JA 856, 890, 951-52.) And the claim that NMHG admitted that "40% of the lift trucks on the market in 2003 did not have an over-the-center, operator-adjustable parking brake" (Appellant's Brief, p. 34) simply omits the fact that this roughly 40% of the market identified by NMHG's witness had a different type of parking brake ***which was also operator-adjustable.*** (JA 1115-1116.)[9]

H. The Failure to Warn Claim.

As noted above, at trial the Administrator conceded there was no evidence Mr. Evans would have read and heeded any additional or different warnings, and premised her failure to warn claim solely on the mistaken theory that she was entitled to a heeding presumption. (JA 694-695.) Her counsel expressly told the Court that "***the reason there is no evidence of [causation] is Jerry was killed"*** and that

[9] The Administrator's assertion about the incorrect diagram in NMHG's Operating Manual is unavailing and non-consequential, because there is no evidence Mr. Evans ever saw or read the manual or ever saw the diagram. (JA 408-409, 630-631, 670-671, 1055, 1183.) Beyond that, the diagram simply showed a different way for the operator to adjust the parking brake rather than adjusting it by turning the park brake handle. (JA 852-853.)

any evidence that Mr. Evans would have read and heeded a different warning would be "speculation." (JA 695, emphasis added.) He then explained that:

> And the warnings law is, ***there is a presumption***, that if the warning is found defective that a better warning would have been heeded. That is the law in products liability on warnings…
>
> [I]if a warning is found defective ***it is presumed*** that a better warning -- the person would have heeded it, because people are supposed to heed warnings. ***So that's the law on warnings law***.

(JA 694-695) (emphasis added).

Virginia does not recognize a "heeding presumption." *Ford Motor Co. v. Boomer*, 285 Va. at 160. Moreover, the agreed upon finding instruction sought recovery only on a theory of negligent *design*. (JA 91-92.) It contained no reference to a theory of negligent failure to warn, and did not instruct the jury how to find a verdict on that theory. Similarly, the verdict form requested a verdict solely on the claim of negligent *design*. (JA 109.) There was no reference to a theory of negligent failure to warn, nor was the jury requested to find a verdict on that theory.

ARGUMENT AND AUTHORITIES

I. THE ADMINISTRATOR'S EVIDENCE DID NOT SHOW A VIOLATION OF ANY OBJECTIVE STANDARD OF SAFETY AND WAS INSUFFICIENT TO ESTABLISH NEGLIGENT DESIGN. (NMHG's Assignment of Cross-Error No 1.)

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,* 292 Va. 461, 481-82 (2016).

B. Argument.

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." 292 Va. at 478 n.14. In making that determination, courts look to applicable government regulations, applicable industry standards, and reasonable customer expectations. *Id.*

The Administrator argues this Court should not adhere to the test it set out in *Holiday Motor* because the test would "work a sea change in Virginia products-liability law", or that the test is somehow *dicta.* (Appellant's Br., pp. 36, 38.) But the test articulated in *Holiday Motor* has long been the law of Virginia. When read together, this Court's decisions in *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 250-51 (1975); *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428-31 (1975); and *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430 (1982) establish the criteria for determining whether a product is unreasonably dangerous:

- Promulgated U.S. government standards;

- Promulgated U.S. industry standards;
- Established U.S. industry customs or "norms"; and
- In the absence of the above, or when other evidence shows that the applicable standard or industry custom was not reasonably safe, expert testimony based on objective data, publications, and testing or experimentation.

This is precisely what this Court articulated in *Holiday Motor.* Virginia law has long recognized that a product does not suddenly become "unreasonably dangerous" merely because a plaintiff is injured, and a product cannot be "unreasonably dangerous" in the abstract merely because it may have been possible to design it in a way which would have prevented the plaintiff's injury. Rather, a product can only be unreasonably dangerous in design if its design fails to meet a recognized, objective standard at the time it is manufactured and sold.

1. The Administrator Did Not Establish the Violation of Any Governmental or Industry Standard, or of Any Industry Norm.

The evidence in this case failed to establish the violation of any governmental regulation, industry standard or industry norm. The governing ANSI B56.1 design standards have been adopted into federal law. Mallett conceded this, and conceded that the design of the S120XMS, including its park brake, satisfied ANSI B56.1. (JA 314, 472.) 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." (JA 465-468, 1115-1116, 1799 [ASME B56.1-2000; Part I, §2].)

If the Administrator's evidence and theory were accepted as sufficient to establish a defect, then effectively every Class IV and Class V lift truck manufactured in the 2003 timeframe was negligently designed and unreasonably dangerous. While the Administrator claims that "Mallett proposed a parking brake with a set screw that would prevent operators from adjusting or disabling it without tools" (Appellant's Brief, p. 27), she cites only to Mallett's direct examination – wholly ignoring that he ultimately conceded on cross-examination that the "set screw" design was also operator-adjustable, and that this design was therefore also unreasonably dangerous in his opinion. (465-468, 507-508.)

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. (JA 477-478.)

2. The Administrator Did Not Offer Any Evidence that Purchasers of Lift Trucks Considered Operator-Adjustable Parking Brakes Unreasonably Dangerous, or That They Were Demanding That the Feature be Eliminated.

Nor was there any evidence that customers were demanding park brake designs that were not operator adjustable. The sort of anecdotal testimony from a single operator touted by the Administrator (Appellant's Brief, p. 32) is not "customer expectation" evidence.

> Consumer expectations, which may differ from government or industry standards, can be established through "evidence of actual industry practices, . . . published literature, and from direct evidence of what reasonable purchasers considered defective."

Alevromagiros v. Hechinger Co., 993 F.2d 417, 420-21 (4th Cir. 1993) (quoting *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir.) (applying Kentucky law), *cert. denied*, 116 L. Ed. 2d 52, 112 S. Ct. 79 (1991)). The Administrator had no such evidence in this case. In fact, the evidence of "customer expectation" in the case was that in 2003 virtually every Class IV and Class V lift truck had an operator-adjustable parking brake like the Hyster S120XMS.[10] Mallett, despite having a job with MCFA that included receiving customer feedback about the design and function of lift trucks, conspicuously did not offer any testimony that customers had complained about the over-center, operator-adjustable parking brake or that they had requested that the adjustment feature be eliminated.

The evidence of what reasonable purchasers of lift trucks considered acceptable was offered *by NMHG*, and it was uncontradicted. That evidence consisted not only of statistical evidence showing all (or virtually all) similar lift trucks had operator-adjustable parking brakes (JA 1035, 1115-1116), but also included

[10] The Administrator claims that, "By the time of trial, none of the major North American manufacturers were following NACCO's over-center, operator-adjustable parking brake design." (Appellant's Brief, p. 30.) Even if this were true (which it is not, JA 851), it would not help the Administrator because the design is to be judged as of the date "when the goods left [NMHG's] hands" in 2003. *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428 (1975).

specific evidence that Weyerhaeuser – the original purchaser of the Hyster S120XMS – had jointly negotiated the specifications for its lift trucks (which included the over-center, operator-adjustable parking brake) with Hyster and purchased hundreds of lift trucks from Hyster every year.[11] (JA 1190-1194.)

3. The Administrator Offered Nothing More Than Her Expert's Unsupported Opinion That a Supposedly "Safer" Conceptual Design Was Feasible – But This is Insufficient to Establish Negligent Design.

At trial, the Administrator did not even pretend she had established the violation of government regulations, industry standards or customer expectation. Rather, she took the position that she was not required to offer such proof, but instead was entitled to proceed on the basis of her expert's opinion that there was a "safer" design. (JA 99; 686-687.) Her effort to change her defect theory on appeal points up the insurmountable problem she has in establishing any unreasonably dangerous condition.

Likewise, there was no evidence that the park brake design on the Hyster S120XMS was less safe than the design on any other Class IV or Class V lift truck existing in 2003, or that the "set screw" design advocated by Mallett would have

[11] The Administrator's suggestion that she could prove an unreasonably dangerous condition through the testimony of a single lay witness would eviscerate this Court's decisions holding that unsupported expert testimony is insufficient to establish an unreasonably dangerous condition. *E.g.*, *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 156 (2015) (expert's opinion that vehicle was unreasonably dangerous "was without sufficient evidentiary support.")

somehow made it impossible to disable the park brake. (To the contrary, Mallett acknowledged that the set screw design "[a]ssum[es] that at some point the parking brake was correctly adjusted before the screw was tightened…." JA 516.)

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*, 292 Va. at 478 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").

II. THE TESTIMONY OF MALLETT SHOULD HAVE BEEN EXCLUDED. (NMHG's Assignment of Cross-Error No. 2)

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. Argument.

1. Mallett Lacked the Requisite Qualifications.

Mallett was admitted as an expert in the "design and evaluation of park brake systems." (JA 336.) But his experience did not include any experience in designing park brake systems or evaluating the safety of park brake designs. The Circuit Court noted the 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 Circuit 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 he 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.

2. Mallett's Opinions Lacked Adequate Foundation.

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. (JA 466-468, 507-508.) 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. (JA 420-421.) 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) (JA 421-422.) 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,* 292 Va. at 484-85; *Hyundai,* 289 Va. at 157-58.

III. THE ADMINISTRATOR CANNOT RELY ON THE FAILURE TO WARN CLAIM TO SAVE THE VERDICT. (NMHG's Assignment of Cross-Error No. 3)

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. Argument.

1. The Circuit Court Should Have Granted NMHG's Motion to Strike the Failure to Warn Claim Because There Was No Evidence of Proximate Causation.

"Virginia does not observe a heeding presumption." *Ford Motor Co. v. Boomer*, 285 Va. At 160. For the Administrator to make out a claim for negligent failure to warn she needed evidence in the record that would allow a reasonable jury to conclude that Mr. Evans' death would not have occurred had an "adequate" warning been given.[12] *Hoar v. Great Eastern Resort* Management, Inc., 256 Va. 374, 388 (1998); *Southern Ry. Co. v. Whetzel,* 159 Va. 796, 807 (1933).

Here, there was no evidence from which a jury could conclude that Mr. Evans relied in any way upon the allegedly "inadequate" warning label. The suggestion that Mr. Evans "believed" the park brake was *operational and would hold on*

[12] The Administrator's warnings expert, Mr. Laughery, focused exclusively on ***one*** warning decal which he opined was inadequate, despite the fact that he conceded its language complied with the applicable industry standard. (JA 632-633.) Laughery did not offer any testimony about ***any*** of the other on-product warnings.

the incline because no warning alarm sounded when he left the operator's seat is pure speculation. It is contradicted by the testimony of Julian Lindsay who testified that the park brake adjustment was so loose that he could tell as soon as he touched it that it would not hold (JA 730-731), and by other witnesses who testified that a knowledgeable operator could determine by feel if the park brake adjustment was too loose. (JA 840, 896-897, 1035-1036.)

Additionally, the undisputed evidence in this case showed that Mr. Evans disregarded positive safety warnings and instructions provided by his employer, and that he either failed to read and understand – or completely disregarded – the other warnings and instructions which were on the lift truck. He also committed numerous violations of Federal law. The Administrator presented no contrary evidence suggesting Mr. Evans "was inclined to follow recommended procedures and guidelines." *Boomer*, 285 Va. 141, 161 (2013).

Finally, there is no evidence in the record that any alleged inadequacy in the Operator's Manual for the lift truck played any causal role in Mr. Evans' accident and death. Every witness who was asked acknowledged that he had no evidence suggesting Mr. Evans had ever seen the Operator's Manual, and there was no evidence whatsoever that Mr. Evans had ever seen the portion of the manual that Mallett claimed was "misleading" or "inaccurate." (JA 408-409, 630-631, 670-671,

1055, 1183.) On the record evidence, no reasonable jury could conclude that any alleged failure to warn was a proximate cause of Mr. Evans' accident and death.

The Administrator's counsel in fact ***conceded*** there was no evidence Mr. Evans would have read and heeded any additional or different warnings. (JA 694-695.) She instead premised her failure to warn claim solely on the mistaken theory that she was entitled to a heeding presumption. (*Id*.) That argument fails under Virginia law, which has explicitly rejected the heeding presumption. *Ford Motor Co. v. Boomer*, 285 Va. at 160.

2. In Any Event, the Agreed Verdict Form Did Not Present the Failure to Warn Claim for the Jury's Decision, So It Was Waived.

By failing to submit the negligent failure to warn theory to the jury in the finding instruction and the verdict form, the Administrator waived that theory of recovery. *Campbell Co. v. Royal*, 283 Va. 4, 25-27 (2012) (inverse condemnation theory of recovery was waived under language of instruction).[13]

The Administrator's assertion that, "The jury instructions defined negligent design to include the failure to provide an adequate warning" (Appellant's Br., p. 10 n. 4) misstates the instructions and the applicable law. The jury instructions the

[13] Because the Administrator failure to object to the finding instruction and the verdict form before the jury was discharged, she has forever lost the right to a jury finding on this theory of recovery. *See Northern Virginia Power Co. v. Bailey,* 194 Va. 464, 473-474 (1952) (defendant waived objection to verdict form's omission of proximate cause element by not raising the issue before the jury was discharged).

Administrator points to contain no such instruction. To the contrary, the jury was instructed that, "A product is unreasonably dangerous if it is defective in assembly or manufacture, unreasonably dangerous in design, or unaccompanied by adequate warnings concerning its hazardous properties." (JA 79.) That instruction sets forth three ***separate*** ways a product can be unreasonably dangerous – "if it is defective in assembly or manufacture" (negligent manufacturing); if it is "unreasonably dangerous in design" (negligent design); ***or*** if it is "unaccompanied by adequate warnings concerning its hazardous properties" (negligent failure to warn). No instruction conflated the claim of negligent design with the claim of negligent failure to warn, and it is well settled under Virginia law that they are separate theories. *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 965 (1979) (analyzing claims of negligent design and negligent failure to warn separately).

IV. MR. EVANS WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW, BARRING THE ADMINISTRATOR FROM ANY RECOVERY. (The Administrator's Assignment of Error)

A. Standard of Review.

Because the Circuit 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). "[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. Argument.

Because the Administrator's evidence was insufficient to establish her negligent design claim, the Court does not even need to reach the contributory negligence issue. *Belcher v. Goff Bros.*, 145 Va. 448, 458 (1926) ("the primary negligence of the defendants has not been established by the evidence, and hence it is immaterial whether or not the plaintiff was guilty of contributory negligence"). But if the Court does reach this issue it should affirm the Circuit Court's conclusion.

1. The Circuit Court Correctly Ruled that Mr. Evans' Unnecessary and Careless Actions Caused His Accident and Death.

The Circuit Court ruled that Mr. Evans' conduct amounted to contributory negligence as a matter of law, ruling that the evidence showed he engaged in "a collective series of actions (and inactions) which, although in some instances instigated and perpetuated by International Paper, defied common sense, violated internal procedures and federal regulations, and was plainly careless and contrary to his own safety." (JA 223-224.)

"The essence of contributory negligence is carelessness" and is judged by "whether a plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances." *Artrip v. E. E. Berry Equipment Co.*, 240 Va. 354, 358 (1990). Here, Mr. Evans was not authorized to operate the lift truck at all, and his lack of knowledge and experience in safe operation was evident. From the moment he drove his lift truck through the red light and got it stuck, Mr. Evans made one careless decision after another which culminated in his accident and death. No one forced Mr. Evans into any of these actions – he came up with the plan to free the stuck lift truck, and in the process of doing so he carelessly and unnecessarily placed himself a hazardous position where he had no ability to protect himself and no margin for error. Mr. Evans was "the author of his own passing" and the Administrator is therefore barred from recovery. *Brickell v. Shawn*, 175 Va. 373, 380 (1940).

2. The Circuit Court Identified a Litany of Careless Acts and Omissions That Resulted in Mr. Evans' Accident and Death.

The Circuit Court pointed to seven separate acts or omissions by Mr. Evans where he failed to exercise reasonable care for his own safety under the circumstances.

- "(i) Jerry 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.)

It was a violation of Federal law for Mr. Evans to operate the lift truck, and that violation continued right up until the moment of his accident and death. *See Southern Ry. Co. v. Rice's Adm'r*, 115 Va. 235, 244-46 (1913) (if plaintiff is acting in violation of statute or ordinance, and the violation proximately contributes to the injury, plaintiff is guilty of contributory negligence). The Circuit Court was right to point to this violation, because Mr. Evans' lack of knowledge about safe operating procedures underlay all of his careless decisions. And Mr. Evans knew that he was not trained and certified, because he had quit the certification program.

The Administrator seeks to excuse Mr. Evans' conduct by relying on *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 372 (4th Cir. 1983), quoting the proposition that "[A]n 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." According to the Administrator, because Mr. Evans' employer told him to operate the lift truck, any act or omission in the process of operation is somehow excused.

But *Jones* (even to the extent it correctly predicts Virginia law) stands only for the limited proposition that where the employer has given an employee specific instructions on how to perform a discrete job task, the employee may not be guilty of contributory negligence in following those instructions. 723 F.2d at 372-73. Here, there was no evidence that Mr. Evans was ever given any instruction on how

to go about attempting to free the disabled lift truck. Indeed, Mr. Evans specifically ***rejected such instruction*** by failing to notify a supervisor after the first accident. Instead, he continued to operate the lift truck in violation of Federal regulation. The Circuit Court denied the Administrator's proffered Instruction No. G (JA 103), which was based on *Jones*, for this very reason, and the Administrator has not appealed that ruling.[14]

The certification to operate the lift truck was not, as the Administrator suggests, just a "piece of paper" or a formality. Mr. Evans quit the training program because he understood he was not being allowed sufficient time to train so that he could operate the lift truck safely. His failure to understand the equipment, and to follow safe operating procedures, caused him to operate the lift truck in an unsafe condition and to violate Federal safety regulations, ultimately resulting in his accident and death.

> - "(ii) Before his fatal accident, Jerry Evans did not discover any defect in the park brake during a pre-operation inspection (as is evidenced by the lack of any inspection form and by his subsequent use of the lift truck) or during his subsequent operation of the lift truck" (JA 222.)

[14] The broad rule argued for by the Administrator would effectively excuse any negligent workplace conduct because the employer instructed the employee to perform a task. 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).

There was no evidence that Mr. Evans in fact conducted a pre-operation inspection of the lift truck. The Administrator speculates he must have done so, but the evidence showed that after the accident the parking brake was effectively disabled to the point that Mr. Lindsay knew the moment he touched it that the brake was not going to hold on the ramp. The disabled park brake would have been obvious to a trained operator. (JA 730-731.) Given the condition of the park brake when it was inspected after the accident, it is apparent that Mr. Evans either failed to inspect the parking brake, or else his inspection was completely ineffectual given his lack of training. He then continued to operate the lift truck with the parking brake in the disabled condition, without bothering to make any adjustment. The condition of the parking brake, and Mr. Evans' failure to note it and make appropriate adjustments, led directly to his accident and death.

- "(iii) During Jerry Evans' operation of the lift truck immediately before his fatal accident, he suffered a significant mishap when he drove his lift truck into a gap at the end of the dock, which effectively disabled the lift truck" (JA 222.)

- "(iv) Following the mishap, and despite the repeated admonition of his co-worker, Mr. Lacy, Jerry Evans elected to try and operate the disabled lift truck without reporting the mishap to supervisory personnel and without the assistance of supervisory personnel" (JA 222.)

It is undisputed that Mr. Evans drove his lift truck up the ramp and off the edge of the loading dock, crashing the front wheels into the gap between the edge

of the loading dock and the trailer. The Administrator attempts to excuse this conduct by arguing that the dock light system was malfunctioning. In that case, due care required that Mr. Evans ascertain – by a visual inspection – that the dock plate was in place before attempting to drive a 20,000 pound forklift into the trailer. Instead, Mr. Evans proceeded in the face of a red light telling him it was unsafe to do so. (Indeed, there was no need for Mr. Evans to drive into the trailer at all. The evidence showed that he was going back into the trailer to check for a leak, which he could have accomplished by simply walking back into the trailer.)

After this accident, Mr. Evans dismounted his lift truck and went back to the plant floor. At that point, he was not in any danger. He found Mr. Lacy, but rejected Mr. Lacy's urging to notify a supervisor about the accident – in violation of International Paper's policies. (JA 571, 671, 726.) Instead, Mr. Evans improvised a makeshift plan for moving a 20,000 pound vehicle with no training or experience in how to do it. If Mr. Evans had notified a supervisor then he would not have placed himself in the dangerous position that resulted in his accident and death.

The first accident created the circumstances that resulted in Mr. Evans' accident and death, because Mr. Evans put himself between the two lift trucks only as a part of the process of freeing his stuck and disabled lift truck. By refusing to notify a supervisor, Mr. Evans put his fate in the hands of himself and Mr. Lacy and the plan Mr. Evans developed on the spot.

- "(v) After Mr. Lacy used his lift truck to "tow" Jerry Evans' disabled lift truck out of the gap, Jerry Evans "parked" his lift truck on an incline, as opposed to traveling a short distance down the incline to the relative safety of level ground" (JA 222.)

Mr. Lacy and Mr. Evans managed to free the front wheels of Mr. Evan's lift truck. But for some reason Mr. Evans chose to stop the lift truck on the incline of the loading ramp. There was no reason it needed to be stopped on the ramp; Mr. Evans could simply have ridden it another few feet down the ramp to the flat plant floor, where there was no chance it could have rolled.

The Administrator's arguments for why it might have been reasonable for Mr. Evans to stop the lift truck on the ramp are sheer speculation. The facts showed that at the point when he chose to stop the lift truck on the incline Mr. Evans was not in any danger, and that there was no urgent need to remove the tow chain. Had Mr. Evans simply ridden the lift truck a few feet down to the flat plant floor he could have dismounted and removed the chain with no risk whatsoever. In his haste, however, he choose to leave the unblocked lift truck with the raised attachment parked in a dangerous position on an incline. Where no emergency is involved, a plaintiff who chooses a hazardous method of performing a task instead of an obviously safer one is generally guilty of contributory negligence. *Riverside and Dan River Cotton Mills, Inc. v. Carter*, 113 Va. 346, 351 (1912).

- "(vi) After Jerry Evans parked his lift truck on the incline, and contrary to an explicit and prominently dis-

> played warning, Jerry Evans dismounted his now unattended lift truck without lowering the clamp attachment or chocking the wheels in any way" (JA 222-223.)

With the lift truck on the inclined ramp, Mr. Evans left the operator's compartment and walked directly behind his lift truck. At this point, the lift truck was on an incline and "unattended" because it was no longer in Mr. Evans' view, as shown by the fact that Mr. Lacy was screaming at Mr. Evans in an effort to get his attention. (JA 521.) Federal regulations therefore required that Mr. Evans lower the carriage and block the wheels. Neither Mr. Evans nor Mr. Lacy had any idea whether the lift truck had been damaged in the first accident, as Mr. Lacy admitted. (JA 544.)[15] But importantly, the regulations require that the carriage be lowered and that the wheels be blocked even if the operator believes the parking brake is properly adjusted and the lift truck is otherwise in operational condition (29 C.F.R. § 1910.178(m)(5) – because there is an inherent risk of unintentional movement anytime a 20,000 pound piece of wheeled industrial equipment is parked on an incline. Lowering the carriage to the ground creates friction that helps prevent unintentional movement (JA 861-82, 1074) and blocking the wheels obviously keeps them from rolling.

[15] The Hyster S120XMS had an underclearance of only four to five inches and no suspension. (JA 1087.)

A warning decal in the operator's compartment repeated these warnings and instructions. (JA 1762.) The Administrator now argues this warning decal was illegible or otherwise inadequate, but she never advanced any such contention at trial – indeed, her warnings expert never reviewed this decal and, besides, the decal was repeated in the product manual which the Federal regulations required trained operators to read, review and understand.

The Administrator argues that it was reasonable for Mr. Evans not to block the wheels because no chocks were available, and that it was reasonable for him not to lower the carriage because he had not been instructed to do so. But the absence of available chocks for the wheels merely points up how imprudent it was for Mr. Evans to stop the lift truck on the incline when there was no reason or requirement to do so. And the Administrator's own expert described lowering the carriage on a lift truck as a "universal requirement." (JA 438.)

Due regard for one's own safety dictates that a 20,000 pound piece of wheeled equipment on an incline be secured so that it cannot roll inadvertently – and this is particularly true when that equipment has just been involved in an accident and may have been damaged. Mr. Evans failed to take these common sense steps, and that negligence led directly to his accident and death.

> - "(vii) Jerry Evans' death resulted when he placed himself on the downhill side of his unattended lift truck, and his lift truck subsequently rolled down the incline

> and crushed him between his lift truck and the one operated by Mr. Lacy" (JA 223.)

With the lift truck parked on the incline, Mr. Evans again left a place of safety and placed himself in peril by walking directly behind his lift truck and placing himself between his lift truck and Mr. Lacy's lift truck. The carriage on Mr. Evans' lift truck was raised, the wheels were not blocked, and Mr. Evans had no idea whether the lift truck had been damaged during this first accident.

Positioning himself between the two 20,000 pound lift trucks under these circumstances, and placing himself in a position where he could not see the lift truck on the incline, would have been a reckless thing to do even if Mr. Evans had been certain that the parking brake was in good operating condition and was properly adjusted. *See Kelly v. Virginia Elec. & Power Co.*, 238 Va. 32, 40 (1989) (plaintiff's claim that an uninsulated wire excused his conduct was rejected because implicit in that contention was the admission that, were the line insulated, it would have been safe to run the risk of touching it with a metal ladder, which is reckless conduct in itself.).

* * *

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. 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. This Court has affirmed rulings that a plaintiff was guilty of contributory negligence as a matter of law where he failed to show due apprehension about an obviously dangerous situation, failed to make reasonable inquiries about the situation to permit him to work safely, and failed to take simple safety precautions (even if they might have required additional time or effort). *E.g., Kelly,* 238 Va. at 40-41. This is such a case.

CONCLUSION

The Circuit Court properly entered judgment for NMHG, and there were other grounds on which it should have ruled for NMHG as well. Accordingly, for all of the foregoing reasons the judgment for NMHG should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2017, three true and accurate copies of Appellee's Brief were hand-filed with the Supreme Court of Virginia, and a true copy has been served, by email, upon the following:

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