IN THE

Supreme Court of Virginia

RECORD NO. _____

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

Petitioner,

V.

NACCO MATERIALS HANDLING GROUP, INC.,

Respondent.

PETITION FOR APPEAL

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Table of Contents

Table of Authorities

Constitutions

Statutes

Cases

Regulations

Introduction

Jerry Evans was crushed to death when the park brake on an industrial lift truck failed to hold on an incline. His widow sued the lift truck's manufacturer, alleging that the brake was defective. After a six-day trial, the jury agreed. It rejected the manufacturer's contributory-negligence defense and returned a $4.2 million verdict. The trial court set that verdict aside as "plainly wrong." It did not find that the verdict lacked evidentiary support. Just the opposite, the trial court conceded that reasonable jurors could differ in their assessments of Mr. Evans's specific actions. Letter Op. 7, Sept. 2, 2016. The lower court simply took a different view of the case as a whole, disagreeing with the jury's assessment of the weight of the evidence, the credibility of the witnesses, and the deep question of what qualified as "reasonable" conduct.

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. *Preserved at* Pl.'s Brief in Opp. to Def.'s Mot. to Set Aside the Verdict & Enter Summary Judgment in its Favor as a Matter of Law, or in the Alternative for a New Trial 1-2, 6-26, June 17, 2016; H'rg Tr. 23-35, Aug. 19, 2016; Final Order 6, Sept. 16, 2016.

Nature of the Case and Material Proceedings Below

Ronda Maddox Evans, Administrator of the Estate of Jerry Wayne Evans, deceased, sued NACCO Materials Handling Group, Inc. in the Circuit Court for the City of Roanoke. After a six-day trial, the jury returned a plaintiff's verdict. The trial court set the verdict aside as plainly wrong, holding that Mr. Evans was contributorily negligent.

Statement of Facts

1. Jerry Evans was killed when the Defendant's park brake failed.

Jerry Evans supported his family by working at the International Paper plant in Lynchburg. Trial Tr. 137, 529 [hereinafter "Tr."]. To advance in his job, he volunteered to learn how to operate a Hyster S120XMS lift truck manufactured by the Defendant. *See* Tr. 1359. The lift truck was essentially a forklift with a clamp attachment:

PX36.013.

To operate the lift truck, Mr. Evans had to be trained and certified by his employer. *See* 29 C.F.R. § 1910.178(l); *see also* Tr. 384. His "license," or certification to operate the vehicle, would thus have come from his employer, International Paper, not from a governmental authority like the Department of Motor Vehicles or OSHA. 29 C.F.R. § 1910.178(l)(6).

International Paper's training program included three elements: (1) classroom training with a handbook and video; (2) a hands-on demonstration with a lift truck; and (3) on-the-truck training with a mentor. Tr. 309, 1348-49. Mr. Evans had progressed to the third stage. He'd undergone substantial classroom training and practical instruction. Tr. 603-04, 610-12, 1365, 1384-85; PX 21; PX22; PX23. Mr. Evans received hands-on training from (among others) Julian Lindsay, who was the most experienced lift-truck operator at the Lynchburg plant. Tr. 730, 744, 748, 758. He had spent hours on the truck learning from Mr. Lindsay. Tr. 748.[1]

[1] Mr. Lindsay felt that, in addition to his other training, Mr. Evans should have had at least two weeks of full-time practical training on the truck with him, and expressed frustration that he was only able to train Mr. Evans in one- or two-hour blocks. Tr. 748. This opinion conflicted with other testimony, which stated that an operator could complete the required training in a single day. Tr. 1386-89.

Particularly relevant here, Mr. Evans was trained on how to inspect the lift truck before using it, and on how to park the vehicle. *See* PX22, PX23.[2] He was not trained to adjust the park brake. Operators were not supposed to adjust the park brake themselves, but were instead told to tag the lift truck out for maintenance if the brake needed adjustment. Tr. 764-66, 1361-62.

Even so, Mr. Evans felt that he was not getting enough time on the machine, so he withdrew from training. Tr. 405, 620, 633; *see also* 748.

On the evening of January 22, 2010, Mr. Evans's supervisor directed him to use the lift truck to unload a tractor-trailer parked at the loading dock. Tr. 481, 603-04, 620. After Mr. Evans had successfully completed

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[2] PX 22 is a December 2009 evaluation that directs the evaluator to mark any item for which Mr. Evans did not meet standards and to explain that item in the remarks. It appears, however, that the evaluator did the opposite, marking the items for which Mr. Evans *met* the standards, and explaining some of the unmarked sections. For instance, the boxes under "Fueling" and "Railcar Loading/Unloading" are unmarked, with a notation for each stating "Not yet." Those comments would make no sense if leaving the box unchecked meant that Mr. Evans complied with the standard. By contrast, none of the marked boxes comes with an explanation. This includes the boxes checked for "Demonstrates proper pre-shift inspection" and "Demonstrates proper procedure for parking." PX23 is a January 2010 written training review, and it includes a question about pre-shift inspections. At this stage of the proceedings, the facts must be viewed in the light most favorable to Ms. Evans, and all reasonable inferences must be drawn in her favor. The reasonable inference to be drawn from the evidence is that Mr. Evans was trained on pre-shift inspections and parking.

several trips into and out of the trailer, his lift truck became stuck in the 11-inch gap between the trailer and the dock. Tr. 114, 162, 482; *see* Tr. 499, 1544, PX19.

Mr. Evans recruited another lift-truck operator, Lamont Lacy, to help him move the lift truck. Tr. 482. Mr. Lacy first suggested that they contact a supervisor, but ultimately decided to assist Mr. Evans. Tr. 482, 494. Mr. Lacy went to get some fuel for his truck and Mr. Evans left to get a chain. Tr. 483. Back at the trailer, Mr. Lacy attached his vehicle to the stranded lift truck with the chain and towed it out of the gap, bringing it to rest on the loading dock's ramp. Tr. 483-84. It is unclear from the record where, exactly, the trucks stopped. Grades on the ramp varied, DX86 & DX107-1, so it is not even clear that the operators realized that Mr. Evans's truck was resting on an incline.

Federal regulations and the applicable industry standard required that the lift truck's park brake be strong enough to hold on a 15% grade. 29 C.F.R. § 1910.178(a)(2); DX33 § 7.16.[3] The loading dock ramp had a maximum effective grade of 12%. Tr. 284-85.

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[3] Specifically, the park brake had to hold on the lesser of (1) a 15% grade or (2) the maximum grade that the truck could climb while carrying its rated capacity load. At trial, both parties treated this as a requirement that the brake hold on a 15% grade.

Consistent with his training and applicable warnings, Mr. Evans turned off the lift truck. He set the park brake and removed his seat belt. Tr. 284, 484-85.

A warning next to the park brake stated that an alarm would sound if the brake was not applied. Tr. 285. The alarm did not sound. *See* Tr. 951-52.

Mr. Evans dismounted the truck. He did not "chock" the wheels, because chocks were not available to lift-truck operators, Tr. 607, and he was not leaving the truck unattended, *see* 29 C.F.R. § 1910.178(m)(5).

The park brake held on the incline. Tr. 486. Mr. Evans walked around to the back of the truck and began to undo the tow chain. Tr. 485.

At that point, the park brake failed. The lift truck rolled down the incline. It crushed Mr. Evans against Mr. Lacy's truck, killing him. Tr. 288, 485-86. Post-accident evaluation showed that the truck's park brake was out of adjustment. Tr. 289-90, 293. The park brake's handle rotated like the throttle on a motorcycle. The safety-critical brake could be adjusted or even disabled by an operator—including an operator on an earlier shift—just by turning that handle, without using tools. Tr. 248-49, 252-54.

2. After a six-day trial, the jury found that the park brake was defective and rejected NACCO's contributory-negligence defense. It returned a plaintiff's verdict, which the trial court set aside as "plainly wrong."

Mr. Evans's widow brought a wrongful-death action against NACCO. Over the course of a six-day trial, she proved that the lift truck was unreasonably dangerous because:

1) The safety-critical park brake could be disabled by an operator—bypassing maintenance workers, and not requiring any tools—simply by the turning of the handle during use, *e.g.*, Tr. 248-49, 253-54; and

2) The park brake was not accompanied by adequate warnings, *e.g.*, Tr. 285-87, 555-56.

NACCO denied that the park brake was unreasonably dangerous and insisted that Mr. Evans died because of his own carelessness. Even so, NACCO was forced to concede that the park brake's manual provided operators with inaccurate information about how to adjust the brake. In fact, the manual appeared to describe a park brake that could be adjusted only with tools, PX111—which is exactly how the Plaintiff thought that the brake should have worked in the first place. NACCO admitted that this was a "mistake" that was "totally not acceptable," and assured the jury that it would be fixed. Tr. 877-78, 935-36, 942.

After considering the evidence, the jury returned a $4.2 million verdict, rejecting the Defendant's contributory-negligence argument. Tr.

1406-07; Verdict Form. NACCO moved to set the verdict aside. After briefing and argument, the trial court determined that the jury's verdict was "plainly wrong on the issue of contributory negligence and must be set aside." Letter Op. 2, Sept. 2, 2016. It entered judgment in favor of NACCO.

Arguments and Authorities

1. Standard of Review

A trial court may set a jury's verdict aside only when it is plainly wrong or without credible evidence to support it. *Bussey v. E.S.C. Rests., Inc.,* 270 Va. 531, 534 (2005); Va. Code § 8.01-430. "This authority is explicit and narrowly defined." *Id.* A trial court must show "the utmost deference" to the jury's verdict. *Id.* If the evidence is conflicting on a material point, or if reasonable people could draw different conclusions from the evidence, or if a conclusion depends on the weight that the fact-finder gives to the evidence, the trial court cannot substitute its own conclusion for the jury's just because it would have reached a different result. *Estate of Moses v. Southwestern Va. Transit Mgmt. Co.*, 273 Va. 672, 677 (2007).

On appeal, this Court will give Ms. Evans "the benefit of all substantial conflicts in the evidence, and all fair inferences that may be drawn from the evidence." *Bussey,* 270 Va. at 535.

2. In deciding to take this case away from the jury, the trial court improperly viewed the facts in the light most favorable to the Defendant and substituted its own judgment for that of the jury.

The trial court's holding fundamentally violates this standard. Contributory negligence is an affirmative defense that consists of two independent elements: negligence and causation. *Rascher v. Friend*, 279 Va. 370, 375 (2010). When a defendant asserts contributory negligence, it has the burden of proving not only that the plaintiff acted unreasonably, but also that his negligence was a proximate cause—a direct, efficient, contributing cause—of his accident. *Id.* Negligence and proximate causation present classic questions of fact for the jury. A plaintiff can be found contributorily negligent as a matter of law only when reasonable people could not disagree on the outcome. *Id.*

Here, the trial court overruled the jury's fact findings and insisted that Mr. Evans was contributorily negligent, drawing the following conclusions from the evidence:

(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;

(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;

(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;

(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;

(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;

(vi) After Jerry Evans parked his lift truck on the incline, and contrary to an explicit and prominently displayed warning, Jerry Evans dismounted his now unattended lift truck without lowering the clamp attachment or chocking the wheels in any way; and

(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.

Letter Op. 4-6 (footnote calls and bullet points omitted).

A reasonable jury hearing the same evidence could—and did—disagree with the trial court on each of these points, as well as the court's ultimate conclusion. We will consider each in turn.

First, the trial court mistakenly faults Mr. Evans for operating the lift truck even though he knew that he was not certified or fully trained. This

complaint overlooks the fact that International Paper was responsible for Mr. Evans's training and certification. It knew precisely how much classroom instruction and hands-on practical training he'd received.

That's important, because International Paper also directed Mr. Evans to use the lift truck. Given the state of his training, it was for the jury to determine whether it was reasonable for Mr. Evans to follow that instruction. "[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." *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 372 (4th Cir. 1983).[4] Here, Mr. Evans could have considered his employer's direction an informal "certification" that he was ready to use the machine.

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[4] The trial court struggles to distinguish *Jones*, insisting that the case's holding applies only when the employer gives reasonable instructions. Letter Op. 7. That is incorrect; the instruction at issue in *Jones* was to clean an industrial blender by hand without cutting off the power, even though the blender's blades sometimes started spinning by themselves. 723 F.2d at 372. That's much less reasonable than anything that International Paper told Mr. Evans to do here. But even if the trial court's reading of Jones were correct, the decision's rule would still turn on the reasonableness of the employer's instruction. That is a question of fact, and one on which the trial court and jury differed here.

Equally troubling, the record does not support the trial court's conclusion that incomplete training or a lack of formal certification somehow proximately caused the accident. Mr. Evans was trained on the pre-operation inspection and parking of the lift truck. PX22, PX23. It's causally irrelevant that he did not finish his training on other points not involved in the accident, like fueling techniques or horn etiquette.

Nor is there any reason to think that completing International Paper's training, or receiving a certificate, would have changed the outcome. Defense witness Stephen Grandstaff, International Paper's former safety supervisor, admitted that training and certification could be completed in a single day. Tr. 1386-89. And the trial testimony illustrated how much the training could leave out. Mr. Lacy was a fully trained and certified lift truck operator with six years' experience, Tr. 471, and he was involved in the fatal accident. His training notwithstanding, Mr. Lacy testified that he was never trained on how to adjust the park brake, or even told that it was adjustable. Tr. 474. In six years of service as a lift truck driver, he'd never adjusted a park brake. Tr. 474. Nor had Mr. Lacy received any training about how to move a disabled truck, or what to do if his truck got stuck, or how to park on an incline. Tr. 477. Mr. Lacy attended a training with Mr.

Evans just 15 days before the accident. None of these topics were covered. Tr. 477-78.

For these reasons, a rational jury could have concluded that it was reasonable for Mr. Evans to operate the lift truck as instructed, and that his lack of a formal certificate or additional training did not proximately cause his death.

Second, the trial court blames Mr. Evans for not discovering any defect in the park brake during his pre-operation inspection or use of the truck. Letter Op. 5. This argument overlooks the fact that International Paper's lift truck operators were trained to test the park brake two different ways, one of which was completely ineffective. That is, some operators at International Paper were taught to test the park brake by putting the lift truck in gear with the parking brake applied, and then trying to set the truck in motion. Tr. 274. But when the park brake is applied, a switch in the starting circuit is closed so the engine cannot be started. Tr. 275. The switch also puts the transmission in neutral. Tr. 275. Thus, once an operator sets the park brake, no amount of pressure on the accelerator will move the truck, irrespective of the park brake's adjustment. Tr. 275, 1121-22, 1164. This test will therefore *always* tell the operator that the park brake is functional, even when it is out of adjustment. Six of the eight operators at

International Paper who gave depositions tested the park brake this way. Tr. 275. Their confusion was understandable, because their training was based, in part, on the NACCO's manual. Tr. 415, 1184-85, 1375; 29 C.FR. 1910.178(l)(3)(A), (M). That manual did not tell operators how to test the park brake in a facility (like the International Paper plant) that did not have a 15% slope. Tr. 276-78

If Mr. Evans inspected the truck as he'd been trained to do but nonetheless failed to detect the lift truck's defective park brake, then it was for the jury to say whether he was negligent.

Third, the trial court chides Mr. Evans because "he drove his lift truck into a gap at the end of the dock, effectively disabling the truck." Letter Op. 5. This critique impermissibly views the evidence in the light most favorable to the Defendant. Mr. Lindsay inspected the lift truck after the accident, and he saw no damage. Tr. 762. He certainly did not report that it was disabled. That makes sense, because the gap between the dock and the trailer was only 11 inches wide, while the truck's tires alone were 22 inches wide. Tr. 114, 162; *see* Tr. 1544, PX19.

Even if the jury considered this incident to be significant, it was not concurrent with NACCO's primary negligence, and it was too far removed from the accident to be considered a proximate cause as a matter of law.

Viewing the evidence in the light most favorable to the Plaintiff and drawing all reasonable inferences in her favor, at least the following events took place between the truck getting stuck and Mr. Evans's death:

1) Mr. Evans turned off the lift truck;
2) Mr. Evans set the park brake;
3) Mr. Evans removed his seat belt;
4) Mr. Evans dismounted the lift truck;
5) Mr. Evans contacted Mr. Lacy;
6) Mr. Evans and Mr. Lacy discussed the situation;
7) Mr. Lacy went to get some propane for his truck;
8) Mr. Evans left to find a tow chain;
9) Mr. Lacy brought his truck around;
10) Mr. Evans and Mr. Lacy connected the trucks;
11) Mr. Evans boarded the lift truck;
12) Mr. Evans fastened his seat belt;
13) Mr. Evans turned on the lift truck;
14) Mr. Evans released the park brake;
15) Mr. Lacy towed the disabled lift truck;
16) Mr. Evans turned off the lift truck;
17) Mr. Evans set his park brake;
18) Mr. Evans removed his seat belt;

19) Mr. Evans dismounted the lift truck;

20) The lift truck's alarm did not go off, indicating that the park brake was applied;

21) The lift truck held on the incline;

22) Mr. Evans walked between the lift trucks to remove the tow chain;

23) The lift truck's park brake failed;

24) The lift truck started to roll;

25) Mr. Lacy tried and failed to alert Mr. Evans; and

26) The lift truck crushed Mr. Evans.

Step 26 is just too causally attenuated to be considered the direct and proximate result of Step 1.

Fourth, the trial court scolds Mr. Evans for trying to "operate the disabled lift truck without reporting the mishap to supervisory personnel and without the assistance of supervisory personnel." Letter Op. 5. There are at least three problems with this argument. First, the defense did not call a supervisor to testify. There was no evidence in the record to explain what a supervisor might have done, had he or she been on the scene, or how that might have changed the outcome. Mr. Lindsay, the most experienced operator at the plant, testified that the towing method Mr. Evans and Mr. Lacy employed was simply how operators handled stuck trucks. He explained that there was nothing unsafe about the procedure. Tr. 761-62,

772-73. In fact, Mr. Lindsay himself had towed a lift truck that way. He did not recall whether he'd contacted a supervisor, explaining that it wasn't a requirement at the time. Tr. 772-73. There was, therefore, no evidentiary basis for the trial court's conclusion that failing to summon a supervisor was negligent, let alone that it was the proximate cause of the accident.

Second, as explained above, there was no evidence that the truck was disabled.

Third, 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. So long as the lift truck remained stuck between the dock and the trailer, it presented immediate safety concerns for the lift truck itself; for the trailer, which couldn't leave; for any other trailers trying to unload; and for any people working in the area. A jury could find it reasonable that Mr. Lacy and Mr. Evans tried to get the lift truck out of this position as quickly as possible. But there is no indication from the record that once Mr. Lacy had towed the truck to a place of relative safety, Mr. Evans planned to "operate" it for the remainder of the shift.

Fifth, the trial court faults Mr. Evans for parking the lift truck on an incline, rather than "traveling a short distance down the incline to the

relative safety of level ground." Letter Op. 5. A reasonable jury could find that it was reasonable to park the lift truck on a ramp because it was designed to be parked on an incline. Expert Frederick Mallett testified that it was sometimes necessary to park on an incline, Tr. 409-10, and NACCO itself conceded that it was foreseeable that an operator would do so, Tr. 908-09. NACCO had little choice. OSHA had promulgated regulations governing parking a lift truck on an incline, and OSHA and ANSI standards required the park brake to hold on a 15% incline. 29 C.F.R. § 1910.178(a)(2), (m)(5); DX33 § 7.16. The lift truck itself was not easy to move; it weighed about 20,000 pounds and had a rated capacity of another 7,700 pounds. Tr. 375, 398, 819; DX82-55. On level ground, inertia alone would hold the truck in place. A park brake strong enough to meet OSHA and ANSI requirements would be necessary only if the truck were to be parked on an incline.

To use the park brake for its intended purpose should not be considered contributory negligence—and certainly not contributory negligence as a matter of law. The trial court disagreed, arguing in a footnote that parking on an incline is "dangerous," and that "[t]he circumstances did not compel Jerry Evans to park on the incline; he could very well have continued to level ground, which would have minimized the

overall risk of serious bodily injury." Letter Op. 5 n.11. A reasonable juror looking at the numerous photographs of the crowded area in which the lift trucks were operating could disagree. *See, e.g.*, PX36. What is more, this claim follows the trial court's repeated assertions that the lift truck was disabled. If that were the case, then a reasonable juror could find that the circumstances—specifically, the lift truck's disability—compelled the operators to stop on the ramp. Even defense witness Grandstaff agreed "[t]here's no parking on an incline *unless you have a disabled vehicle*." Tr. 1370 (emphasis added).

The trial court's position also ignores the basic point that doing something "dangerous" is not necessarily negligent; doing something *unreasonably* dangerous is, and it is the jury's job to draw the line between the two concepts.

Sixth, the trial court faults Mr. Evans for dismounting the "now unattended lift truck without lowering the clamp attachment or chocking the wheels in any way," contrary to "an explicit and prominently displayed warning." Letter Op. at 5-6. A reasonable jury could disagree with the trial court on each of these points.

To begin with, chocks were not available to lift-truck operators. Tr. 607. It's therefore unreasonable to fault Mr. Evans for not using them.[5] And the trial court was wrong to conclude that Mr. Evans's lift truck was "unattended" as the applicable regulations define that term. Under 29 C.F.R. § 1910.178(m)(5), a lift truck is unattended when (1) the operator is at least 25 feet away from it, if the truck is in his view, or (2) whenever the operator leaves the vehicle and it is not in his view. Mr. Evans was less than 25 feet away from the truck at the time of the accident, Tr. 1190-91, so the question is whether the truck was in his view.

The trial court evidently reads the phrase "not in his view" to mean that a lift truck is unattended the instant an operator looks away from it—even if he is standing right next to the vehicle, with his hand on it. That is an unreasonable interpretation, because no operator could ever comply with it. When trying to follow the regulation, as the trial court reads it—for example, by securing the required chocks—the operator would have to take his eyes off the vehicle and illegally leave it "unattended" with its wheels unblocked. The trial court offers no explanation or authority for its reading, and this Court should not adopt an interpretation that an operator

[5] The trial court recognizes this quandary, but insists without explanation that the absence of chocks cannot excuse Mr. Evans's failure to use the (unavailable) chocks. Letter Op. 6 n.12.

could never satisfy. A more reasonable understanding of the regulation is that a truck is not in the operator's view, and is therefore "unattended," when some obstruction blocks the operator's view of the vehicle.[6] Here, there was no evidence of any such visual obstruction, so the truck was not unattended and Mr. Evans was not required to block its wheels.

Even if the Court were to adopt the trial court's reading of 29 C.F.R. § 1910.178(m)(5), the lower court's argument would still fail because the evidence would not let it conclude, consistent with the standard of review, that the lift truck was outside of Mr. Evans's view. Mr. Lacy was the only eyewitness to the accident. In his testimony, he did not specify where Mr. Evans was looking. Tr. 485. We can reasonably infer that Mr. Evans was not looking backward at Mr. Lacy because Mr. Lacy was unable to get his attention once the lift truck began rolling. Tr. 485-86.[7]

Nor does Mr. Evans's failure to lower the clamp provide any basis for upsetting the jury's verdict, because he was not trained to do so. International Paper's safety coordinator, Shawn Baier, personally

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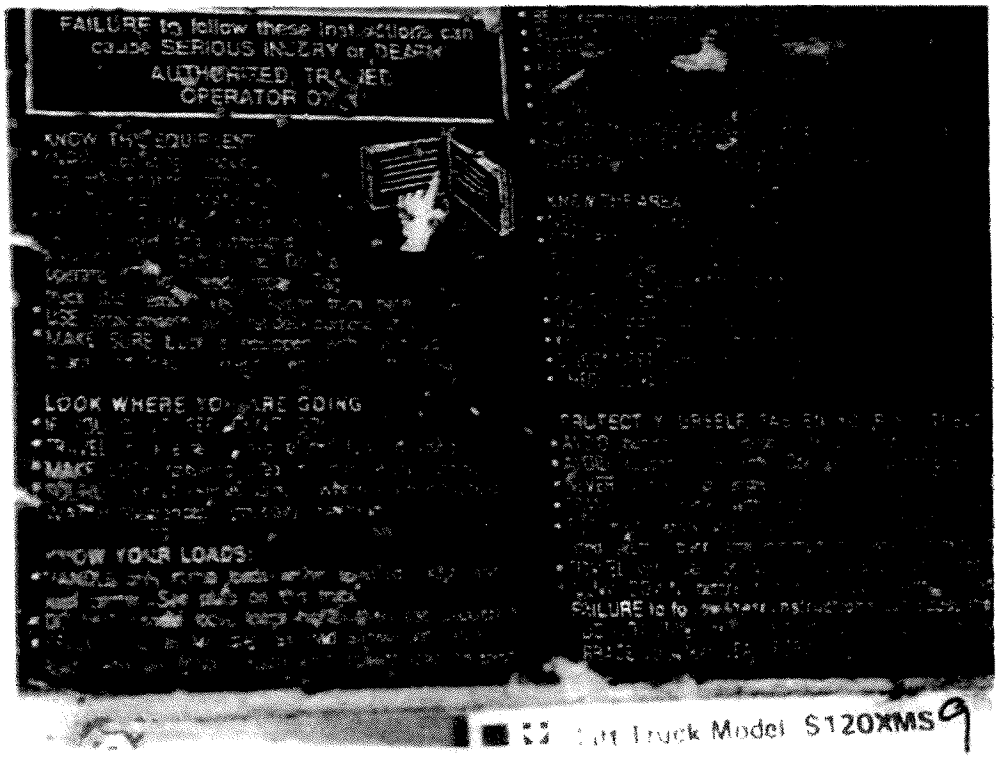
[6] Indeed, International Paper's safety coordinator testified that it was acceptable to leave the lift truck *running* as long as the operator remained within three feet of the machine. Tr. 605-06.

[7] After the accident, another witness found Mr. Evans facing "to the right." Tr. 501. This does not imply that the lift truck was outside the field of Mr. Evans's peripheral vision.

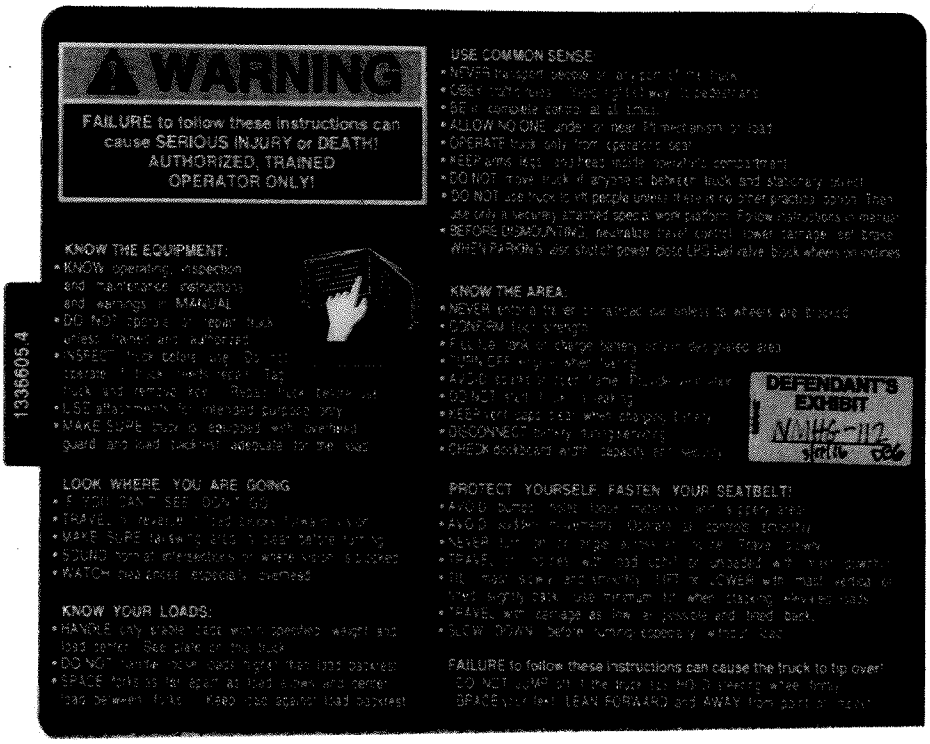
investigated the accident. He testified that at the time of the fatality in 2010, operators were not trained to lower the clamp to the ground when dismounting. Tr. 603-06. This was International Paper's considered policy, because lowering the clamp to the ground would damage the clamp's pad. Tr. 606-07.

As for the Defendant's warning, the jury was free to determine for itself just how "explicit and prominently displayed," Letter Op. 5, the relevant text was:



DX86-7.

For the Court's convenience, here is the full text of the warning, rendered much more legible than the caution that was actually provided to Mr. Evans:



DX112. The trial court seized on the last bullet point in the upper-right block of text.

But this was just one of numerous admonitions emblazoned on the lift truck. Its adequacy—and even its basic legibility, *see* DX86-7—presented a question of fact for the jury. Following a model jury instruction, the trial court told the jury that, in determining whether a warning is adequate, it should consider (1) whether it could be expected to catch the attention of a reasonable person; (2) whether it could be understood by a reasonable

person; and (3) whether it gives a reasonable indication of the nature and extent of the potential danger. Tr. 1412; *compare id. with* V.M.J.I. 34.1550. Human-factors expert Dr. Kenneth Laughery likewise explained that an effective warning should communicate three types of information: the nature of the hazard, the consequences of the hazard, and the manufacturer's instructions about how to avoid the hazard. Tr. 551-52.

NACCO's warning fails these tests. It's inconspicuous, buried in a welter of boilerplate. The warning has nothing to say about the nature or extent of the hazard, let alone how to avoid it. It does not tell operators to put the clamp on the ground for added traction or to stop the truck from rolling downhill. It could just as easily be read as an instruction to lower the clamp to avoid excess wear on the hydraulics or to prevent a rollover. In fact, the warning states that "FAILURE to follow these instructions can cause the truck to tip over!" It does not say that the clamp is a necessary anchor, without which the park brake will not hold. Nor could it. The industry standard, ANSI 56.1-2000, does not require a park brake to hold on a 15% incline when the carriage is lowered; it requires the park brake to hold on a 15% incline, full stop. DX33 § 7.16.

NACCO's warning simply does not provide the sort of specific, unequivocal admonition that could support the trial court's ruling.

Finally, there is no evidence to support the trial court's conclusion that failing to lower the clamp was a proximate cause of the accident as a matter of law.

Seventh, the trial court criticizes Mr. Evans for moving to the downhill side of the lift truck. Letter Op. 6. Again, the park brake was designed to hold on an incline. *See* DX33 § 7.16. A jury could conclude that it was reasonable for Mr. Evans to rely on the brake to serve its explicit purpose.

Moving from the facts to the law, the lower court strains to distinguish some of the myriad cases where trial courts have set aside jury verdicts because of contributory negligence, only to be reversed on appeal.[8] On the trial court's account, those cases involved a plaintiff's "borderline reasonable omission of a single and simple precaution, such as failing to look both ways." By contrast, the argument goes, this case involves "a collective series of actions," so none of those rulings control. Letter Op. 6. "While the jury could have possibly differed about the reasonableness of a

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[8] Letter Op. 6 n.13 (addressing *Rascher v. Friend*, 279 Va. 370 (2010), *Burroughs v. Keffer*, 272 Va. 162 (2006), and *Jenkins v. Pyles*, 269 Va. 383 (2005)). The trial court does not try to distinguish other contributory-negligence cases that the Plaintiff discussed below, like *Estate of Moses v. Southwestern Va. Transit Mgmt. Co.*, 273 Va. 672 (2007) (reinstating jury verdict in favor of plaintiff), *Karim v. Grover*, 235 Va. 550 (1988) (reversing judgment granting motion to strike), or *Coleman v. Blankenship Oil Corp.*, 221 Va. 124 (1980) (reinstating jury verdict in favor of plaintiff).

specific undertaking in the chain of events leading to the accident," the trial court reasons, rational jurors could not have differed about the reasonableness of the entire series of events. Letter Op. 7.

But they could have; that's the whole point of having a jury. If *one* genuine dispute of material fact can *defeat* judgment as a matter of law, it doesn't follow that *seven* genuine disputes of material fact *mandate* judgment as a matter of law. Just the opposite, in cases that present multiple close questions of fact, it is all the more important to let the jury play its role as factfinder.

And the trial court's blanket statement about the case law—that this Court's prior contributory-negligence cases each involved only one "borderline reasonable" omission—just begs the question of what counts as "reasonable," and ignores the complexity of those decisions.

Consider the case that the trial court singles out in the text, *RGR, LLC v. Settle*, 288 Va. 260 (2014) (4-3 decision). There, a dump truck driver, Charles Settle, repeatedly crossed a railroad track at an intersection where the road narrowed to a single lane. The road ran north-south, and the track ran east-west. *Id.* at 270. Most, but not all, of the trains on the track came from the east. *Id.* at 272, 289. Settle's sightline extended just 600 feet in that direction. *Id.* at 270. A stack of lumber blocked Settle's view

of any train coming from the west until the front of his truck was less than feet from the railroad track. *Id.* at 269, 272, 289, 290.

Given the weight and gearing characteristics of Settle's truck, this presented a conundrum: if Settle were to look to his right upon clearing the lumber and see a train coming from the west, he would not have the time to stop his truck, even if he were moving at a crawl. Yet if he came to a full stop before crossing the tracks to ensure that no train was approaching from the west, Settle would not have enough time to avoid a crash with a train coming from the east because it would take him longer to get his truck up to speed and clear the tracks than it would take an oncoming train to cover the 600 feet that he could see. *Id.* at 311-12 (McClanahan, J. dissenting). He had no good options.

As Settle approached the crossing for the seventh time that day, he met a box truck headed in the opposite direction, which was stopped across the intersection. The box truck's driver and passenger saw a train coming from the west and heard the train's horn sound (although other witnesses did not hear the horn). *Id.* at 271. They gestured frantically to get Settle's attention as he drove onto the track. *Id.* at 271, 290. Settle was looking straight ahead. *Id.* at 290. The oncoming train hit him from the right and killed him.

Settle's widow sued, and the jury awarded a $2.5 million verdict against RGR, the company that had stacked the lumber. RGR appealed, arguing, among other things, that Settle was contributorily negligent for failing to look and listen for the train. *Id.* at 283.

A divided Court rejected RGR's position and affirmed the judgment. It explained that because Settle's sightlines were limited, he was forced to rely on his hearing. *Id.* at 289. Numerous witnesses never heard the train's horn, and Settle's ability to hear from inside his cab was limited. *Id.* A reasonable jury could have concluded that Settle interpreted the gestures from the box truck as an attempt to wave him through the intersection and across the track, not to warn him off. *Id.* at 290. And the fact that Settle was looking straight ahead when he crossed the track did not, of itself, imply that he was looking straight ahead when he emerged from behind the lumber, or that he'd never looked to the west. *Id.*

Thus, to dismiss *Settle* as a case where a driver "fail[ed] to look both ways" simplifies the opinion beyond recognition. The majority spent ten pages analyzing contributory negligence (including the two pages that it devoted to proximate causation). The three-justice dissent spent five pages on the subject. This Court granted a petition for rehearing and withdrew its original decision. As this suggests, the contributory-negligence issues were

anything but straightforward. A person inclined to take a critical view of Settle's conduct could recite a litany of decisions that, in hindsight, seem questionable—from crossing the track in the first place, when it wasn't necessary and he had no safe options; to not using Norfolk Southern's flagging service; to repeating the crossing six more times after he'd been lucky enough to survive it once; to ignoring or misinterpreting the gestures from the box truck; to not hearing the train; to failing to look both ways.

Contributory negligence thus presented a close question in *Settle.* But as the Court explained, that did not justify setting aside the verdict. The factfinder heard conflicting evidence about contributory negligence. *Id.* at 291. It was for the jury to weigh the credibility of the witnesses and draw the appropriate inferences, and ultimately to decide whether Settle had behaved reasonably. *Id.* The same is true here.

Conclusion

This case merits appellate review. The trial court disagreed with the jury about basic questions of fact—like what evidence to believe, what conduct counted as "reasonable," and what caused Mr. Evans's death. The judge and jury plainly had very different reactions to Mr. Evans's conduct. But none of that can justify setting the verdict aside.

The trial court did not take the case away from the jury because no material facts were in dispute, and a reasonable jury could decide only one way. To the contrary, it conceded the existence of live disputes of fact—but it tried to resolve many of them against the Plaintiff, weighing the evidence and substituting its own judgment for that of the factfinder. *See, e.g., id.* at 3 n.3; *id.* at 5 n.10, n.11; *id.* at 6 n.12; *id.* at 7. The trial court's analysis overlooked or downplayed key points that any fair arbiter would have to acknowledge, including that:

- Mr. Evans had received hours of training on the lift truck;
- Mr. Evans set the park brake before getting off the truck;
- The park-brake alarm did not sound; and
- The park brake initially held on the incline.

To be sure, there is nothing improper or even particularly unusual about a judge and a jury arriving at different conclusions about the weight or credibility of the evidence. But it is extraordinary for a trial court to set a verdict aside based on those disagreements. Doing so violates foundational tenets of Virginia law. Our jurisprudence has long recognized "[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other and ought to be held sacred." Const. of Va., art. I, § 11. The General Assembly has preserved this right

inviolate to the parties. Va. Code Ann. § 8.01-336(A). It is up to the judiciary to see that it is protected.

The Court should grant this appeal, reverse the trial court's judgment, reinstate the jury's verdict, and enter final judgment in favor of the Plaintiff.

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Certificate

Counsel for the Petitioner certifies as follows:

1. The Petitioner is Ronda Maddox Evans, Administrator of the Estate of Jerry Wayne Evans, deceased, who is represented by

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3. A copy of the foregoing Petition was mailed, postage prepaid, by first class mail, to opposing counsel this 16th day of December, 2016.

4. The Petitioner desires to present oral argument in person in support of this petition.

Given under my hand this 16th day of December, 2016.

James J. O'Keeffe