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COURT OF APPEALS

STATE OF NEW YORK

HOOVER,

Respondent,

-against-

No. 36

NEW HOLLAND NORTH AMERICA, INC.,

Appellant.

20 Eagle Street
Albany, New York 12207
February 12, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: Number 36, Hoover v.
2 New Holland. Counselor, you want any rebuttal time?

3 MR. JONES: Yes, Your Honor. If I may, I'd
4 like to reserve three minutes.

5 CHIEF JUDGE LIPPMAN: Three minutes. Go
6 ahead. You're on.

7 MR. JONES: May it please the court, my
8 name is Paul Jones of Phillips Lytle in Buffalo. My
9 colleague Joanna Chen and I are counsel for
10 appellants, CNH America LLC and Niagara Frontier
11 Equipment Sales, Inc.

12 This court held over thirty years ago in
13 Robinson, that material alterations - - - quoting - -
14 - "material alterations at the hand of a third party,
15 which work a substantial change in the condition" - -
16 -

17 CHIEF JUDGE LIPPMAN: Why is this a
18 material alteration? What - - - couldn't we assume
19 that the shield, or whatever the technical name is -
20 - - would wear out with use? Why - - - why is it a
21 material alteration? Must you - - - must you replace
22 the shield? Is there - - - is there an affirmative
23 duty to do so?

24 MR. JONES: To - - - to take the last part
25 - - -

1 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

2 MR. JONES: - - - of your question first,
3 Chief Judge Lippman, the answer is yes. You must
4 replace it.

5 CHIEF JUDGE LIPPMAN: A part breaks, you
6 always have to replace it?

7 MR. JONES: Well - - -

8 CHIEF JUDGE LIPPMAN: Or in this particular
9 case, you have to replace it?

10 MR. JONES: Well, I think as a general
11 proposition, we have these cases, for example,
12 Mayorga, from the Second Department in 1997, that
13 says exactly that. Part wears out, it's the duty of
14 - - - there's no - - -

15 CHIEF JUDGE LIPPMAN: In all circumstances?

16 MR. JONES: I don't know if Mayorga says it
17 quite that explicitly, but - - -

18 JUDGE SMITH: Would - - - would it be
19 different if this thing cost 4,000 instead of 40
20 dollars?

21 MR. JONES: Well, but it didn't. It cost
22 40 dollars. And that's - - - that's - - - on the
23 facts of this case, I wanted to address that last
24 question - - -

25 JUDGE READ: We're looking - - - we're

1 looking - - - we're looking for something obviously,
2 and you're asking for something that would apply more
3 generally than the facts of this - - - than the facts
4 of this case, so would it make a difference in
5 whatever rule we develop? I mean, is it going to
6 depend on what it costs to replace?

7 MR. JONES: No, I don't think it would,
8 especially - - - and I wanted to come back, Judge
9 Lippman - - -

10 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

11 MR. JONES: - - - to your - - -

12 CHIEF JUDGE LIPPMAN: Sure.

13 MR. JONES: - - - the last part of your
14 question which was this. On the record of this case,
15 there absolutely was an obligation to replace the
16 shield. The - - - the operator's manual said that
17 explicitly. And we know from the record of this case
18 that there originally were failure to warn claims in
19 this case. Those were dismissed.

20 So as a matter of law, the warnings in the
21 operator's manual were adequate for - - -

22 CHIEF JUDGE LIPPMAN: Are you protected - -
23 - let me ask this another way - - - are you protected
24 from something that's underneath that shield that's
25 dangerous - - - cause if the person using it or who

1 buys it doesn't put back the shield, then it's all on
2 them? You follow what I'm saying?

3 If there's a dangerous condition and
4 there's certainly some, you know, allegations here
5 that there is, if it's underneath that and - - - and
6 you know when you - - - when it's manufactured, that
7 it's dangerous, are you protected that once that
8 shield breaks in any way and it's not replaced, the
9 manufacturer and the people who are in the line of
10 all of this are off the hook?

11 MR. JONES: Yes. Yes. And that's - - -

12 CHIEF JUDGE LIPPMAN: Always? Always? All
13 the - - -

14 MR. JONES: I think always. And that's - -
15 - that's the holding of Robinson.

16 JUDGE PIGOTT: Where did the - - - where
17 did the Fourth Department go wrong, then, when - - -
18 in their decision? Because they - - - they conceded
19 that you had met your initial burden, or at least
20 they said, assuming you have, the plaintiffs have
21 raised issues of fact with respect to that, and they
22 - - - where was their mistake in - - -

23 MR. JONES: I think where they really went
24 wrong was they focused on the durability of the
25 shield.

1 JUDGE PIGOTT: Wasn't there - - - correct
2 me, because I'm not positive about this - - - but I
3 thought there was testimony by someone, you know,
4 that said, well, with respect to these things, we buy
5 them and then we put blue paint on them and call them
6 a Ford. And it sounded like you didn't make these -
7 - - these parts, but they became part of the entire -
8 - - at that time, I guess it was - - - Ford New
9 Holland, but then Case New Holland. And - - -

10 MR. JONES: Well, I think the line of - - -
11 I'm not entirely sure. I think the line of
12 succession was, this used to be the Ford Motor
13 Tractor business, but whether the name Ford was on it
14 or not, doesn't matter. Sure. They bought - - - the
15 manufacturer bought component parts, and - - - and
16 actually with respect to the post hole digger,
17 contracted out the manufacture of the post - - -

18 JUDGE ABDUS-SALAAM: But why was it wrong
19 for the Fourth Department to focus on the shield
20 being defective?

21 MR. JONES: Well, because we know from, as
22 I said earlier, Mayorga and other cases, there is no
23 duty to manufacture a safety device that will - - -
24 or a part that will not wear out. Let's accept the
25 testimony of Mr. Smith here, the owner of the post

1 hole digger. After two years, perhaps as long as
2 five years, this wore out. It wore out because of
3 the way he operated it. All right. It wore out. He
4 knew. He testified - - - he knew why that was there.
5 It's a safety device. He removed what was left of it
6 - - -

7 JUDGE ABDUS-SALAAM: What was it about the
8 way he operated it that made it wear out? From my
9 understanding of the record, he dug holes with it.
10 That's what you - - - that's what he bought it for,
11 and that's something - - - the way he dug the holes
12 is something that you could foresee, correct?

13 MR. JONES: The way he du - - - he dug two
14 types of holes. He dug holes that were just vertical
15 holes, and then - - - this was a vineyard. And so at
16 the end of the vines, the end of a row, he had an
17 angled post. And it was in - - - in digging the
18 angled posts where he drove not just the auger into
19 the ground but the shield surrounding - - - the
20 gearbox shield - - -

21 JUDGE ABDUS-SALAAM: So you're saying it
22 would - - - it was unforeseeable on your part that he
23 might angle this digger when he got to the end of the
24 row?

25 MR. JONES: No, I don't say that at all,

1 Your Honor. I don't say that it was unforeseeable,
2 and the manufacturer, after all, has - - - has a duty
3 not only with respect to foreseeable uses, but
4 foreseeable misuses. The point is this. The - - -
5 nothing lasts forever. Brakes on your car don't last
6 forever. Tires on your car don't last forever.

7 And as - - - it's a safety matter that you
8 re - - -

9 JUDGE ABDUS-SALAAM: But the jury found Mr.
10 Smith liable here. They assigned thirty percent to
11 him, no?

12 MR. JONES: Well, they did. And that was
13 wholly inadequate. But I don't want to get diverted
14 on that. But the point is, it shouldn't - - - never
15 should have been a jury question. As a matter of law
16 - - - our argument is, as a matter of law, this case
17 - - - summary judgment should have been granted.

18 JUDGE PIGOTT: You should've won at summary
19 judgment - - -

20 MR. JONES: Yes.

21 JUDGE PIGOTT: - - - at the beginning - - -
22 for - - -

23 MR. JONES: Absolutely - - -

24 JUDGE PIGOTT: - - - you know - - -

25 MR. JONES: - - - never would've gone to a

1 jury.

2 CHIEF JUDGE LIPPMAN: What exactly - - -

3 JUDGE GRAFFEO: But why is it that - - -

4 CHIEF JUDGE LIPPMAN: - - - go - - -

5 JUDGE GRAFFEO: - - - when a safety device
6 wears out that equates to a modification?

7 MR. JONES: Well, because - - -

8 JUDGE GRAFFEO: And I understand you're
9 saying that there may be an obligation by the owner
10 of the equipment to replace the safety device. But
11 why is that akin to a modification such that you were
12 entitled to summary judgment?

13 MR. JONES: Well, it's a modification
14 because when he bought it brand new, it had a shield
15 that did what it was supposed to do. It protected
16 people from that rotating shaft. And after two
17 years, it had worn out - - - according to his
18 testimony two to five years - - - and was no longer
19 functioning. So the substantial modification was,
20 removing it and not replacing it.

21 JUDGE GRAFFEO: But if you - - -

22 JUDGE RIVERA: But he's - - - they're
23 arguing it's inadequate to the task, so it's
24 defective as - - - when it left your hands to get to
25 his hands.

1 MR. JONES: I understand exactly what
2 they're saying. But - - -

3 JUDGE RIVERA: Why isn't saying that a - -
4 -

5 MR. JONES: - - - that isn't the test.

6 JUDGE RIVERA: - - - security device on
7 this kind of equipment which if - - - okay, accepting
8 your argument that it may not necessarily have to
9 last forever, but two years?

10 MR. JONES: Two to five years. But two
11 years is a long time. He drill - - - he was drilling
12 1,000 to 2,000 holes per year. So in two years, at a
13 minimum, he had drilled 2,000 holes with this.
14 That's a lot of use.

15 CHIEF JUDGE LIPPMAN: Yeah, but you're not
16 saying that the equipment that you're selling is a
17 two-year product, and after that you throw it away?

18 MR. JONES: Absolutely not. It - - -

19 CHIEF JUDGE LIPPMAN: What hap - - - what's
20 the exact nature of your warning, and what happens -
21 - - it's expected that it might break in two years,
22 what happens - - -

23 MR. JONES: It - - - I'm sorry. The - - -

24 CHIEF JUDGE LIPPMAN: - - - what happens?

25 MR. JONES: The explicit warning was, "Do

1 not operate without all shields in place." And the
2 court - - -

3 CHIEF JUDGE LIPPMAN: And if you operate
4 it, that's it, you're off the hook?

5 MR. JONES: Well, if - - - the warning goes
6 on and says, personal injury can occur. And - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
8 as far as you're concerned, your responsibility is
9 met? You've put in the warnings that don't operate
10 it if that shield falls off or whatever it says.

11 MR. JONES: Well, never mind what I say.
12 That's what the trial court said. The trial court
13 dismissed the failure to warn claims. The trial
14 court and - - -

15 CHIEF JUDGE LIPPMAN: Yeah, yeah. But - -
16 -

17 MR. JONES: Yes.

18 CHIEF JUDGE LIPPMAN: - - - we're here to
19 talk about all of that, right?

20 MR. JONES: Well, yes, but the trial court
21 explicitly held that the warnings were sufficient,
22 including the one that I just - - -

23 JUDGE SMITH: And have - - - is there an
24 appeal from that, or is that - - -

25 MR. JONES: There was no appeal from that.

1 JUDGE PIGOTT: If you get back, then, to
2 what the Fourth Department said, they said, "A
3 protruding bolt that attached the drive chain to the
4 gearbox was an entanglement hazard, the plastic
5 shield could be damaged by normal use and foreseeable
6 misuse of the digger, and there were design
7 alternatives that would have reduced or eliminated
8 the hazard with only minimal increase in cost."

9 Where did they go wrong there?

10 MR. JONES: Well, first of all, they went
11 wrong because it doesn't have to last forever. But
12 they also went wrong on - - - on the - - - you
13 mentioned the alternative - - -

14 JUDGE PIGOTT: Design alternatives.

15 MR. JONES: - - - the design alternatives,
16 which - - - and the - - -

17 JUDGE SMITH: But aren't you - - - but
18 don't you have an independent argument based on the
19 substantial alteration doctrine, that is, I mean even
20 if - - - even if they have a case of a design - - -
21 of a badly designed product, doesn't Robinson say
22 that if there was a shield - - -- if there was a
23 shield in pl - - - if they'd chosen to take off the
24 shield and throw it away, Robinson would be squarely
25 applicable, right?

1 MR. JONES: Yes.

2 JUDGE SMITH: And you're saying, as I
3 understand it, it's the same thing when he wears out
4 the shield by misuse and chooses not to replace it
5 for - - - you know, for no better reason than it's
6 just going to get broke again, when it does last
7 three years and only costs forty bucks.

8 MR. JONES: That - - - that is correct.

9 JUDGE SMITH: You're saying that's really
10 not distinguishable from taking the thing off?

11 MR. JONES: I - - - I think it's - - -
12 legally - - - the legal analysis is, yes, that's the
13 - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but - - -

15 MR. JONES: - - - they're effectively the
16 same.

17 CHIEF JUDGE LIPPMAN: - - - but you're
18 saying that - - - that protects you even if the
19 product is defectively designed, that there is a
20 dangerous condition there, and that you could have
21 foreseen that - - -

22 MR. JONES: There - - -

23 CHIEF JUDGE LIPPMAN: Let's assume that
24 there was a defective design and that you could have
25 designed it some other way, and - - - and in that

1 circum - - - let's say it's a hypothetical - - - in
2 that circumstances, still protected?

3 MR. JONES: Yes. There is - - -

4 CHIEF JUDGE LIPPMAN: Why? Why - - - why
5 is that - - - why is that right, when - - - when you
6 know that this could - - - this could happen? Let's
7 not even say in your case. Hypothetically, you know
8 there's a defect under there; you could have done it
9 some other way. Yes, the shield breaks. Yes, it's
10 not replaced. Why isn't it your responsibility?

11 MR. JONES: There - - - there's several
12 pieces to that. First of all, we don't concede for a
13 minute - - - and the client never - - - CNH never
14 conceded for a minute that there was a defect in the
15 underlying - - -

16 CHIEF JUDGE LIPPMAN: Let's assume there
17 is.

18 MR. JONES: All right. I understand.
19 Behind any guard, behind any shield, is a dangerous
20 component. That's why the shield is there.

21 CHIEF JUDGE LIPPMAN: Not dangerous
22 component, a design defect that could've, should've
23 been designed in a different way so that people
24 wouldn't get hurt, or whatever the consequence is.
25 In that circumstance, why should you be insulated?

1 MR. JONES: Robinson doesn't draw that
2 distinction. Robinson says modification, end of
3 case.

4 JUDGE SMITH: Robinson - - - as you read
5 Robinson, was it decided on the assumption that there
6 was a defect - - - that there was a defect against
7 which the safety device was protecting?

8 MR. JONES: Well, there was certainly a
9 hazard there, which is why the guard was there.

10 JUDGE PIGOTT: Well, that - - - yeah.
11 You're talking about the molding machine?

12 MR. JONES: The - - - in Robinson, yes.

13 JUDGE PIGOTT: Let me - - - excuse me,
14 Judge. The last thing that the Appellate Division
15 said is, "We further conclude that the plaintiffs
16 presented sufficient evidence that Smith's removal of
17 the damaged gearbox shield did not constitute a
18 substantial modification." Now, obviously, you think
19 that's wrong.

20 MR. JONES: They're wrong.

21 JUDGE PIGOTT: That there was no - - -
22 there was no evidence that Smith's removal of the
23 damaged gearbox (sic) was not a substantial
24 modification. You say it was a substantial
25 modification?

1 MR. JONES: It clearly was a substantial
2 modification. And I know the red light is on, and
3 there are any number - - -

4 CHIEF JUDGE LIPPMAN: Just finish answering
5 the judge's - - -

6 MR. JONES: - - - other issues, and we
7 won't get to them. But just on that, the jury - - -
8 I know what the Appellate Division said, but the jury
9 - - - implicit in the not - - - denial of summary
10 judgment by the trial court, was the existence of a
11 material question of fact - - - question of material
12 fact, namely was it a substantial modification.
13 That's, at least, what the trial court felt.

14 Then when the trial was over and the
15 defendant asked for that specific question to be put
16 to the jury, he didn't. So I know what the Appellate
17 Division said, but that question was never put to the
18 jury.

19 JUDGE PIGOTT: Okay.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.

21 MR. JONES: Thank you.

22 CHIEF JUDGE LIPPMAN: Thanks, counselor.

23 MR. COLLINS: Good afternoon, Your Honors.

24 CHIEF JUDGE LIPPMAN: Good afternoon.

25 MR. COLLINS: If it pleases the court.

1 Plaintiff is not arguing here and is not asking the
2 court to hold - - -

3 CHIEF JUDGE LIPPMAN: Who are you
4 representing, exactly, counsel?

5 MR. COLLINS: I represent Jessica Bowers,
6 the injured plaintiff.

7 CHIEF JUDGE LIPPMAN: Okay, go ahead.

8 MR. COLLINS: Yes, Your Honor, John
9 Collins.

10 Plaintiff is not arguing and is not asking
11 the Court to hold that a product must be rendered - -
12 - or manufactured in a way that it's indestructible
13 and will not wear out.

14 JUDGE PIGOTT: You're saying this de - - -
15 this decision did not offend Robinson v. Reed-
16 Prentice?

17 MR. COLLINS: I don't think so. I think it
18 is fully in accord with Robinson, because under
19 Robinson, there has to be a conscious effort, I
20 think, to bypass a proper safety - - -

21 JUDGE PIGOTT: Those were intentional acts
22 when they cut the hole in the Plexiglas in Robinson?

23 MR. COLLINS: That's right.

24 JUDGE SMITH: You don't - - - you don't
25 think that Mr. Smith intentionally bypassed the

1 safety shield when he throws it away and said it's
2 not worth spending forty bucks for another one?

3 MR. COLLINS: No, because the safety shield
4 was not performing any function at the time he took
5 off the broken shards of it.

6 JUDGE SMITH: Well, yeah, but - - - but it
7 - - - but if he bought a new one for forty dollars,
8 this accident wouldn't have happened.

9 MR. COLLINS: Well, I think - - -

10 JUDGE SMITH: Do you dispute that?

11 MR. COLLINS: If a shield were on at the
12 time of this occurrence on October 2, I don't dispute
13 that Jessica would not have been injured. But I
14 think the jury was entitled to find, under these
15 facts, that the reason the shield broke apart within
16 two years is that it constituted a design defect - -
17 -

18 JUDGE SMITH: Well, suppose - - -

19 MR. COLLINS: - - - because it was not
20 adequate - - -

21 JUDGE SMITH: - - - suppose you're right
22 about that. But wasn't it - - - I mean, wasn't it -
23 - - wasn't it irresponsible of Smith not to replace
24 it? Wasn't that - - - isn't that just as
25 irresponsible as the - - - as what the purchaser of

1 the product did in Robinson?

2 MR. COLLINS: I don't think it's equatable
3 with what the purchaser did - - -

4 JUDGE SMITH: Why not?

5 MR. COLLINS: - - - in Robinson. Because
6 in Robinson, there was a conscious effort to cut
7 holes in a guard that was working perfectly well, in
8 order to - - -

9 JUDGE SMITH: Here's a conscious effort - -
10 -

11 MR. COLLINS: - - - facilitate the
12 production process.

13 JUDGE SMITH: - - - well, here was a
14 conscious effort to save forty dollars by not
15 replacing a single part. Why is one worse than the
16 other?

17 MR. COLLINS: Well, because it would be
18 equatable, I think, only if he purposely took off a
19 working shield for some reason.

20 CHIEF JUDGE LIPPMAN: So what's the rule -
21 - - what's the rule? If the product breaks and you
22 allow it - - - you continue to use it despite the
23 fact that there's a warning, okay; but if you break
24 the product on purpose, not okay? Is that the - - -
25 is that the rule?

1 Let me take you back to the - - - Mr. Jones points
2 out that - - - that summary judgment was still an
3 issue here. And it was denied. And I was asking him
4 about the grounds that the Appellate Division used.
5 And one of them, they say, is that the "Smith's
6 removal of the damaged gearbox (sic) did not
7 constitute a substantial modification." How - - -
8 can you explain how that's possible?

9 MR. COLLINS: It did not, because, for one
10 thing, a substantial modification has to render a
11 safe product defective. This was not a safe product,
12 because the shield was, from the beginning,
13 inadequate - - -

14 JUDGE SMITH: Well, but it was - - -

15 MR. COLLINS: - - - given the - - -

16 JUDGE SMITH: - - - but it was - - - but
17 you admit it was safe as long as the shield was on?

18 MR. COLLINS: Yes. But - - -

19 JUDGE SMITH: Well, isn't that the same
20 thing as in Robin - - - I mean, the product in
21 Robinson wasn't safe without the safety device?

22 MR. COLLINS: But in Robinson, the shield
23 didn't break apart leading the owner to say - - -

24 JUDGE PIGOTT: Well, is that what - - -

25 MR. COLLINS: - - - well, I might as well

1 take off the broken pieces.

2 JUDGE PIGOTT: - - - is that what you're
3 getting to then? In Robinson, it was intentional,
4 and in this case, it's not? Is that - - - is that a
5 distinguishing factor between these two?

6 MR. COLLINS: Yes, I think that's a major -
7 - -

8 CHIEF JUDGE LIPPMAN: Would - - -

9 MR. COLLINS: - - - distinguishing factor.

10 CHIEF JUDGE LIPPMAN: - - - and does it
11 matter that - - - as I asked your adversary - - -
12 that there's something underneath the shield that is
13 defectively designed or that could be designed
14 better?

15 MR. COLLINS: Yes.

16 CHIEF JUDGE LIPPMAN: Does that go into
17 this test that - - - what - - - what does it expose,
18 and could that have been done differently, so that
19 even without the shield, it wouldn't be dangerous if
20 it has been designed in a different way?

21 MR. COLLINS: It certainly would have been
22 less dangerous. And I think, under the facts of this
23 case, the jury found that there were two product
24 defects in this case, the shield being inadequate for
25 its intended use or foreseeable use, and secondly,

1 the use of a protruding nut and bolt - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but - - -

3 MR. COLLINS: - - - on this unit.

4 CHIEF JUDGE LIPPMAN: - - - but if you
5 didn't have - - - if there was nothing under there
6 that would create a problem, then it wouldn't really
7 matter what happened to the shield, would it?

8 MR. COLLINS: Well - - -

9 CHIEF JUDGE LIPPMAN: You know what I mean?
10 If there wasn't another - - - whatever you want to
11 call it - - - another design defect or something that
12 could have been designed more safely, then it
13 wouldn't have been as important whether he - - - he
14 let the - - - throw the shield away or didn't, right?

15 MR. COLLINS: It would have been safer,
16 because there was proof and the jury, I think,
17 viewing the evidence in the light most favorable to
18 plaintiff, found that the clothing caught on this
19 protruding nut and bolt which certainly was a defect,
20 because it violated what everyone agreed upon is the
21 three principles of design which is - - -

22 JUDGE SMITH: But doesn't - - -

23 MR. COLLINS: - - - first - - -

24 JUDGE SMITH: - - - Robinson - - - doesn't
25 Robinson assume the existence of a product defect?

1 If there's no defect, there's no case. You wouldn't
2 - - - they wouldn't have had to - - - in Robinson,
3 they wouldn't have to talk about substantial
4 modification if there were no defect in the product
5 to begin with.

6 MR. COLLINS: Well, there's not a defect.
7 There is a hazard. In Robinson, it was a press that
8 comes down and molds these plastic beads. But there
9 wasn't, as in this case, an indication that - - -

10 JUDGE SMITH: What was - - - what - - - I
11 mean, I admit, I can't figure it out from the opinion
12 either. But presumably, there must have been some
13 theory of liability in Robinson. They didn't say
14 they were liable just be - - - you can't sue just
15 because the plaintiff cut a hole in the safety
16 shield.

17 MR. COLLINS: I think that was the argument
18 is that it should have been designed in such a way
19 that it couldn't be bypassed even intentionally by
20 cutting holes in it. And the court held you can't
21 prevent someone from altering a safe machine. But in
22 this case, there was - - -

23 JUDGE SMITH: So - - -

24 MR. COLLINS: - - - what was not present in
25 Robinson - - -

1 JUDGE SMITH: - - - so your argument, then,
2 is that there, he - - - if this thing had been not
3 negligently designed, there would have been no hazard
4 to shield?

5 MR. COLLINS: If it had been designed with
6 what our expert posited, which is a metal shield
7 instead of a plastic shields- - -

8 JUDGE SMITH: No, I understand that. I'm
9 just trying to get the theory. You're saying that in
10 Robinson, there was no way of getting rid of the
11 hazard. But here, the hazard could have been
12 eliminated and not shielded?

13 MR. COLLINS: It would still be shielded,
14 but there was a hazard - - -

15 JUDGE SMITH: Why would it be shielded, if
16 it wasn't there?

17 MR. COLLINS: Well, there was a hazard over
18 and above the protruding nut and bolt. I don't
19 dispute that. But the nut and bolt certainly was a
20 defect that created a heightened hazard that rendered
21 the use of the shield even more important. And it
22 was this combination of the missing shield and an
23 unnecessarily present protruding nut and bolt - - -

24 JUDGE SMITH: So you - - - you limit
25 Robinson, then, to the situation where the complaint

1 is of a - - - of a defect in the safety device
2 itself, not in the product that the safety device was
3 intended to protect against?

4 MR. COLLINS: Well, I think Robinson dealt
5 only with safety devices and didn't even address the
6 question of was there a defect above and beyond that,
7 that created - - -

8 JUDGE SMITH: So that - - -

9 MR. COLLINS: - - - a heightened hazard.

10 JUDGE SMITH: - - - and as you read
11 Robinson, if the plaintiff had said there, well, they
12 made the temperature of this mold too hot; they could
13 have melted plastic at a much lower level, and it
14 wouldn't have injured - - - injured my guy so much,
15 then Robinson comes out differently?

16 MR. COLLINS: I think it could, yeah, if
17 there was a separate defect over and above the guard.
18 But I think this case still comes down to enough
19 proof being here, certainly, that a jury could and
20 did find that there was a design defect in the guard
21 because it just wasn't adequate for the job, based
22 upon what the manufacturer and the seller, CNH, knew
23 at the time that this was first designed and
24 produced, which is that the - - -

25 JUDGE SMITH: You're - - -

1 MR. COLLINS: - - - auger can dig so deep
2 that it - - -

3 JUDGE SMITH: - - - you're making two - - -

4 MR. COLLINS: - - - hits the ground - - -

5 JUDGE SMITH: - - - alternative arguments,
6 as I - - - one is, you say that the - - - but you're
7 also saying, I guess, that even if they had designed
8 a perfect safety shield, and Mr. Smith had pried it
9 off because he didn't like the look of it, the - - -
10 you still have a case, because the product is not as
11 safe as it should have been.

12 MR. COLLINS: Yes, there would - - -
13 because of the second defect, which is a protruding
14 nut and bolt, instead of a smooth surface.

15 JUDGE PIGOTT: Is that disputed at all?
16 Because I know it wasn't the same bolt, right?

17 MR. COLLINS: There was testimony by Gary
18 Hoover that the replacement nut and bolt was longer.
19 Peter Smith said no, it was identical. The jury was
20 certainly free to accept that. And under this
21 court's decision in Sage, the replacement of one part
22 with one that's functionally equivalent just carries
23 on the product defect that was there from the
24 beginning. And again, viewing in the light most
25 favorable to plaintiff, we have to assume that the

1 jury agreed that it was a defect that was there
2 equivalent and equal to that was there at the day it
3 was made in 1996.

4 JUDGE PIGOTT: Why was the removal - - - I
5 guess I'm stuck on this - - - why is the removal of
6 the - - - of the gearbox shield not a substantial
7 modification? The Appellate Division - - -

8 MR. COLLINS: Because - - -

9 JUDGE PIGOTT: - - - said you had
10 sufficient evidence to show that it wasn't.

11 MR. COLLINS: Mr. Smith testified that it
12 had begun breaking apart; he repeatedly put it back
13 on with larger and larger washers, and - - -

14 JUDGE PIGOTT: Right. But it's still a
15 substantial modification, right? I mean - - -

16 MR. COLLINS: Well, it's not, because he
17 testified that at the time it was finally broken
18 apart, it was no longer acting as a guard. It was
19 basically - - -

20 JUDGE PIGOTT: But it's still a substantial
21 modifica - - - I mean, regardless of the reason why
22 it happened, isn't it a substantial modification?
23 And you're saying it's a substantial modification
24 that caused my client's injury.

25 MR. COLLINS: It's not a substantial

1 modification from the product as sold, because it
2 had, due to a defect, already lost all utility as a
3 guard. I think to substantially modify an existing
4 safe product, he would have had to remove a guard
5 that was fulfilling its purpose.

6 JUDGE SMITH: So your argument really
7 depends on the distinction between removing a safety
8 device and failing to replace a broken one, no matter
9 how easy and cheap it would have been to replace?

10 MR. COLLINS: Yeah. I don't think that his
11 failure to put it on - - -

12 JUDGE SMITH: You're saying not putting it
13 on - - -

14 MR. COLLINS: - - - insulates - - -

15 JUDGE SMITH: - - - is different from
16 taking it off?

17 MR. COLLINS: Well, he would have - - -
18 what he took off was not a working guard.

19 JUDGE SMITH: I understand. I understand.
20 You say he didn't take off any safety device, because
21 it didn't do - - - wasn't doing him any good, at that
22 point?

23 MR. COLLINS: Correct.

24 JUDGE SMITH: And you're also - - - but
25 you're also saying that failing to put it on, even

1 when the failure is as gross as it was here, for no
2 good reason, you're saying that's not the same as
3 removing it?

4 MR. COLLINS: Well, I think there was a
5 good reason, because - - -

6 JUDGE SMITH: The reason he gave was, oh,
7 it's just going to get broke again.

8 MR. COLLINS: And it's acknowledged on this
9 record, not only by Mr. Berry, our witness, but by
10 defense witnesses, that it's well known in the field
11 of agricultural machine design, that once a guard
12 breaks off, there is a strong likelihood that the
13 farmer's interested in one thing, which is a machine
14 that does what it's supposed to do, and will often
15 not replace a guard.

16 JUDGE SMITH: Okay, but that's - - - you're
17 - - - that, you're saying, was foreseeable. I mean,
18 Robinson, we said it was foreseeable, very - - -
19 totally foreseeable. It was, in fact, foreseen that
20 they were going to modify the safety device. You're
21 not saying that there was a good re - - - you're not
22 defending what Mr. Smith did. You're not saying
23 there was a good reason for him to say oh, it's just
24 going to get broke again; I'm not going to bother to
25 replace it?

1 MR. COLLINS: Well, I think what Mr. Smith
2 did was wrong, and that's why he was assessed with
3 thirty percent liability. But I don't think - - -

4 JUDGE SMITH: You don't think it's the
5 equivalent of taking off a safety device?

6 MR. COLLINS: No, because the safety device
7 was just improperly utilized in the first place, and
8 it was not adequate to the job. And by not replacing
9 it, he - - - as the jury found - - - acted culpably,
10 but not so culpably that it should - - -

11 CHIEF JUDGE LIPPMAN: Okay - - -

12 MR. COLLINS: - - - exonerate as a matter
13 of law - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

15 MR. COLLINS: - - - the defendant.

16 CHIEF JUDGE LIPPMAN: - - - thank you.
17 Counselor?

18 MR. MATTELIANO: May it please the court,
19 good afternoon. My name is Joe Matteliano. I
20 represent Gary Hoover, who's now deceased, the
21 estate. I will be brief. I have to be. I have
22 three minutes, and let me hit these bullet points - -
23 -

24 CHIEF JUDGE LIPPMAN: Sure, go ahead - - -

25 MR. MATTELIANO: - - - if I can?

1 CHIEF JUDGE LIPPMAN: - - - counselor.

2 MR. MATTELIANO: And fire away, if you
3 want.

4 But first of all, the three percent finding
5 of liability against my client should not be
6 disturbed by this court for a couple of reasons.

7 One, the appellants did not preserve that
8 issue either in the court below, in the Appellate
9 Division, the trial court, or on their motion for
10 leave. That was not one of the reasons they asked
11 this court for legal insufficiency to review this
12 case.

13 And pursuant to this court's decision in
14 Quain v. Buzzetta, which is briefed, he has waived -
15 - - they have limited the issues on appeal. So
16 therefore, it is our opinion that legal sufficiency
17 of a three percent jury finding is not before you.

18 Even if this court were to examine and
19 analyze this finding based upon its prior decision in
20 Cohen v. Hallmark Cards and its progeny, we look at
21 sufficiency as a rationality test versus weight which
22 is a fair interpretation test.

23 In this case - - - I was trial counsel; I
24 was there; I saw it - - - five weeks of trial. A
25 very astute jury who took its time, deliberated all

1 night - - - all day and all night with special
2 permission from an administrative judge to deliberate
3 on into the night - - -

4 JUDGE SMITH: Well, the length of
5 deliberations can't make an irrational verdict
6 rational, can it?

7 MR. MATTELIANO: No, but it is rational.
8 There's no irrationality to finding someone three
9 percent responsible on a comparative negligence
10 charge. They were charged with comparative
11 negligence. They found three percent as to my - - -
12 my client. They also - - -

13 CHIEF JUDGE LIPPMAN: Why do you think you
14 only had three percent?

15 MR. MATTELIANO: Because they did a very
16 good division based on the facts presented before
17 them: thirty percent as to the manufacturer - - -

18 CHIEF JUDGE LIPPMAN: But - - - but your
19 guy was really right there when this happened.

20 MR. MATTELIANO: He was right there, but he
21 did not know even of the existence of the shield,
22 Your Honor.

23 CHIEF JUDGE LIPPMAN: I'm not saying I'm
24 not pleased with it. I'm just asking - - -

25 MR. MATTELIANO: Oh, no.

1 CHIEF JUDGE LIPPMAN: - - - what - - - what
2 - - -

3 MR. MATTELIANO: You - - -

4 CHIEF JUDGE LIPPMAN: - - - you thought
5 went through the jury's mind?

6 MR. MATTELIANO: Well, what's in the jury
7 mind can be sort of illustrated by the fact that with
8 respect to the products liability charge - - - and we
9 know about the chain of liability - - -

10 CHIEF JUDGE LIPPMAN: Right.

11 MR. MATTELIANO: - - - through the retail -
12 - - they in fact, found the retailer, who was not
13 there, who just sold it, two percent responsible.

14 JUDGE SMITH: But if you're - - - if you're
15 psychoanalyzing the jury, it's at least a possibility
16 that they said we're not going to do this kid any
17 good by giving her a huge judgment against her
18 father.

19 MR. MATTELIANO: Stepfather, sure.

20 JUDGE SMITH: I mean, the - - - stepfather.
21 And don't you have to - - - don't you have to make a
22 rational, cold-blooded case, that this - - - what he
23 did was to operate this incredibly dangerous machine
24 without making sure the child was out of the way?
25 And that's only three percent, and the rest of it - -

1 - while thirty percent goes to a guy who maybe chose
2 to put a bolt rather than a smooth surface?

3 MR. MATTELIANO: Well, first of all, with
4 all due respect, Judge, that man, her stepfather,
5 didn't know about the safety hazard of having an
6 unprotected shaft. He was never told about a shield.
7 Secondly, he was shown - - -

8 JUDGE SMITH: Yeah, but you don't - - - it
9 doesn't take a rocket scientist to figure out that a
10 machine like this, you ought to get the kid out of
11 the way before you drill?

12 MR. MATTELIANO: Well, he testified that he
13 thought she stepped away - - - one to two feet away.

14 JUDGE GRAFFEO: Especially since she
15 apparently - - - doesn't the record say she had flip
16 flops and pajama bottoms on? I mean, she was - - -

17 MR. MATTELIANO: I don't know about pajama
18 bottoms. I know about flip flops.

19 JUDGE GRAFFEO: But she wasn't really
20 dressed to be doing this kind of agricultural work
21 next to this kind of dangerous machinery?

22 MR. MATTELIANO: But they found him
23 responsible three percent. Were they asking this
24 court here to sit here as a trier of fact, now, and
25 interpose your judgment, it should have been twenty

1 percent, thirty percent? Had they found him not
2 responsible, I think this discussion would have
3 greater impact. If there is no liability at all,
4 maybe the argument here is that's irrational.

5 And under the Cohen test, it's got to be
6 utterly irrational. That's this court's words. I
7 submit - - - and my time's up here - - - that it was
8 rational, but it wasn't preserved so we shouldn't
9 even discuss this.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. MATTELIANO: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks, counselor.
13 Rebuttal, counsel?

14 MR. JONES: Thank you, Your Honor. And
15 I'll be very brief.

16 First of all, as to the preservation issue,
17 it was preserved by the post-trial motion. We've
18 addressed that in the papers. I want to come back to
19 - - - the word foreseeable - - - foreseeability
20 finally surfaced. And Robinson made it clear that
21 the rule applies irregard - - - irrespective of
22 foreseeability. Foreseeability or not doesn't impact
23 the - - -

24 JUDGE SMITH: What - - - what about the
25 point that in Robinson he says there was no defect

1 other than the alleged problem with the shield
2 itself? Here they say you could have divined - - -
3 designed a product where the absence of the shield
4 would have been harmless.

5 MR. JONES: The absence of the shield never
6 would have been harmless.

7 JUDGE SMITH: Well, I'm not saying it would
8 have been okay to do it without a shield. But if
9 there had been - - - the jury could find that if
10 there were no protruding bolt, and if you had a
11 smooth surface, even without a shield, the accident
12 would not have happened.

13 MR. JONES: Even the plaintiff's experts
14 conceded that a rotating shaft, even with the
15 recessed bolt that they so much wanted, the rotating
16 shaft itself was a hazard that required a shield.

17 JUDGE SMITH: I have no doubt that it was a
18 hazard. But their theory is, you made it more
19 hazardous by designing it in this particular way, and
20 if you had not done that, this child would not have
21 been injured.

22 MR. JONES: Well, I know that's their - - -

23 JUDGE SMITH: And isn't that different from
24 Robinson, is really what my question is?

25 MR. JONES: Well, no, it isn't different

1 from Robinson, because inherent in the concept of
2 guarding is there's something dangerous behind there.
3 And all the great engineers in the world - - -

4 CHIEF JUDGE LIPPMAN: But doesn't it matter
5 whether, in fact, there is or there is not something
6 dangerous behind it?

7 MR. JONES: Pardon me?

8 CHIEF JUDGE LIPPMAN: Doesn't it matter, in
9 fact, whether there is or is not something dangerous
10 behind it?

11 MR. JONES: That's not the Robinson rule.

12 CHIEF JUDGE LIPPMAN: Irrelevant?

13 Irrelevant?

14 MR. JONES: That's not the Robinson rule.

15 CHIEF JUDGE LIPPMAN: Irrelevant?

16 MR. JONES: Irrelevant.

17 JUDGE PIGOTT: You're right. I mean, you
18 guard the hazard. I mean, that's the - - - you know,
19 the way - - - the way it goes. Mr. Collins was
20 talking about these washers that were applied, you
21 know, to keep this thing on, at some point. And
22 that's why, it seemed to me, in - - - in Robinson, it
23 was practically like a burglary to do what they did.
24 I mean, they had to cut a hole in this thing to make
25 it - - - it was a clear, intended act, to get around

1 this safety device.

2 And here, it reads like there's a safety
3 device. They were trying to keep it on - - - at
4 least there's a question of fact as to that - - - and
5 that it - - - they failed in that, and that then led
6 to this injury, and that's why it's distinguished
7 from Robinson. Where's the flaw in that reasoning?

8 MR. JONES: Let me address it this way.
9 Inherent in so many product liability cases from this
10 court, are concepts of balancing. Where do we put
11 the risk? Where do we put the responsibility? Well,
12 on these facts, where do you put the responsibility?
13 On - - - on Mr. Smith, who - - - who consciously - -
14 - he knew - - - he precisely knew the danger. And he
15 - - - he precisely - - - he decided not to replace
16 this shield. Is the responsibility on the
17 manufacturer, under those circumstances?

18 Let me add this. Be - - -

19 CHIEF JUDGE LIPPMAN: What if the
20 manufacturer knew that if they had designed what was
21 under that shield in a safer way, and that it was
22 feasible to do so, that there wouldn't be accidents
23 like this? Why - - - if you're talking fairness and
24 you're talking about Smith knowing that, you know, he
25 shouldn't operate it without the shield, what about

1 the manufacturer knowing that that shield, there's a
2 good chance it's going to fall off, and that not
3 everyone's going to replace it, and that I could
4 design this safer without a hell of a lot of more
5 cost, and not hurt anybody in these kind of
6 situations, why from a policy perspective, shouldn't
7 you be held responsible?

8 MR. JONES: Well, the record doesn't go - -
9 -

10 CHIEF JUDGE LIPPMAN: Even if we - - -

11 MR. JONES: - - - that far.

12 CHIEF JUDGE LIPPMAN: - - - say Smith is -
13 - - is, you know, not totally off the hook either,
14 why shouldn't you be responsible in that
15 circumstance?

16 MR. JONES: The record doesn't go that far.
17 There is no acknowledgement - - -

18 CHIEF JUDGE LIPPMAN: I'm not asking you
19 about the record. I'm asking you, in this situation,
20 where you manufacture the product; you know that
21 there's a better way to design it so that if that
22 shield comes off and someone doesn't replace it, not
23 because they intentionally cut a hole in the shield,
24 it just falls off, and you know people could be
25 spared serious injury, and you don't take that

1 alternative course, why aren't you responsible?

2 MR. JONES: Well - - -

3 CHIEF JUDGE LIPPMAN: Policy-wise, why not?

4 MR. JONES: Again, that's not this case.

5 CHIEF JUDGE LIPPMAN: Nuh-uh. Assume it
6 is.

7 MR. JONES: Well, Robinson - - - I still
8 say, Robinson doesn't go that - - - Robinson cuts it
9 off. Robinson cuts off their responsibility - - -

10 CHIEF JUDGE LIPPMAN: I understand that you
11 are relying heavily on Robinson. I'm asking you,
12 from a policy perspective, why should you not be
13 responsible on that hypothetical set of facts?

14 MR. JONES: Well, because - - - and I
15 address it in this term - - - these terms also in the
16 - - - in the brief, the action - - - there's sort of
17 a continuum, I think, between what we have in
18 Robinson and intervening superseding causation.

19 I know plaintiff objected to the fact that
20 I even raised that in my brief. But - - - and
21 there's - - - the example from the - - -

22 CHIEF JUDGE LIPPMAN: What's the - - -

23 MR. JONES: - - - Restatement - - -

24 CHIEF JUDGE LIPPMAN: - - - answer? Why is
25 it fair or not fair? That's all I'm asking you. In

1 normal words?

2 MR. JONES: Because, the act of the - - -
3 Smith, in this instance, would have completely
4 eliminated the hazard - - - or the action of Smith is
5 what created the hazard, his not replacing the
6 shield.

7 CHIEF JUDGE LIPPMAN: Even when you could
8 have designed it in a way that could would spare
9 this, and it wasn't a big deal? Assume that's the
10 case.

11 MR. JONES: Well, you know what, if I may,
12 let me just change the hypothetical - - -

13 CHIEF JUDGE LIPPMAN: Yeah, but give me a
14 simple answer. That's all I'm asking.

15 MR. JONES: No, there's no responsibility
16 under those circumstances, because - - -

17 CHIEF JUDGE LIPPMAN: You're saying it's
18 fair, as long as - - - I think what you're saying,
19 and I just want to understand it is, if Smith doesn't
20 replace that shield, it takes you totally off the
21 hook, because he's really the one responsible for the
22 accident?

23 MR. JONES: Well, and that's exactly how it
24 works in the intervening superseding causation cases.
25 The manufacturer is off the hook. Responsibility is

1 cut off.

2 CHIEF JUDGE LIPPMAN: Because it's his
3 fault?

4 MR. JONES: It's his fault.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. JONES: And I just wanted to - - -

7 CHIEF JUDGE LIPPMAN: Thank you. Finish
8 your thought, counselor. Go ahead.

9 MR. JONES: All right. I just wanted to -
10 - -

11 CHIEF JUDGE LIPPMAN: We're going to - - -

12 MR. JONES: - - - finish the thought with
13 this. Not only did he not replace the shield, but
14 after he was sued, then he did this activity where he
15 fabricated the evidence. And we haven't gotten into
16 that, and I don't mean to go down that road - - -

17 CHIEF JUDGE LIPPMAN: Let's not start now.

18 MR. JONES: - - - but - - - but then he
19 testified at his deposition, when that was all done,
20 he took that shield off, didn't replace it, and then
21 continued to operate it for at least four more years
22 without the shield. Now - - -

23 CHIEF JUDGE LIPPMAN: Okay. Okay.

24 MR. JONES: - - - but let me give you this
25 hypothetical. Suppose - - -

1 CHIEF JUDGE LIPPMAN: Counsel, one more
2 thought.

3 MR. JONES: All right. If then there was
4 another accident on those facts, on those facts,
5 where he knew there'd already been an accident, and
6 he took it off again and didn't replace it - - -

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MR. JONES: - - - on those facts, whose
9 responsibility?

10 CHIEF JUDGE LIPPMAN: Thank you counselor.

11 MR. JONES: Thank you.

12 CHIEF JUDGE LIPPMAN: Thank you all.

13 Appreciate it.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Hoover v. New Holland North America, Inc., No. 36 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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