IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091685

KEVIN JAMERSON,

Appellant,

v.

COLEMAN-ADAMS CONSTRUCTION, INC.
and VIRGINIA STEEL & BUILDING SPECIALITIES, INC.,

Appellees.

BRIEF OF APPELLEE COLEMAN-ADAMS CONSTRUCTION, INC.

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I. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

In his Third Amended Complaint, Plaintiff/Appellant Kevin Jamerson ("Plaintiff") alleges that he was injured when a platform on which he was standing (the "Platform") fell to the floor below. App. 3. The Platform and a steel slide pole installed next to the Platform (the "Pole") were fabricated by Defendant/Appellee Virginia Steel & Building Specialties, Inc. ("Virginia Steel"), App. 351, 360, and allegedly were installed in a building by Defendant/Appellee Coleman-Adams Construction, Inc. ("Coleman-Adams"). App. 3.

The construction of the building, and all work related to the design, fabrication, and installation of the Platform and Pole, were completed more than five years before the Plaintiff's accident occurred. App. 308-309. Therefore, application of Virginia's statute of repose (Virginia Code § 8.01-250) was the threshold issue for the Trial Court's consideration. Virginia Code § 8.01-250 provides in pertinent part as follows:

> No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction.

> The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property . . . .

On February 2, 2009, the Trial Court conducted an evidentiary hearing concerning application of this statute, and then heard the arguments of counsel. By Order entered May 19, 2009, which incorporated rulings made from the Bench, the Trial Court ruled that both Defendants fall within the protection afforded by the first paragraph of Virginia Code § 8.01-250. With respect to the exception contained in the second paragraph of the statute, the Trial Court ruled that Virginia Steel was both a "manufacturer" and a "supplier" of the Platform and Pole; that Coleman-Adams was not a "manufacturer", but was a "supplier", of the Platform and Pole; and that the Platform and Pole did not constitute "equipment" within the meaning of the statute. As a result, the Trial Court ruled that Plaintiff's claims against both Defendants are barred by Virginia Code § 8.01-250, granted the Pleas in Bar, and dismissed the case with prejudice.

Plaintiff filed a Notice of Appeal and, subsequently, a Petition for Appeal in which he asserted three Assignments of Error. In an Order entered January 5, 2010, this Court awarded Plaintiff an appeal on his

Assignments of Error[1] and also awarded an appeal on the Assignments of Cross Error asserted by the Appellees. In this Brief in Opposition, Coleman-Adams requests that this Court affirm the judgment of the Trial Court that the Platform and Pole do not constitute equipment within the contemplation of Virginia Code § 8.01-250, and that the action against Coleman-Adams is time-barred. Alternatively, Coleman-Adams requests a ruling in its favor on its Assignment of Cross Error.

II. ASSIGNMENT OF CROSS-ERROR

The Trial Court erred when it ruled that Coleman-Adams was a "supplier" of the Platform and Pole within the meaning of Virginia Code § 8.01-250.

III. QUESTIONS PRESENTED

Question Presented No. 1: Whether the Trial Court erred in ruling that the Platform and Pole were not "equipment, machinery or other article", and granting the Appellees' Plea in Bar. (Plaintiff's Assignment of Error I)

Question Presented No. 2: Whether the Trial Court erred in ruling that Coleman-Adams was not a "manufacturer" of the Platform and Pole, pursuant to Virginia Code § 8.01-250. (Plaintiff's Assignment of Error II)

Question Presented No. 3: Whether the Trial Court erred in excluding evidence regarding the Moneta Volunteer Fire Department's training of fire fighters with respect to the Platform and Pole. (Plaintiff's Assignment of Error III - WITHDRAWN)

Question Presented No. 4: Whether the Trial Court erred when it ruled that Coleman-Adams was a "supplier" of the Platform and Pole within

[1] As stated in his Opening Brief, the Plaintiff has withdrawn his Assignment of Error III. Opening Br., p. 32.

the meaning of Virginia Code § 8.01-250. (Coleman-Adams' Assignment of Cross-Error)

Question Presented No. 5: Whether the Trial Court erred in finding that Virginia Steel was a "manufacturer" and/or "supplier" of a steel platform and pole under Virginia Code § 8.01-250. (Virginia Steel's Assignment of Cross-Error)

IV. SUMMARY OF ARGUMENT

The Trial Court's ruling that the Platform and Pole are not "equipment, machinery or other articles" was based on factual findings, supported by the evidence, to which this Court's precedent and the plain meaning rule were properly applied. The Trial Court also correctly found that Coleman-Adams, a general contractor, was not a "manufacturer" of the Platform and Pole. The Trial Court's decision to grant Coleman-Adams' Plea in Bar and dismiss the case with prejudice should be affirmed.

V. STATEMENT OF FACTS

As a threshold matter, Coleman-Adams notes that Plaintiff's opening brief does not recite the facts in the light most favorable to the prevailing parties. Rather, Plaintiff's recitation of facts is filled with conclusory characterizations favorable to Plaintiff's positions. That being said, the facts in the record are as follows.

The Platform and Pole were designed, fabricated and installed more than seven and a half years before the filing of Plaintiff's initial Complaint,

as part of the construction of a fire station in Moneta, Virginia (the "Fire Station"). App. 308-309. Coleman-Adams designed and constructed the Fire Station pursuant to a written contract with the Fire Station's owner, Moneta Volunteer Fire Department, Inc. ("MVFD"), in which Coleman-Adams was defined as the "contractor". App. 259, 494-509. Coleman-Adams is and was a Class A contractor licensed by the State of Virginia. App. 256.

The Fire Station consists of a steel frame building with a garage area on one side where the fire trucks are located, and an adjoining two-story space on the other side. App. 280-81. In the original contract drawings, a set of stairs provided the only means of accessing the garage area from the second floor. *Id.* The building design set forth in the original contract between Coleman-Adams and MVFD did not include the Platform and Pole. App. 261-62.

Near the end of the project, MVFD requested that Coleman-Adams provide an additional means of accessing the garage area from the second floor. App. 279. After one or more discussions between MVFD and Coleman-Adams, it was decided that a door would be installed that would open from the second floor to the garage area. App. 280-82, 314-15. On the garage side of the door, a platform would be installed with an

accompanying slide pole. App. 280-82. Accordingly, Coleman-Adams contacted Virginia Steel and solicited a bid for the fabrication of a platform and accompanying pole. App. 283-285. Pursuant to a contract with Coleman-Adams, Virginia Steel had provided steel for the construction of the Fire Station. App. 334-36. In response to Coleman-Adams' request for a bid for a platform and pole, Virginia Steel provided a bid in the amount of $820.00 for the following:

> 1. ONE 3'-O x 3'0 GRATING PLATFORM WITH RAILS.
> 2. ONE 3" DIAMETER PIPE WITH BASE PLATE AND BRACE ANGLES.
> 3. ALL STEEL PRIME PAINTED.

App. 343-44, 513. Contrary to the Plaintiff's characterization in his Opening Brief, the bid makes no mention of "custom manufacture", and does not mention a "slide pole". App. 513. In any event, Coleman-Adams then factored the amount of Virginia Steel's bid into the total cost to install the platform and pole, and communicated this additional cost to MVFD in a memo dated October 19, 1998. App. 343, 515. In the memo, the Platform and Pole were described in general terms only:

> THE PLATFORM AND POLE INCLUDES A 3'0"-90 MINUTE RATED DOOR, A 3'-0" PLATFORM WITH RAILING, A 3" DIAMETER POLE EXTENDING FROM THE FLOOR TO THE STRUCTURAL STEEL ABOVE.

App. 515.

MVFD approved the Platform and Pole as described, which approval was later memorialized in a written change order (Change Order No. 3) to the contract between MVFD and Coleman-Adams. App. 293, 518-19. A change order is a standard way to incorporate additional work into a contract during the course of a construction project. App. 286. There was nothing unusual about Change Order No. 3, or the manner in which it was handled. App. 286. Requests for additional work had been handled in the same manner on this project, and in the same manner on other projects in which Coleman-Adams' project manager had been involved during the past twenty years. App. 286.

With MVFD's approval in hand, and at the request of Coleman-Adams, Virginia Steel prepared a shop drawing that detailed the fabrication of the Platform and Pole. App. 296, 344. Virginia Steel then submitted this shop drawing to Coleman-Adams for comment. App. 349. Upon receipt of a shop drawing, generally Coleman-Adams reviews the drawing to make certain the dimensions and sizes are what is necessary, and to make certain the material will work with the existing construction. App. 297. According to Virginia Steel, Coleman-Adams offered only one comment which is set forth on the shop drawing as follows:

TRIM 4 TO TOP
OF GRATING THIS
SIDE ONLY

App. 350, 522.

Neither Virginia Steel nor Coleman-Adams demonstrated control over the fabrication process consistent with the manufacture of a piece of "equipment". Based on the testimony of Tina Fleshman (Vice President of Virginia Steel), Virginia Steel had no independent knowledge of the sizes, dimensions, materials, and overall design necessary to construct the Platform and Pole. App 347-49. Rather, that information was provided by others. App. 349, 369. With this information in hand, Virginia Steel prepared a shop drawing from which the Platform and Pole could be fabricated. App. 341,344.

Once Coleman-Adams had an opportunity to review and comment on the shop drawing, Virginia Steel ordered the materials necessary to fabricate the Platform and Pole – steel grating, steel rails, pipe, base plate, and brace angles. App. 351, 513. Its welders and fitters then cut, formed and welded the steel at Virginia Steel's shop (not factory) to fabricate the Platform and Pole. App. 351. Contrary to Plaintiff's assertion in his Opening Brief, the Platform was not subject to a "quality control process" at

any point during the fabrication process. *See* Opening Br., p. 7. Prior to fabrication, Virginia Steel did look at the materials that had been ordered, and confirmed that they were the same as indicated in the shop drawing. App. 388. But Virginia Steel did not inspect the steel for defects, cracks or rust. App. 387. Likewise, after fabrication was completed, Virginia Steel confirmed that the welds were secure. App. 387. But Virginia Steel did not conduct a close, visual inspection of the Platform and Pole. App. 388. Virginia Steel did not inspect the Platform for the purpose of confirming that it "matched" the shop drawing. App. 388. Virginia Steel did not inspect for cracks and other defects. App. 387-88. And Virginia Steel did not pronounce that the Platform and Pole had "passed inspection." *See* Opening Br., p. 8.

After fabrication was completed, Virginia Steel delivered the Platform and Pole to the Fire Station. App. 354, 360-61. Contrary to the Plaintiff's suggestion in his Opening Brief, however, the delivery of the Platform and Pole was not accompanied by any warranties, and certainly not any warranties conditioned on installation and/or use in compliance with any instructions from Virginia Steel. App. 390, 392-93. Charles Evans (Vice President, Coleman-Adams) acknowledged that the shop drawing was meant to accompany the Platform and Pole when delivered and that it has

a "few things on here that relate to installation". App. 317, 356. Tina Fleshman, however, testified that Virginia Steel did not create or provide the shop drawing for the purpose of detailing the manner of installation, underscored by the fact that one or more aspects of the installation were dependent upon existing field conditions (i.e., "through bolt, if possible"). App. 356, 381. Virginia Steel was not in a position to provide any warranties related to installation, and did not do so. App. 390, 392-93. Likewise, the record contains no evidence suggesting that Virginia Steel was even aware of the intended use of the platform. Therefore, Virginia Steel could not have conditioned any warranty on the *use* of the Platform and Pole in accordance with the shop drawing or other instructions.

After the Platform and Pole were delivered to the jobsite, they were installed in and became part of the Fire Station, along with the door. Virginia Steel did not install the Platform and Pole, nor did Virginia Steel oversee their installation. Virginia Steel submitted an invoice to Coleman-Adams dated January 13, 1999, which Coleman-Adams paid in late January, 1999. App. 526. Coleman-Adams passed on this cost to MVFD in accordance with their contract through Applications for Payment Nos. 8 and 9. App. 523-25, 527-29.

On March 1, 1999, Bedford County issued the certificate of occupancy for the Fire Station. App. 530. The Plaintiff's accident occurred more than five years later on November 4, 2006. Plaintiff filed his initial Complaint on December 29, 2006.

VI. STANDARD OF REVIEW

As in prior decisions analyzing the application of Virginia Code § 8.01-250, well established principles guide the resolution of this case. "[A] plea in bar is a defensive pleading that reduces the litigation to a single issue, which, if proven, creates a bar to the plaintiff's right of recovery."[2] "The party asserting a plea in bar carries the burden of proof."[3] "When the trial court hears the evidence *ore tenus,* its findings are entitled to the weight accorded a jury verdict, and these findings should not be disturbed by an appellate court unless they are plainly wrong or without evidence to support them." [4]

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[2] *Cooper Industries, Inc. v. Melendez*, 260 Va. 578, 595, 537 S.E.2d 580, 590 (2000) (quoting *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 562, 422 S.E.2d 757, 758 (1992); *Tomlin v.* McKenzie, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996).

[3] *Id.*

[4] *Id.* at 595, 537 S.E.2d at 590 (quoting *Bottoms v. Bottoms*, 249 Va. 410, 414, 457 S.E.2d 102, 104-05 (1995)).

VII. ARGUMENT

Plaintiff has not assigned error to the Trial Court's ruling that Coleman-Adams and Virginia Steel are within the protection afforded by the first paragraph of Virginia Code § 8.01-250. *See* App. 474-75. Rather, at issue is the applicability of the exception found in the second paragraph of the statute, which provides in pertinent part:

> The limitation provided in [the first paragraph of] this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property . . . .

Plaintiff assigns error to the Trial Court's ruling that the Platform and Pole were not "equipment, machinery or other articles." Plaintiff never argued to the Trial Court that the Platform and Pole were "machinery", and it makes no such argument in its Opening Brief. The focus of Plaintiff's position has always been that the Platform and Pole were not "ordinary building materials" but were, instead, "equipment." *See*, *e.g.*, App. 90 (Plaintiff's Reply Brief, filed January 28, 2009); Petition for Appeal, p.12. Regarding "other articles", Plaintiff's counsel did suggest to the Trial Court that "you may not be completely comfortable calling it a piece of equipment, but it is clearly an 'other' article. App. 468. However, Plaintiff's counsel acknowledged the holding in *Cape Henry Towers, Inc. v. National Gypsum*, 229 Va. 596, 331 S.E.2d 476 (1985), that "the general words ['or

other articles'] add no new or further categories to those excluded from the operation of the statute by the specific words of the second paragraph . . . ."[5] App. 468. In his Opening Brief, Plaintiff suggests this holding in *Cape Henry* was wrong. Opening Br., pp. 28, 29. Nevertheless, the primary issue in this appeal is whether the Trial Court erred in ruling that the Platform and Pole were not "equipment" within the meaning of § 8.01-250.

A. The Trial Court Correctly Ruled that the Platform and Pole were not "equipment" within the meaning of Virginia Code § 8.01-250.

1. Plaintiff's Opening Brief does not address the basis for the Trial Court's ruling that the Platform and Pole were not "equipment".

Plaintiff contends that the Trial Court erred in ruling that the Platform and Pole are not "equipment". Yet Plaintiff's Opening Brief fails to mention, much less rebut, the findings and analysis articulated by the Trial Court as the basis for his ruling.

In discussing this Court's precedent, the Trial Court stated as follows:

> So there again, the Supreme Court is talking about the function. And it seems to me the distinction in that respect between *Grice* and *Cooper* is the circuit breaker in *Grice* provided electrical service to the structure itself in which it was installed.
>
> Now the circuit breaker on the pier [in *Cooper*] didn't provide the electrical service to the pier. It was not part of the pier; it was not part of the structure, but rather it was intended to

[5] 229 Va. at 603, 331 S.E.2d at 481; *accord Grice v. Hungerford Mechanical*, 236 Va. 305, 309, 374 S.E.2d 17, 19 (1988).

provide electrical service to submarines when they were docked there at the pier. It didn't perform a function related to the pier itself.

Well, I find that important in this particular case as far as what is the function. I also think that in interpreting and understanding a statute, that one can apply -- unless, there's some reason to do otherwise, such as a statutory definition -- apply the common ordinary meaning of words.

And when I look at the word "equipment" or "machinery," I think, in deciding whether something is equipment or machinery, you also go to the intrinsic characteristics of the article or the material and see what they are.

* * * *

And what does equipment or machinery do? Maybe not always, but doesn't it do something other than just serve as a part of the entire structure itself or as integrative part? It does something. Very often, maybe not always, very often it has moving parts, it does something. It provides electricity, it does something.

This is a pole, a platform. And as I go through this, I don't see that this platform, this pole is anything that should be defined in the context of this case law or this statute as equipment or machinery. What did it do? What is its function? How does it perform that function?

And as far as being assembled, but perhaps there's not a whole lot assembly to it once it leaves Virginia Steel, but until it is installed on real property and becomes a part of its structure, what is its function and how does it perform that function? It doesn't do anything. It can't do anything. It just -- if you had that platform out in the driveway, what's it going to do? Nothing.

The electrical service in the switch gear down on the pier [in *Cooper*], when they delivered that, all they had to do was put it in a cradle and hook it up.

Of course, there's some installation required in anything, but this pole or this platform -- the platform serves as something to stand on.

> And what does the pole then do? The pole enables a person to get from the upper level to the lower level faster than if he or she takes the stairs. That's its function, and it does nothing else. And once it is installed it becomes part of the structure, I feel, just the same as stairs, and has the same function as a set of stairs.
>
> And just to me, as I review my notes here, when I look at the function, how -- what is its function and how it performs that function, and what are the intrinsic characteristics and the other things that are discussed in these case law, I find that this pole, this platform, is more like the drain cover in *Baker* or like the electrical panel box in *Grice*, or like the exterior walls in *Cape Henry*, or like the swimming pool walls in *Luebbers*. And I don't find it like the switch gear in *Cooper Industries* at all . . . .

App. 214-217.

Plaintiff does not assign error to the Trial Court's factual findings regarding the function of the Platform and Pole, and he does not dispute them. If anything, he agrees with them. *See, e.g.,* Opening Br., pp. 5[6], 24.

Plaintiff argues that the Trial Court "ignored" the ordinary building materials doctrine and, instead, "incorrectly made up its own test to determine whether the Platform and Pole were equipment." Opening Br., p. 14. Again, Plaintiff fails to acknowledge what the Trial Court said about the ordinary building materials doctrine ("I am required to apply that

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[6] "During the building process, the firemen became concerned because the second floor of the building only contained one exit, a set of stairs in the back of the second floor that exited away from the garage area where the trucks and lockers were. App. 279-280. The firemen wanted a quicker means of aggress to reach the fire trucks and to shorten their response times. App. 280-281, 329." Opening Br., p. 5.

standard in this case because the Supreme Court has said so." App. 209), and fails to mention the Trial Court's application of the ordinary building materials doctrine to the facts of this case. *See* App. 207-217.

In his Opening Brief, Plaintiff argues the Trial Court "made up" the "'do something' test" – i.e., material cannot constitute equipment unless it does something. Opening Br., p. 14. Plaintiff's argument ignores decisions of this Court regarding the significance of function, and fails to acknowledge the Trial Court's express reliance on those decisions. For example, the ruling in the *Cooper* decision was based upon the function of the switch gear and circuit breakers there at issue:

> [W]e are not persuaded by Cooper's arguments because they are premised on a mischaracterization of the switch gear and circuit breakers as "essential to the existence of the piers." The switch gear and circuit breakers were not part of the electrical system of Pier 23, instead they composed the electrical system for submarines docked at the pier so that the submarines could receive electrical power from the shore rather than having to operate their engines and generators.[7]

Similarly, this Court in the case of *Luebbers v. Fort Wayne Plastics, Inc.,* noted that the steel panels, braces and liners at issue in that case "served no function other than as generic materials to be included in the larger whole . . . ."[8]

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[7] 260 Va. at 595, 537 S.E.2d at 590.
[8] 255 Va. 368, 373, 498 S.E.2d 911, 913 (1998).

The Trial Court found, and Plaintiff cannot persuasively dispute, that the Platform and Pole served the same purpose as a set of stairs. When installed, they became a part of the building. They were not "equipment."

2. Plaintiff's contention that the Platform and Pole constitute equipment is not consistent with the plain meaning rule or the definition of equipment in other sections of the Virginia Code.

On at least five prior occasions, this Court has examined whether certain materials constitute "equipment" within the meaning of Virginia Code § 8.01-250. This Court has concluded that Virginia Code § 8.01-250 "perpetuate[s] a distinction between ... those who furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers or suppliers, at the direction of architects, designers, and contractors, and ... those who furnish machinery or equipment."[9] In none of these decisions has this Court ruled out consideration of the plain meaning of the term "equipment":

> The dispositive question with regard to this issue is whether the switchgear and its component parts, including the circuit breakers, are ordinary building materials ***or*** "equipment" within the meaning of Code § 8.01-250 . . . .[10]

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[9] *Cape Henry Towers, Inc. v. National Gypsum*, 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985).

[10] *Cooper Industries, Inc. v. Melendez*, 260 Va. 578, 588, 537 S.E2d 580, 592 (2000) (emphasis added). In a later footnote, the Court underscores the distinction between ordinary building materials and equipment. 260 Va. at 591 n.10, 537 S.E.2d at 596 n.10.

The primary issue in this case, as properly framed by the Trial Court, is whether the Platform is "equipment" ***or*** whether it is "ordinary building materials" within the meaning of Virginia Code § 8.01-250. *See* App. 208.

In analyzing what constitutes "equipment" within the meaning of Virginia Code § 8.01-250, a trial court should be guided by accepted principles of statutory construction, such as the plain meaning rule:

> We also observe that when we interpret unambiguous statutes . . . we apply the plain meaning rule.
>
> While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.[11]

As "Equipment" is a word of plain and definite import, the Trial Court was justified in considering the plain meaning of the term. App. 215.

It is also permissible to look for additional guidance in other sections of the Virginia Code. In *First National Bank of Richmond v. Holland*, the Supreme Court looked to other code sections to determine whether "goods or chattels" in a particular code section applied to "choses in action."[12]

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[11] *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 457, 464 S.E.2d. 148, 152 (1995) (citation omitted).
[12] *First Nat. Bank of Richmond v. Holland*, 99 Va. 495, 39 S.E. 126 (1901).

"The Code is one act, prepared and adopted as such, and therefore, in construing section 2414, we are not confined to the language of that section, but can look to other sections of the Code, where the same terms are employed."[13] Likewise, in a criminal case, the Court of Appeals of Virginia has held that, "[o]rdinarily, when a particular word in a statute is not defined therein, a court must give it its ordinary meaning. . . . In interpreting a statute, '[t]he Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed.'"[14]

Similarly, the term "equipment" is used throughout the Virginia Uniform Statewide Building Code ("VUSBC"). Like the Statute of Repose, the VUSBC deals with construction of buildings and other structures. Section 120.6 of the VUSBC (1996 ed.) provides as follows:

> 120.6 Unsafe equipment: Equipment deemed unsafe by the code official shall not be operated after the date stated in the notice unless the required repairs or changes have been made and the equipment has been approved, or unless an extension of time has been secured from the code official in writing.

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[13] *Id.* at 129.

[14] *Moyer v. Commonwealth*, 33 Va. App. 8, 35, 531 S.E. 2d 580 (2000) (quoting *Hart v. Commonwealth*, 18 Va. App. 77, 79, 441 S.E.2d 706 (1994)).

In this case, the Platform and Pole were not "operated," could not be "operated", and never will be "operated". As found by the Trial Court, the Platform and Pole "[do not] do anything. [They] can't do anything." App. 487.

Also, Section 202.0 (General Definitions) of the VUSBC (1996 ed.) defines "equipment" as follows:

> Equipment: Plumbing, heating, electrical, ventilating, air-conditioning and refrigeration equipment, elevators, dumbwaiters, escalators *and other mechanical additions or installations*. (Emphasis Added.)

The Platform and Pole are not a "mechanical addition or installation." In fact, there is no "mechanical" component associated with the Platform or Pole.

In that same section of the VUSBC, "structure" is separately defined as follows:

> "Structure" means an assembly of materials forming a construction for occupancy or use including stadiums, gospel and circus tents, reviewing stands, *platforms*, stagings, observation towers, radio towers, water tanks, storage tanks (underground and aboveground), trestles, piers, wharves, swimming pools, amusement devices, storage bins, and other structures of this general nature but excluding water wells.... (Emphasis Added.)

That "equipment" and "structures" are different is underscored in Section 121.0 of the VUSBC (1996 ed.):

101.2. Scope: This code prescribes building regulations to be complied with in the construction and maintenance of *structures and the equipment therein*.... (Emphasis added.)

3. Plaintiff's contention that the Platform and Pole are "equipment" is not consistent with prior decisions of the Supreme Court of Virginia dealing with "equipment" or "ordinary building materials".

The fundamental rationale underlying application of Virginia's statute of repose was set forth in the *Cape Henry* case more than two decades ago:

> We conclude that the General Assembly intended to perpetuate a distinction between, on one hand, those who furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers or suppliers, at the direction of architects, designers, and contractors, and, on the other hand, those who furnish machinery or equipment. Unlike ordinary building materials, machinery and equipment are subject to close quality control at the factory and may be made subject to independent manufacturer's warranties, voidable if the equipment is not installed and used in strict compliance with the manufacturer's instructions. Materialmen in the latter category have means of protecting themselves which are not available to the former.[15]

The "distinction" between "equipment" and "ordinary building materials" drawn by this Court stemmed from the Virginia General Assembly's apparent reaction to one, if not two, federal district court

[15] *Cape Henry Towers. Inc. v. National Gypsum Company*, 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985).

decisions (*Wiggins* and *Smith*) interpreting the application of Virginia's statute of repose. In both cases, the pertinent language of the statute of repose was as follows:

> No action ... arising out of the defective and unsafe condition of an improvement to real property... shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such ***improvement to real property*** more than five years after the performance or furnishing of such services and construction.[16]

Code § 8.01-250. In both cases, the plaintiff claimed that he had suffered personal injuries while operating a large piece of machinery used in the manufacturing process – machinery that had been installed more than five years prior to the plaintiff's injuries. And in both cases, the machinery weighed many thousands of pounds, and was affixed to the concrete floor of the factories by heavy bolts. In construing the language of the then-applicable statute of repose, both federal courts concluded that the machinery at issue constituted "an improvement to real property", and that the party that had constructed the machinery was entitled to the protection of the five-year limitation.

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[16] *Wiggins v. Proctor and Schwartz*, 330 F.Supp. 350, 353 (E.D. Va., 1971); *Smith v. Allen-Bradley Company*, 371 F.Supp. 698, 699 (W.D. Va., 1974).

As this Court concluded in *Cape Henry*, in 1973 the General Assembly reacted to the *Wiggins* decision by adding the following second paragraph to the statute of repose:

> This limitation shall not apply to the manufacturer or supplier of any equipment or machinery or any other articles which are installed in or become a part of any real property either as an improvement or otherwise....

Moreover, in 1977 as part of the recodification of former Title 8 as new Title 8.01, the General Assembly revised this language as follows:

> The limitation prescribed in this Section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property ....

As noted in the *Cape Henry* decision, the General Assembly presumably was aware of the significance of the *Smith* case that preceded the recodification, and nevertheless declined the opportunity to remove the protection of the statute of repose from all parties who manufacture or supply building materials.

Based on this legislative history, this Court reached two conclusions. First, this Court concluded that the General Assembly appreciated the significance of the *Wiggins* decision, and "recognized the need for a change in that the statute's original form included manufacturers of

machinery later affixed to realty, a result considered undesirable."[17] Second, this Court concluded that the "amending language was selected which would accomplish the *precise end sought*."[18] The precise end sought by the General Assembly was to remove manufacturers or suppliers of equipment or machinery from the protection of the statute of repose.[19] Therefore, in determining whether a particular manufacturer is deserving of the protection, the question is whether the material is the same as or substantially the same as the machinery and equipment at issue in the federal court decisions that prompted the General Assembly to modify the statute.

In *Cape Henry Towers,* in which exterior wall panels were alleged to be defective, this Court did not conclude any differently. Rather, this Court

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[17] *Cape Henry Towers. Inc. v. National Gypsum Company*, 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985).

[18] *Id.* (Emphasis Added.)

[19] In *Cape Henry Towers*, this Court relied heavily on a legislative committee report commenting upon the federal court's construction of Virginia's statute of repose in the *Wiggins* case. The relevant portion of the legislative committee report reads as follows:

> It is the opinion of this committee that Virginia Code section 8-24-2 was never intended to cover or apply to manufacturers or supplies of any equipment, machinery or articles whether or not they become an improvement to real property.

attempted to characterize some of the attributes of machinery and equipment that differentiate them from other building materials:

> Unlike ordinary building materials, machinery and equipment are subject to close quality control at the factory and may be made subject to independent manufacturer's warranties, voidable if the equipment is not installed and used in strict compliance with the manufacturer's instructions. Materialmen in the latter category have means of protecting themselves which are not available to the former. We construe § 8.01-250 to cover the former category and to exclude the latter.[20]

In applying this rationale to the exterior wall panels at issue, this Court determined that the exterior wall panels are not equipment or machinery within the meaning of Virginia Code § 8.01-250.

In the next case to take up the issue, this Court in *Grice v. Hungerford*, 236 Va. 305, 374 S.E.2d 17 (1988), was careful to note from the outset that the issue on appeal had been "framed by the parties":[21]

> ... [T]he principal question presented in this appeal is whether, as the trial court ruled, an electrical panel box and its component parts are ordinary building materials rather than "equipment" within the meaning of Code § 8.01-250, a statute of repose.[22]

With the issue framed by the parties, and guided solely by the criteria previously set forth in *Cape Henry Towers*, this Court concluded that the

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[20] 229 Va. at 602, 331 S.E.2d at 480.
[21] *Grice v. Hungerford Mechanical Corp.*, 236 Va. 305, 305, 374 S.E.2d 17, 17 (1988) (emphasis added).
[22] *Id.*

electrical panel box and its component parts were ordinary building materials and not equipment or machinery. In doing so, this Court attempted to characterize some of the attributes of ordinary building materials that differentiate them from equipment and machinery.

Ten years later, in *Luebbers v. Fort Wayne Plastics, Inc.*, 255 Va. 368, 498 S.E.2d 911 (1998), this Court again focused on the meaning of "ordinary building materials" relative to the language of the statute:

> The issue we consider in this appeal is whether certain items used in the construction of a swimming pool are ordinary building materials rather than "equipment" within the meaning of Code § 8.01-250, a statute of repose.[23]

In *Luebbers*, Dennis Luebbers died as a result of an accident that occurred while swimming in an in-ground swimming pool. The pool had been constructed by Crystal Pools in part with components manufactured by Fort Wayne. In response to a suit filed by Luebbers' estate against Crystal Pools and Fort Wayne, both defendants filed pleas in bar based on the five-year limitation in Virginia Code § 8.01-250. The plaintiff argued that the structural component materials used to construct the finished swimming pool were not ordinary building materials, but rather equipment within the meaning of the statute of repose. This Court disagreed. In doing so, the

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[23] *Luebbers v. Fort Wayne Plastics, Inc. 255 Va. 368, 370, 498 S.E.2d 911, 911 (1998).*

Court focused on whether the structural components were "ordinary building materials":

> In the present case, the steel panels, braces, and vinyl liners manufactured by Fort Wayne are interchangeable in the swimming pool construction industry with component materials made by other manufacturers. Such materials are purchased by distributors in bulk to be used in the construction of swimming pools according to the dimensions and shapes desired by particular customers. Fort Wayne exercises no oversight over the construction of the pools. Fort Wayne merely warrants that its steel panels will be free from defects of workmanship and that its vinyl liners will be free from defective welding. Fort Wayne sells the specification guides and installation manuals as general guides for the construction of generic vinyl pools. Moreover, these manuals did not address the construction of a pool with the particular dimensions and shape of the one involved in the present case.
>
> Here, as in *Cape Henry Towers*, the materials manufactured by Fort Wayne and incorporated into the finished swimming pool by Crystal Pools were clearly fungible components of that pool. Individually, these items served no function other than as generic materials to be included in the larger whole and are indistinguishable, in this context, from the wall panels we addressed in Cape Henry Towers.[24]

Therefore, in *Luebbers*, additional guidance is provided in the context of what constitutes "ordinary building materials", but not in the context of what constitutes "equipment".

Next in the series of cases to examine the application of Virginia Code § 8.01-250 is *Cooper Industries, Inc. v. Melendez*, 260 Va. 578, 537

[24] 255 Va. at 373, 498 S.E.2d at 913.

S.E.2d 580 (2000). In *Cooper Industries*, the plaintiff was injured while installing a circuit breaker in an energized switchgear that had been manufactured by Cooper. In response to the plaintiff's suit, Cooper maintained that the plaintiff's action was time barred by Virginia's statute of repose. After conducting an evidentiary hearing, the trial court concluded that the switchgear and circuit breaker were equipment within the meaning of Virginia Code § 8.01-250. On appeal, this Court agreed:

> The dispositive question with regard to this issue is whether the switchgear and its component parts, including the circuit breakers, are ordinary building materials or "equipment" within the meaning of Code § 8.01-250, a statute of repose.[25]

In framing the issue in this fashion, this Court focused not only on why the switchgear and component parts were more like equipment, but also why they were less like ordinary building matters. And in finding that the materials were more like equipment, the Court emphasized that they were not an essential component incorporated into the property, had been delivered fully assembled by the manufacturer, and were fully tested before delivery. In finding that the materials were less like "ordinary building materials", this Court determined that that the switchgear and component parts were not "fungible or generic materials", even though the Navy's

[25] 260 Va. at 588, 537 S.E.2d at 592.

specifications would have permitted the use of circuit breakers from different manufacturers.

The last of the cases to address the application of Virginia's statute of repose is *Baker v. Poolservice Company*, 272 Va. 677, 636 S.E.2d 360 (2006). *Baker* involved the death of a young child held underwater by the suction of the drain cover to an outdoor spa. The spa had been manufactured by Hayward Pool Products, Inc. (Hayward). In response to the lawsuit filed by the child's personal representative, Hayward filed a plea in bar maintaining that the plaintiff's action was time-barred because the drain cover had been installed more than five years prior to the accident. The trial court granted the plea. On appeal, this Court affirmed the trial court's decision based on the following rationale.

> The evidence before the trial court clearly supported the finding that the drain cover at issue is indistinguishable from the materials found to be ordinary building materials in our prior cases. ... Hayward mass-produced the drain cover for installation into swimming pools and spas. It sold the drain cover primarily, if not exclusively, to distributors. Hayward had no role designing the swimming pools and spas into which the drain covers were installed, nor did it participate in the installation of the drain cover. The drain cover was as much incorporated into the spa as an improvement to real estate as were the wall covers in *Cape Henry Towers* and the pool liner in *Luebbers*. Indeed, the drain cover in the case at bar is indistinguishable from the fungible component parts of the swimming pool found to be ordinary building

materials in Luebbers.[26]

In analyzing the particular materials at issue in *Baker*, this Court focused on the attributes of the material in the context of "ordinary building materials".

In its decision in *Cape Henry Towers* more than twenty years ago, this Court first used the phrase "ordinary building materials" as shorthand for materials that are *not* equipment. Since that time, the Court has sometimes focused on the attributes of what is equipment, and on other occasions has focused on what is *not* equipment (i.e. ordinary building materials). This focus has fluctuated depending on the "issue as framed by the parties", and the nature of the materials involved in the cases. Throughout, the goal has been to achieve "the precise end" sought by the Virginia General Assembly when it amended Virginia's statute of repose in 1973 – to remove manufacturers or suppliers of any equipment or machinery from the protection of the statute of repose.

In seeking to achieve that end in this case, this Court should conclude, as did the Trial Court, that the Platform and Pole are not "equipment" like the jute picker machine and die cutting press at issue in *Wiggins* and *Smith*, but rather are "ordinary building materials" as that phrase was first used by this Court in *Cape Henry Towers*. The Platform

[26] 272 Va. at 690, 636 S.E.2d at 368.

and Pole were incorporated into the fire station outside the control of Virginia Steel, at the direction of Coleman-Adams serving as both the general contractor and design professional. Virginia Steel was not involved in the installation, and provided no oversight. The Platform and Pole were not subject to close quality control at Virginia Steel's shop. Virginia Steel did not inspect the Platform for the purpose of confirming that it "matched" the shop drawing, did not inspect for cracks and other defects, and did not pronounce that the Platform and Pole had "passed inspection." Virginia Steel did not provide any warranties to Coleman-Adams related to the Platform or Pole, and certainly no warranties that were voidable if the materials were not installed and used in strict compliance with Virginia Steel's instructions. Indeed, Virginia Steel provided little if any instruction with regard to installation of the Platform or Pole, and no instruction with regard to their use.

Perhaps most important for purposes of this case, the Trial Court followed the guidance of this Court in considering the function of the materials at issue relative to the structure in which they were installed. On this point the trial court made the following observations:

> This is a pole, a platform. And as I go through this, I don't see that this platform, this pole is anything that should be defined in the context of this case law or this statute as

> equipment or machinery. What did it do? What is its function? How does it perform that function?
> ...
>
> And what does the pole do? The pole enables a person to get from the upper level to the lower level faster than if he or she takes the stairs. That's its function, and it does nothing else. And once it is installed it became part of the structure, I feel, just the same as stairs, and has the same function of stairs.

App. 216, 217. Both practically and functionally, the Platform and Pole are the same as a set of stairs that were incorporated permanently into the structure as part of the original construction. Nothing more.

The Platform and Pole are not equipment within the meaning of Virginia Code § 8.01-250.

B. Coleman-Adams was not a "manufacturer" of the Platform and Pole within the meaning of Virginia Code § 8.01-250.

Under Virginia law, a manufacturer is one who transforms new material into an article or a product of substantially different character.[27]

> Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary . . . . There must be transformation; a new and different article must emerge, "having a distinctive name, character or use."[28]

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[27] *See Solite Corp. v. King George Co.*, 220 Va. 661, 663, 261 S.E.2d 535, 536 (1980); *County of Chesterfield v. BBC Brown Boveri, Inc.*, 238 Va. 64, 69, 380 S.E.2d 890, 893 (1989).

[28] *Anheuser-Busch Brewing Association v. United States*, 2007 U.S. 556, 562, 28 S.Ct. 204, 206, 52 L.Ed. 336 (1908). This definition of

Coleman-Adams did not change or transform any material into the Platform or Pole; in fact it played no role in the manufacture of the Platform or Pole. Rather, Virginia Steel used its facilities, equipment and expertise to transform stock materials into new and different articles having a very distinctive character and use. And it was these new and different articles that were then permanently incorporated into the structure of the Fire Station.

Contrary to Plaintiff's assertions, Coleman-Adams' involvement in the decision making process that led to the manufacture of the Platform and Pole does not transform Coleman-Adams into a "manufacturer". To the extent Coleman-Adams provided any specifications, made any changes to Virginia Steel's shop drawing, or gave any final approval related to the Platform and Pole, it did so in its role as a designer and general contractor, and ***not*** as a manufacturer. As the Supreme Court has stated on a number of occasions, designers and installers, even of equipment and machinery, are entitled to the protection of the statute of repose.

> The last sentence of § 8.01-250 exempts from the operation of the statute of repose only the "manufacturer" and "supplier" of machinery or equipment. The designer and the installer of such

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manufacturing was quoted with approval by the Virginia Supreme Court in *Prentice v. City of Richmond*, 197 Va. 724, 90 S.E.2d 839 (1956), and in *Richmond v. Dairy Co.*, 156 Va. 6,3, 157 S.E.2d 728 (1931).

> machinery or equipment are entitled to the protection of the first sentence of the statute. The trial court correctly perceived this distinction by ruling that regardless of how the Heatilator systems were to be categorized, those allegations of the motion for judgment charging the defendants with negligent design are barred by Code § 8.01-250. We add that Nielson, the installer, is entitled to the protection of the statute of repose for the same reason.[29]

C. The Trial Court did not Abuse its Discretion in the Admission of Plaintiff's Evidence regarding the Fire Department's Training of Firefighters

As noted earlier in this brief at footnote 1, Pl has withdrawn all assertions regarding his Assignment of Error III.

D. The Trial Court Erred when it Ruled that Coleman-Adams was a "supplier" of the Platform and Pole within the meaning of the Virginia Code § 8.01-250.

Whether deemed a designer, contractor, or installer in the eyes of Virginia law, Coleman-Adams was not a "supplier" of the Platform and Pole within the meaning of Virginia Code § 8.01-250. In the construction context, and specifically in interpreting Virginia's statute of repose, this Court has recognized the distinction between a general contractor such as Coleman-Adams and a general contractor's suppliers:

> We conclude that the General Assembly intended to perpetuate a distinction between ... those who furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers or *suppliers*, at the direction

[29] *Eagles Court Condominium Unit Owners Ass'n v. Heatilator, Inc.*, 239 Va. 325, 329, 389 S.E.2d 304, 306 (1980).

> of architects, *designers, and contractors,* and ... those who furnish machinery or equipment. Unlike ordinary building materials, machinery and equipment are subject to close quality control at the factory and may be made subject to independent manufacturer's warranties, voidable if the equipment is not installed and used in strict compliance with the manufacturer's instructions. *Materialmen* in the latter category have means of protecting themselves which are not available to the former. We construe § 8.01-250 to cover the former category and to exclude the latter.[30]

The distinction between a contractor and a supplier is underscored by this Court's recognition that a "supplier" and "materialman" are the same.[31] Likewise, in several sections throughout the Virginia Code, the General Assembly recognizes a distinction between a materialman or supplier on the one hand, and a contractor on the other.[32]

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[30] *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985) (emphasis added).

[31] *See Bd. for Contractors v. Sedwick Building Supply*, 234 Va. 79, 80, 81, 360 S.E.2d 169, 170 (1987) (referring to Sedwick interchangeably as a "materialman" (80, 169) and a "supplier" (81, 170)).

[32] *Compare* Virginia Code Section 54.1-1100 (defining as "Contractor" subject to licensure requirement "any person, that for [compensation] contracts for ... the construction, removal, repair or improvement ... of any building or structure ....), *and* Virginia Code Section 54.1-1101(A)(6) (excluding from licensure requirement "[a]ny material supplier ... who does not provide construction or installation services"). *See also Bergen v. Fourth Skyline Corp.*, 501 F.2d 1174, 1176 (4th Cir. 1974) ("In Virginia, a materialman ... is not considered to be engaged in the construction of a building. Therefore, as a stranger to the business, he may be sued at common law by a workman whom he has injured on the project.") (citing *Hipp v. Sadler Materials Corp.*, 211 Va. 710, 180 S.E.2d 501 (1971)).

To impose the moniker of "supplier" on a general contractor such as Coleman-Adams would be to destroy this distinction which both the Supreme Court and the General Assembly have faithfully preserved. Moreover, to blur or destroy the distinction between contractor and supplier would subvert the very purpose of the statute of repose, which has been enunciated by this Court as follows:

> Construction projects can be expected to last for many years after their completion. The owner or occupier of the project will be exposed to long-term liability because he will remain responsible for the maintenance of the project. With the abolition of lack of privity as a defense, Code § 8.01-223, architects, engineers, and building contractors may be subject to liability. However, absent a statute of repose, an architect, engineer, or building contractor also would be exposed to long-term liability, even though their work had long since been completed. These, and other factors, reasonably justify the General Assembly's decision to impose a time limitation for actions against such defendants.[33]

This Court has expressly recognized, in the context of applying the statute of repose, the distinction between a "manufacturer" and "supplier" on the one hand, and a "designer" and "installer" on the other hand:

> The last sentence of § 8.01-250 exempts from the operation of the statute of repose only the "manufacturer" and "supplier" of machinery or equipment. The designer and the

[33] *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990).

> installer of such machinery or equipment are entitled to the protection of the first sentence of the statute.[34]

If a general contractor and/or an architect could so casually be labeled a "supplier" merely by being the recipient of alleged "equipment or machinery" or ordinary building materials subsequently used in the construction of a building, then the exception in paragraph two of the statute would swallow up the rule in the first paragraph, and the protection of the statute of repose would be rendered meaningless.

VIII. RELIEF REQUESTED

For the foregoing reasons, Coleman-Adams requests that this Court affirm the judgment of the Trial Court that the Platform and Pole are not equipment within the contemplation of Virginia Code § 8.01-250, and that the action against Coleman-Adams is time-barred. Alternatively, with respect to the cross-error assigned by Coleman-Adams, Coleman-Adams requests that this Court reverse the judgment of the Trial Court that Coleman-Adams was a supplier of the Platform and Pole within the contemplation of Virginia Code § 8.01-250, and dismiss the claims against Coleman-Adams with prejudice.

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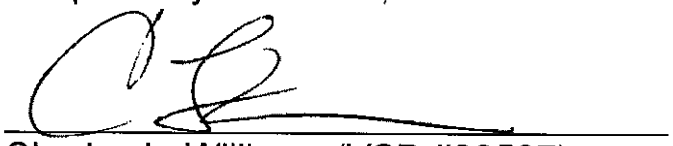
[34] *Eagles Court Condominium Unit Owners Ass'n v. Heatilator, Inc.*, 239 Va. 325, 329, 389 S.E.2d 304,306 (1980).

Respectfully submitted,



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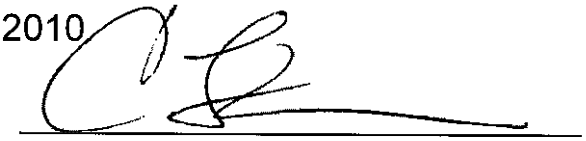
This, the 12th day of March, 2010.



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