

Virginia:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

**RON ERIC SIMMONS and KRISTIE PETTY
SIMMONS, CO-ADMINISTRATORS OF
THE ESTATE OF JUSTIN ERIC SIMMONS,
DECEASED,**

Plaintiffs,

v.

No. CL04001142

MTD PRODUCTS, INC.,

Defendant.

MEMORANDUM OPINION

A jury found that MTD Products, Inc. is legally responsible for the death of Justin Eric Simmons, a 4-year-old boy; awarded compensatory damages of \$2 million, and allocated the damage award among Justin's statutory beneficiaries. MTD asks the court to set aside the jury's verdict and enter judgment in its favor; or, if that motion is denied, to grant a mistrial motion taken under advisement at trial; or to set the verdict aside and order a new trial. Applying familiar principles, I state the facts in the light most favorable to the plaintiffs, the parties for whom the jury found, giving them the benefit of any conflicts in the evidence and of any inferences to be drawn from the evidence.¹

¹ See *Rappahannock Pistol & Rifle Club, Inc. v. Bennett*, 262 Va. 5, 7-8, 546 S.E.2d 440 (2001); *T.M. Graves Constr., Inc. v. Nat'l Cellulose Corp.*, 226 Va. 164, 168-170, 306 S.E.2d 898 (1983).

Justin Simmons suffered fatal injury when three powered lawn mower blades, spinning at approximately 200 miles an hour, penetrated his scalp, his skull, his brain, and the membrane around his brain. His life had spanned four years and one week.

MTD designed, manufactured, and distributed the lawn tractor or riding lawn mower whose blades killed Justin. (The terms "riding lawn mower" and "lawn tractor" are used interchangeably.) Although MTD was not the retail seller of the lawn mower, the parties stipulated that there was a sale and that MTD placed the mower into the stream of commerce. This, the parties agreed, placed MTD effectively in the shoes of the retail seller, and eliminated any need for the retailer (whom the plaintiffs also had sued) to remain a party to the suit.

Justin was survived by his younger brother, Josh, and by his parents, Ron Eric Simmons and Kristie Pety Simmons, who, having qualified as his personal representatives, are the plaintiffs in this suit.

MTD's post-trial filings raise three questions:

- Whether the jury's decision to allocate \$1 million to Justin's baby brother is unsupportable, and thus shows that the verdict was based on prejudice or sympathy?
- Whether the court should now grant a mistrial motion that it took under advisement during the trial?

- Whether a verdict that MTD was legally responsible for Justin's death must be set aside as contrary to the law and the evidence?

The Events Surrounding Justin Simmons's Death

Roberta N. Reedy (also known as Elmira Roberta Reedy), who was licensed by the state to care for children in her home, had been Justin's day care provider since he was 11 weeks old. On the day of Justin's death, Mrs. Reedy was responsible for the care of five children, including Justin and his one-year-old brother, Josh.

Mrs. Reedy and her husband, Orvil, knew that Justin was fascinated by their riding lawn mower, and by tractors, bulldozers, and similar equipment. On the day of his death, Justin had been excited to know that Mr. Reedy was going to mow the grass. He accompanied Mr. Reedy to the mower, and held a wrench or a rag, "helping" Mr. Reedy as he charged the battery and cranked the mower's 18-horsepower engine for the first time that spring.

Mr. Reedy began to mow. Mrs. Reedy took another child inside to change a messy diaper. Both Mr. and Mrs. Reedy knew that Justin was playing in their large yard by himself, unsupervised and unattended. Violating her own sound safety rule that no children could be in the yard while the mower was in use, and violating state regulations for caregivers, Mrs. Reedy lost sight and control of Justin.

MTD manufactured the lawn tractor in 1988. A neighbor of the Reedy's had owned it. Mr. Reedy had borrowed it on occasion. In approximately 2002, Mr. Reedy learned that the neighbor was going to discard it, and asked if she would give it to him, which she did. He had never read (nor possessed) an owner's manual for the mower, nor had he read any of the labels or warnings on the mower itself. Notwithstanding a prominent warning on the mower, he was unaware that it was missing a deflector guard, an important safety device.

On the day of Justin's death, Mr. Reedy and Justin had been outside for half an hour or more. Much of that time was devoted to getting the mower ready. The rest of the time, Mr. Reedy was mowing, and Justin was on his own.

Mr. Reedy was mowing uphill on a slope of approximately 13.5 degrees. As he was mowing uphill, he testified at trial, he felt the transmission slipping, or the mower slipping out of gear. In a 911 call, however, he had said, "I was going up that way, and had backed up, and bang."

The lawn tractor rolled backwards, powered blades rotating. Mr. Reedy did not apply either the foot brake or the hand brake. Though he knew that Justin was in the yard, he did not look behind him. He did not disengage the mower's blades. He did not shift into reverse, which would have disengaged the blades. He knew that by pushing in the clutch, he could mow backwards. He had done it before.

The lawn tractor continued downhill, Mr. Reedy never looking behind him, mower blades rotating at approximately 200 miles an hour. (The jury heard that

Mr. Reedy has said different things about what he was doing while rolling down the hill that April afternoon: that he pushed the clutch in to try to put the mower back in gear, or to engage any forward gear; that he purposely put the mower in neutral to allow it to roll down the hill; that he depressed the clutch to allow the mower to roll downhill; and that he was trying to “pop” the mower into gear.)

The mower struck Justin, the powered blades causing fatal injury. The engine stopped. (In one statement, Mr. Reedy said that he heard a “thud.”) Before dismounting from the mower, Mr. Reedy — still not comprehending that he had struck someone or something — tried, unsuccessfully, to restart the engine. He left the mower seat, saw Justin’s ankle extending from beneath the riding mower, and threw the mower to the side. The mower platform had been covering the rest of the small boy’s body.

INSTRUCTION NO. 12

If you find by the greater weight of the evidence that defendant MTD Products, Inc.:

- (a) was negligent, or
- (b) breached its implied warranty, or
- (c) was negligent and breached its implied warranty; and

If you further find by the greater weight of the evidence that MTD's negligence, or breach of warranty, or both, was a proximate cause of Justin Simmons's injuries and death, then you shall find your verdict in favor of the plaintiffs.

If you find that the plaintiffs have failed to prove either (a) that MTD was negligent, or (b) that MTD breached its implied warranty, you must find your verdict for the defendant.

Similarly, even if you find that MTD was negligent or breached its implied warranty, but you find that the plaintiffs have failed to prove by the greater weight of the evidence that MTD's negligence or breach of warranty was a proximate cause of Justin Simmons's injuries and death, you must find your verdict for the defendant.

If, under the provisions of this instruction, you find your verdict for the plaintiffs, then you must not concern yourselves with whether or not negligence of Mr. and Mrs. Reedy, or either of them, also was a proximate cause of Justin Simmons's injuries and death.

Evidence concerning product defect

Dr. Jeffery Warren, one of the plaintiffs' expert witnesses, holds a Ph.D. in mechanical engineering from Virginia Polytechnic Institute & State University. His undergraduate and master's degrees also were in mechanical engineering. All of his degrees have an emphasis on machine design. He is licensed as a professional engineer in about a dozen states, including Virginia, and characterizes himself as a "consulting mechanical engineer" and a "forensic engineer." He also is a "Certified Safety Professional," "a person [who] identifies hazards and assesses

risks and works on implementation of safety through design." He has been a member of the National Safety Council's Institute for Safety through Design.

Dr. Warren testified that forensic engineering is that branch of engineering "where you are typically looking at claims and accidents that may end up in the courts." At the time of trial, he had been engaged in such work for 19 years, and had investigated more than 1,500 incidents, claims, or accidents involving machinery and equipment.

Dr. Warren, who has specialized in the area of machine safeguarding, is the author of approximately 20 publications, some of which relate to "safety through design," and has given presentations to professional engineers about safety through design. He has never designed a lawn mower, but has dealt with lawn mowers "a couple of times" in his forensic engineering work. He testified before the jury — which was entitled to accept or reject this statement — that "this is just another machine that needs to be looked at from a safeguarding point of view and that's what I'm here to talk about today." His work history includes academia and private enterprise. When this mower was manufactured, Dr. Warren was a practicing mechanical engineer.

Dr. Warren performed an engineering analysis "to determine whether the MTD mower that backed over and killed Justin Simmons was reasonably safe for its intended use and foreseeable misuse." He testified that he conducted a safety design analysis investigation of the hazards, risks, and safety engineering alternatives; inspected and analyzed the lawn mower involved in this case; and

reviewed the depositions and other discovery documents, including the depositions of the Reedys, of the first law-enforcement on the scene, and of Gunter F. Plamper. Mr. Plamper, MTD's chief engineer and vice president of development and safety, was its "corporate representative" in the courtroom throughout the trial. He also was MTD's expert witness. He and his team designed the model of mower involved in this case.

Mr. Plamper also inspected the mower whose blades killed Justin. Both Dr. Warren and Mr. Plamper demonstrated thorough knowledge about the specific lawn tractor, the state of the art when the lawn tractor was manufactured and sold, and the safety concerns of mower manufacturers in 1988, when this mower was manufactured.

Dr. Warren testified, without objection or contradiction, that a design engineer must take into consideration "the operation of the machine," "what the operator is likely to do," and known hazards involved in the machine's operation.

Both Dr. Warren and Mr. Plamper testified about a University of Iowa study, published in 1972, dealing with "backover" and "rollover" hazards. Relying on the Iowa study and on Mr. Plamper's deposition testimony, Dr. Warren testified that small children are a concern in safe design of riding mowers because they are intrigued by machinery and equipment; "they have a tendency to chase after mowers"; and they are difficult to see.

Through the testimony of both Dr. Warren and Mr. Plamper, the jury knew that, when this mower was manufactured, MTD had addressed the hazard of

child-backover injuries on flat ground by its “no mow in reverse” feature, which disengaged the blades when the mower was placed in reverse gear. (Dr. Warren testified that this innovation solved the flat-ground rollover problem.)

From both Mr. Plamper and Dr. Warren, the jury heard that MTD was aware, at the time the mower was manufactured, that an operator could back or roll the mower down an incline, with the blades still engaged and running, by placing it in neutral, or by fully engaging the clutch.

Dr. Warren testified, without contradiction, that the hazard to be addressed was “child rollover, runover hazard or backover hazard when being operated in reverse on a hill, on an incline where ultimately the mower ends up on top of the child and the rotating blade causes an amputation or death.” Dr. Warren testified that this was a “known, specific hazard associated with this machine,” and that MTD did not address this hazard in any way. He testified that, at the time that this lawn tractor was manufactured, technology existed, and was economically available to (a) detect rearward motion, and (b) then engage a brake that would (c) stop the spinning blades within a second or two. He testified — making reference to Mr. Reedy’s statement to law-enforcement officers that the incident happened “in seconds” — that if this known hazard had been addressed by a blade brake, the blades would have stopped “in a couple of seconds,” and Justin would not have been killed.

As the plaintiffs note in their brief, this testimony was before the jury without objection. The jurors had been instructed, also without objection, that

they were the judges of the facts, the credibility of the witnesses, and the weight of the evidence. (Instruction No. 2.)

Also before the jury without objection was Dr. Warren's testimony that a mower designer must take into account the fact that people tend to do what is simplest or easiest. There were two ways to use the Reedy garden tractor to mow while on an incline, he testified. One, using the "dead zone" on the brake/clutch pedal, required two steps to perform, and allowed the operator to cut grass while coasting downhill with the blades spinning. The other involved many steps, including shifting into reverse, which automatically turned off and lifted the blades; shifting into a forward gear to resume mowing, and finally, mowing forward in a forward gear. Mr. Plamper agreed with the assessment that people tend to do the simplest or easiest things. He also agreed that the components Dr. Warren described were available in 1988, when the lawn tractor was manufactured.

Mr. Plamper indicated skepticism about the practical efficacy of what Dr. Warren described. Dr. Warren, obviously, had no such skepticism. Of such disputes are jury issues made.

The same thing is true of two other things MTD discusses -- the existence of working models of alternative designs, and industry and government standards. "The law of the case" allows the jury to give these things such weight and value as the jurors think they are entitled to.

Prototypes

The jurisprudence of Virginia has never required that a plaintiff in a case of this sort prove the existence, at the time the machine complained about was manufactured, of a working example or prototype of the alternative design. The jurisdictions that require such evidence are states in which "strict liability" applies.²¹ "[S]trict liability [is] a doctrine that is not recognized in Virginia."²²

Industry and government standards and trade usage

In its memoranda and oral argument, MTD emphasizes, as it did before the jury:

- that no industry or government standards required (or even suggested) the sort of design that the plaintiffs contend was necessary; and
- that, neither in 1988 nor by the time of trial have any other manufacturers implemented such a design for riding mowers of comparable size.

These things, MTD argues, weigh heavily against the plaintiffs. Some courts suggest that, in products liability cases, "one of the most significant factors

²¹ See, e.g., *Lease v. International Harvester Co.*, 529 N.E.2d 57 (Ill. 1988); *General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985); *Berker v. Lull Engineering*, 573 P.2d 443 (Cal. 1978).

²² *Harris v. T.I. Inc.*, 243 Va. 63, 71, 413 S.E.2d 605 (1992); but see *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 406, 368 S.E.2d 268 (1988) (strict liability applies in blasting cases).

instructions in the case at bar of course focus on reasonable prudence (“ordinary care”) as the standard, not trade practices.

An argument that trade practices should dictate the “standard of care” is essentially an argument that product manufacturers should be treated like doctors, lawyers, and other professionals.²⁸ The Supreme Court of Virginia is unlikely to adopt such a position. As the Arizona Supreme Court stated, trades “will be allowed to create their own standards of reasonably prudent conduct only when the nature of the group and its special relationship with its clients assure society that those standards will be set with primary regard to protection of the public rather than to such considerations as increased profitability.”²⁹

The weight given to evidence of trade practices is closely related to that of experimentation evidence.

Testing and Experimentation

“Settled evidentiary principles” require expert testimony to rest upon “a bedrock of fact” — facts within the expert’s own knowledge or established by other evidence in the case. Mere inferences founded upon inferences “possess no evidential value.”³⁰ Without a prototype of an alternative design, without evidence

(6th Cir. 1983) (defective tractor); *Spinosa v. International Harvester Co.*, 621 F.2d 1154 (1st Cir. 1980) (same).

²⁸ See *Rossell v. Volkswagen*, 709 P.2d 517, 523 (Ariz. 1985).

²⁹ *Id.*

³⁰ *Stover*, 249 Va. at 200. See *Countryside Corp. v. Taylor*, 263 Va. 549, 552, 561 S.E.2d 680 (2002).

is whether others in the field are using the same design, or a safer design."²³

Others consider factors such as known feasibility and adequate testing.²⁴

But it would be a rare court, in an extraordinary case, that would accept "no one else does it" as conclusively establishing lack of duty. "What usually is done," Justice Holmes wrote, more than a century ago, "may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."²⁵

Judge Learned Hand expressed a similar thought when the question was whether tugboats should be equipped with radios:

Is it then a final answer that the business had not yet generally adopted receiving sets? . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.²⁶

Courts deciding products liability cases have often quoted Judge Hand's words, even though they were written in a different kind of case.²⁷ The

²³ *Garst v. General Motors Corp.*, 484 P.2d 47, 61 (Kan. 1971).

²⁴ *Id.* (citing *Watts v. Bacon & Van Buskirk*, 163 N.E.2d 425 (Ill. 1959); *Amason v. Ford Motor Co.*, 80 F.2d 265 (5th Cir. 1935)).

²⁵ *Texas & Pacific Railway Co. v. Behymer*, 189 U.S. 468, 470 (1903) (Holmes, J.) (cited in *Garst*, *supra*, and applied in *Atchison, Topeka & Santa Fe Railway Co. v. Parr*, 391 P.2d 575, 578 (1964)).

²⁶ *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932), cert. denied *sub nom. Eastern Transportation Co. v. Northern Barge Corp.*, 287 U.S. 662 (1932).

²⁷ See, e.g., *George v. Celotex Corp.*, 914 F.2d 26 (2d Cir. 1990) (compliance with industry standard no shield from liability for asbestos-related injuries); *Foster v. Caterpillar Tractor Co.*, 714 F.2d 654

that anyone has constructed a riding mower with the safety features that Dr. Warren says are necessary, can the court say that the foundation of his opinion is anything more than mere conjecture?³¹

In the jurisprudence of this state, it is for the jury, not the judge, to decide what weight or effect to give to the presence or absence of experimental designs and prototypes when, as here, an expert's statements of fact and opinion are before the jury without objection.³²

When the admission of evidence is contested, nothing compels a trial judge to (quoting Chief Justice Rehnquist) "admit opinion evidence which is connected to existing data only by the *ipse dixit* [he himself said it] of the expert."³³ The admission of opinion testimony may be contested by objection, made when the testimony is offered or, if a "defect in an expert witness' testimony [is] not apparent until the testimony of that witness is completed," at the first opportunity.³⁴ If evidence has not been challenged by the time the case goes to the jury, however — no objection has been made, no limiting or cautionary instruction has been sought — then it is for the jury to determine the weight, effect, nature, and quality of that evidence.³⁵ A party who could have objected,

³¹ *Stover*, *Id.*

³² See D. Arthur Kelsey, "Virginia's Answer to Daubert's Question Behind the Question," 90 JUDICATURE No. 2, Sept. – Oct. 2006, at 68, *passim*.

³³ *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1977).

³⁴ *Bitar v. Rahman*, 272 Va. 130, 140, 630 Va. 319 (2006).

³⁵ *TransiLift Equipment, Ltd. v. Cunningham*, 234 Va. 84, 92, 360 S.E.2d 183(1987).

but chose to not do so, cannot be heard to complain that the jury has followed the court's instructions, and considered all of the evidence.³⁶

Further, when a witness's testimony combines statements of opinion and assertions of fact, as Dr. Warren's does, the cross-examiner has the right, under Virginia Code § 8.01-401.1, to require the witness to furnish specifics about the "underlying facts or data" upon which he relied. The cross-examiner probed in this area as far as he chose to go. He cannot now ask the court to conclude that, if he had asked more questions, weaknesses in the plaintiffs' case would have been exposed.

The trial judge has neither right nor prerogative to inquire into the validity of evidence that is before the jury without objection, and is before the jury through witnesses whom the defendant has cross-examined.

Having reviewed the evidence to the extent of determining that, through Dr. Warren, the plaintiffs adduced credible evidence that supports the jury's verdict, I need go no farther.³⁷ I must enter judgment on the jury's verdict.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the

³⁶ *Bitar*, 272 Va. at 140.

³⁷ *See T.M. Graves*, 226 Va. at 169.

ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.³⁸

³⁸ *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 35 (1932)(Murphy, J.); see *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933)(Brandeis, J.)("Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."); *Union P. R. Co. v. Hadley*, 246 U.S. 330, 334 (1918)(Holmes, J.)(since jury's "finding was possible on the evidence it cannot be attributed to disregard of duty," and reviewing court therefore cannot be concerned with whether jury's reasons for decision were right or wrong).