In the

Supreme Court of Virginia

At Richmond

Record No.

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

Petitioner,

– v. –

NACCO MATERIALS HANDLING GROUP, INC.,

Respondent.

BRIEF OF *AMICUS CURIAE* VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER AND REVERSAL

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INTRODUCTION

In *RGR, LLC v. Settle*, 288 Va. 260 (2014), this Court confirmed that jury verdicts have independent salience and that questions, like contributory negligence, historically resolved by the factfinder should remain the province of the factfinder. *RGR* stands for the sensible proposition that, when in doubt because the evidence goes both ways, courts should respect the jury's resolution of the evidence.

Since *RGR*, however, it has been a rough couple of years for the civil jury, and especially so in products liability cases. *See, e.g.*, *Elliot v. Carter*, No. 160224, 2016 Va. LEXIS 151 (Oct. 27, 2016) (holding that a jury was not entitled to determine whether a defendant's actions amounted to gross negligence); *Holiday Motors Corp. v. Walters*, __ Va. __, 790 S.E.2d 447 (2016) (vacating jury verdict in favor of the plaintiff in products liability case); *Hyundai Motor Corp. v. Duncan*, 289 Va. 147 (2015) (same). Though each case was decided on different grounds, they share the common denominator of cutting the jury out of the process. And taken together, one might be inclined to see a trend developing. Whereas previously the general idea was, when in doubt, let the jury decide and let that decision stand, one could conclude that perhaps something about Virginia law has changed in the last couple of years. Perhaps now, when in

doubt the safest thing for a trial court to do is to take the matter away from the jury. That this impression is even possible is highly troubling.

The circuit court's decision in this case suggests that at least some trial courts believe that doubt is now to be resolved in favor of setting aside the jury's verdict. The court's September 2, 2016 Letter Opinion is a paean to doubt: doubt about the correctness of the jury's verdict, but also doubt about the correctness of the court's own reasoning. The court concedes that it cannot say that the jury's resolution of any specific factual question was unreasonable or plainly wrong, but nevertheless reasons that the totality of the circumstances showed that there was contributory negligence in there somewhere. (Sept. 2, 2016 Letter Op. at 7.) This is simply not how it should work. Indeed, it is alarming that a circuit court could even believe that the analysis deployed in the Letter Opinion was appropriate. The Virginia Trial Lawyers Association[1] ("VTLA") therefore urges the Court to grant Ms. Evans's Petition for Appeal and ultimately issue an opinion clarifying that civil jury verdicts still mean something in the Commonwealth, and that doubt is where the jury lives, not the courts.

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[1] VTLA files this amicus brief pursuant to Rule 5:30(b)(2) with the written consent of all parties. *See* email from Jay O'Keeffe, Esq., counsel for the Petitioner, and email from Mark D. Loftis, Esq., counsel for the Respondent, attached hereto.

STATEMENT OF AMICUS INTEREST

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

This appeal presents an issue of fundamental importance to Virginia law: the role of the civil jury. The Court's resolution of this case implicates not only the rights of the parties to this case, but also the rights of litigants and the nature of trial practice throughout the Commonwealth. Indeed, this issue is so important, and the circuit court's handling of it so alarming, that VTLA is compelled to participate at the Petition for Appeal stage for the first time in institutional memory.

ASSIGNMENT OF ERROR

VTLA adopts Ms. Evans's Assignment of Error.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

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

STATEMENT OF FACTS

VTLA adopts Ms. Evans's statement of facts.

ARGUMENT

A. Standard of Review

A trial court may set aside a jury's verdict only if it is plainly wrong or without evidence to support it. *Bussey v. E.S.C. Rests., Inc.*, 270 Va. 531, 534 (2005) (reversing circuit court for setting aside a plaintiff's verdict on the basis of contributory negligence as a matter of law); VA. CODE § 8.01-430. The jury's verdict is entitled to "the utmost deference" and "the trial court may not substitute its conclusion for that of the jury merely because the judge disagrees with the result." *Bussey*, 270 Va. at 534.

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

B. Discussion

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

Virginia law is full of broad exhortations extolling the virtues of the civil jury. The Constitution admonishes that "in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."

See, e.g., *Heinrich Schepers GmbH & Co., KG v. Whitaker*, 280 Va. 507, 512 n.2 (2010) (quoting VA. CONST. art. I, § 11); *see also* VA. CODE § 8.01-336(A) ("The right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by statutes thereof shall be preserved inviolate to the parties.") This Court has also often observed that the recipient of a jury's verdict approved by the trial court occupies the "most favored position known to the law." *See, e.g.*, *RGR*, 288 Va. at 283.

The problem with such lofty language is that it has no force on its own. Saying that the jury trial is sacred or that the recipient of a jury verdict is in a good position means nothing if judges are nevertheless free to do their own "justice" with impunity, or if the jury's work is seen more as a suggestion than as a conclusion. The question is always whether a court will merely recite the lofty language as necessary pablum before going about its business of doing its own "justice," or whether instead a court will enforce the language as a meaningful principle of limitation.

Historically, this Court has fallen into the latter camp. The Court has never diminished the trial judge's traditional role in policing the outer bounds of litigation and ensuring that only true and meaningful disputes of fact are put to the jury. But this Court has also, from time to time, reminded the trial courts that when deciding whether an issue presents a dispute of

fact or a question of law, courts should always err on the side of, and resolve any doubt in favor of, seeing a dispute of fact that must be resolved by a jury.

For example, this Court had a line of cases, known colloquially in the bar as the "short circuiting cases," in which the Court repeatedly admonished and reversed trial courts for making "matter of law" rulings that took legitimate questions of fact away from the factfinder. *See, e.g.*, *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 618 (2005) (admonishing and reversing a trial court for using summary judgment to "short-circuit litigation by deciding disputed facts without permitting the parties to reach a trial on the merits"); *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93, 95 (1997) (admonishing and reversing trial court for granting motion to strike at the conclusion of opening statements); *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993) ("This is another case in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits."); *Renner v. Stafford*, 245 Va. 351, 352 (1993) ("With increasing frequency, we are confronted with appeals of cases in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting

the parties to reach a trial on the merits. This is such a case.") Although each of these cases was decided on its specific facts, it was clear that the opinions were also drafted to send a broader message. Questions that the trial court may see as one-sided are often nevertheless questions of fact that can only be decided by the factfinder. Thus, whenever there is any doubt about which side of the question-of-fact versus question-of-law line an issue might fall on, in Virginia our tradition is to permit the factfinder to resolve the question.

The circuit court's decision in this case does not respect that tradition. The court's September 2, 2016 Letter Opinion begins its analysis with a tip of the hat to the notion that setting aside a jury verdict is an extraordinary exercise of judicial power. But then, in a footnote, the court immediately creates room for itself to exercise this extraordinary power by suggesting that "it is relevant to note that a trial court can determine that a verdict is 'plainly wrong' even if there is some evidence to support it." (Sept. 2, 2016 Letter Op. at 3 n.3 (citing *Braswell v. Va. Elec. Co.*, 162 Va. 27, 38-39 (1934)).

It is this wriggle room to deem a verdict "plainly wrong" even if supported by evidence that the court ultimately uses to set the jury's verdict aside. But the court's own reasoning belies the notion that the jury's verdict

was plainly wrong. In its Letter Opinion, the court sets forth seven points that the court views as supporting a finding of contributory negligence. But the court then immediately concedes that the jury reasonably could have differed with the court's appraisal "about the reasonableness of a specific undertaking in the chain of events"—*i.e.* the seven points the court had just discussed. (Letter Op. at 7.) If the jury reasonably could have resolved each of those seven points in the plaintiff's favor individually, it makes absolutely no sense to then conclude that the jury could not reasonably have resolved the totality of those points in the plaintiff's favor.

Indeed, one need not even review the underlying factual record of this case to determine whether the court's decision was correct. One need only to read the Letter Opinion to see that, analytically, it collapses under the weight of its own uncertainty. The court may very well be convinced that Mr. Evans was contributorily negligent. But the court's analysis of why every other rational person must see it the same way is not convincing. The court's analysis also does not adhere to Virginia's tradition of allowing juries to resolve doubtful factual scenarios and actually respecting the jury's decision. The Court should grant Mrs. Evans's Petition for Appeal to reinforce that, just as courts should not "short circuit" litigation before trial,

courts also should not ignore the results of trial merely because the court sees the facts differently.

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

The bulk of the court's analysis in its Letter Opinion is devoted to highlighting seven points that the court deems to show that Mr. Evans was contributorily negligent. In this section, VTLA briefly looks at each of the seven points and shows why the point does not lead to the court's conclusion.

First, the court notes that Mr. Evans operated the lift truck "with full knowledge that he was neither certified nor fully trained to do so, and had in fact unilaterally elected to terminate his training regarding the safe and proper use of lift trucks." (Letter Op. at 4.) This statement is rather accusatory, and there is great reason to believe that it is not the result of a faithful application of the rule that all fact and inferences must be viewed in the light most favorable to the recipient of the jury verdict. But even assuming that the court's statement here is in any way objective, it does not support the court's conclusion because it does not connect this supposed negligence with proximate causation. The court never shows how certification or "full" training would have resulted in Mr. Evans doing anything differently or any different result in this case.

Second, the court notes that Mr. Evans never discovered any defect in the park brake before or during operation of the lift truck. (Letter Op. at 5.) It is not especially clear what the court is getting at here. If the court is accusing Mr. Evans of not performing a pre-operation inspection, that accusation is not conclusively supported by the record. The record suggests that Mr. Evans was trained by Mr. Lindsay, and that Mr. Lindsay typically would not fill out any paperwork after a pre-operation inspection unless he found something wrong. (Trial Tr. at 760.) Thus, in the absence of any conclusive evidence that Mr. Evans did not conduct a pre-operation inspection, the permissible inference for the jury was that he did and found nothing wrong.

On the other hand, if the court is saying that Mr. Evans would have discovered the defect had he acted reasonably, that point certainly is not supported by the court's analysis. Among various analytical flaws with this point, the most glaring is that it assumes that Mr. Evans could have detected the defect before the incident in question. But that assumes that Mr. Evans could have, and indeed should have, tested the park brake under the exact unique circumstances in existence when it failed and killed him. It also assumes that even if Mr. Evans had been able to create the exact kinds of pressures and forces at play when the brake failed, that the

brake would have in fact failed. This lift truck had been in use for quite some time. But absence of prior failures is not absence of a defect for the very reason that machines react differently under different circumstances. *See, e.g.*, *Goins v. Wendy's Int'l, Inc.*, 242 Va. 333, 335 (1991). There is no indisputable basis to conclude that Mr. Evans would have discovered this defect even if he had done some sort of additional inspection. Thus, to the extent that the court finds fault with Mr. Evans's not discovering the defect earlier, nothing in the court's Letter Opinion explains how he could have discovered the defect or that the failure to do a pre-operation inspection was a proximate cause of his death.

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

Meade v. Saunders, 151 Va. 636, 643 (1928) ("If the continuing negligence of a plaintiff, up to the time of the injury, concurs with the negligence of the defendant in causing the injury, the plaintiff cannot recover.") So, if someone is acting like a fool and breaks his arm, the doctor who is subsequently negligent in the repair of the fracture cannot point to the plaintiff's foolish behavior that caused the break as contributory negligence. Or assume a driver is speeding, loses control, runs into a curb and gets a flat tire. When the driver pulls over to change the tire, the car falls on him and crushes him because the jack was defective. The jack manufacturer cannot point to the driver's speeding as contributory negligence because it was not concurrent with the jack's failure.

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

Fourth, the court notes that after getting stuck, he continued to try to operate the lift truck without reporting the incident to a supervisor and without getting supervisory assistance. Again, this observation is essentially a *non sequitur* because the Letter Opinion never explains how

this alleged act of negligence proximately caused the later incident that killed Mr. Evans. The Letter Opinion does not identify any evidence—and certainly no uncontradicted evidence that the jury was required to accept as true—that reporting the incident to a supervisor or getting supervisory assistance would have resulted in any different chain of events, or that a supervisor would have discovered the park brake's inability to hold.

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

Here, even assuming that in hindsight Mr. Evans could have used greater care, the court points to absolutely no evidence that would compel a jury to conclude that parking the lift truck on an incline as opposed to

level ground was a failure to use ordinary care. Indeed, in footnote 11 of the Letter Opinion the court recognizes the regulations indicating that these lift trucks are supposed to be able to be parked on an incline. How could it possibly be negligent, as a matter of law, for an operator to use a piece of equipment under circumstances in which the piece of equipment is meant to operate? Perhaps the jury could come to that conclusion, but there is no basis for a court to find contributory negligence here as a matter of law.

Sixth, the court claims that Mr. Evans ignored an "explicit and prominently displayed" warning and left the "unattended" lift truck without lowering the clamp attachment or chocking the wheels. There are several problems with this accusation. It assumes that chocks were even available to Mr. Evans, an assumption that is contradicted by the evidence, (Trial Tr. 607), and which even the circuit court recognizes to be in dispute. (Letter Op. at 6 n.12.) It also assumes that the lift truck was "unattended" as that term is used in the industry. *See* 29 C.F.R. § 1910.178(m)(5)(ii) (defining "unattended" to mean when the operator is more than 25 feet away or the truck is not in the operator's view). But the lift truck was not "unattended." Mr. Evans was right behind the truck trying to take the tow chain off. (Trial Tr. 485.) The observation also assumes that lowering the clamp attachment on the <u>front</u> of the truck would have prevented the truck from

rolling backwards.[2] A reasonable jury could conclude that lowering the clamp on the front of the vehicle might prevent it from rolling forward toward the clamp attachment, but not backward. And finally, this observation ignores that whether a warning is adequate is itself a question for the jury. Indeed, there is an entire model jury instruction devoted to this question. VMJI (Civil) 34.150. Here, the jury easily and reasonably could have concluded that the warning on this particular truck, (Def. Ex. 86-7), was so obscured, obliterated, and buried that it was not an adequate warning and that a reasonable person in Mr. Evans's position would have paid it no mind. The court's sixth point simply makes too many assumptions and invades too far into the jury's province to qualify as a basis to find contributory negligence as a matter of law.

Seventh, the court notes that Mr. Evans "placed himself on the downhill side of his unattended lift truck." This point suffers many of the flaws discussed above. It again insinuates that the truck was "unattended" when in fact it was not. It again conflates the ability, in hindsight, to have used greater care with the duty to use ordinary care at the time. And then, on top of that, the court's seventh point assumes that Mr. Evans could have avoided being on the downhill side of the truck after getting towed. He had

[2] It also ignores that there was evidence in the record that operators were instructed not to lower the clamp. (Trial Tr. 605-07.)

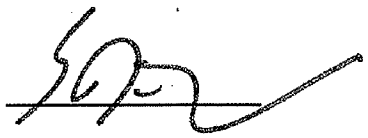
been towed downhill, so the tow chain was attached to the downhill side of the truck. Someone had to remove the tow chain, and the only way to do so was to get on the downhill side of the truck. The whole point of this case is that these trucks are supposed to be able to be parked on an incline greater than or equal to the incline where Mr. Evans had parked his truck. That is exactly what the jury found. The jury could thus easily and reasonably conclude that it was not unreasonably dangerous for Mr. Evans to assume that the truck's brake would hold while he was just trying to do his job. Again, the court's seventh point does not support its conclusion of contributory negligence as a matter of law.

CONCLUSION

The circuit court clearly does not like Mr. Evans's case. That is fine. And there may be some on this Court who feel the same way. That too is fine. But in our tradition of civil trials, that is not a valid basis for the circuit court or this Court to disregard the jury's decision in this case. The Court should grant Ms. Evans an appeal and, eventually, issue a decision that both corrects the error below and reaffirms that the jury's time and conclusion must be respected.

Respectfully Submitted,

VIRGINIA TRIAL LAWYERS
ASSOCIATION



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 16, 2016, seven copies of the foregoing were hand delivered to the clerk's office. This same date, a copy was sent via third party commercial carrier to all counsel of record, at the addresses below:

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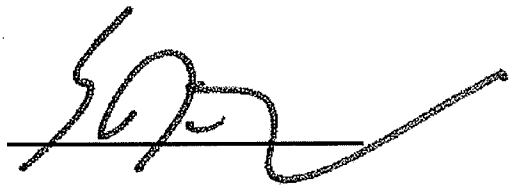

E. KYLE MCNEW

ADDENDUM

Kyle McNew

From: James O'Keeffe <okeeffe@johnsonrosen.com>
Sent: Tuesday, December 13, 2016 2:41 PM
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Subject: RE: Evans v NACCO - VTLA amicus

Absolutely.

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Jay,

Please confirm, by response to this email, that I have the written consent of the Plaintiff-Appellant for VTLA to participate as an amicus curiae in this matter.

-Kyle

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Subject: RE: Evans v. NACCO - VTLA Amicus

Kyle,

My apologies; I was out at a hearing for much of the day yesterday.

To clarify, the Respondent-Appellee consents to the VTLA's filing an amicus brief at the Petition stage only.

Mark

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