In the
Supreme Court of Virginia

Record No. 091685

Kevin Jamerson
Appellant,
v.

Coleman-Adams Construction, Inc.
Appellee
and
Virginia Steel & Building Specialties, Inc.
Appellee.

REPLY BRIEF OF APPELLANT KEVIN JAMERSON

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STATEMENT OF FACTS

I. Virginia Steel's Knowledge of the Platform and Slide Pole.

Coleman-Adams' statement of facts goes beyond a recitation of the facts "in the light most favorable to the prevailing parties", by making it seem that Virginia Steel knew nothing about the use of the platform and slide pole that it manufactured and minimizing Virginia Steel's involvement in the project. As seen from the shop drawing prepared by Virginia Steel, the product at issue was described by Virginia Steel as a "platform and slide pole" for use at "Moneta V.F.D" (Volunteer Fire Department). App. 522. Given that description, and the depiction of the products themselves, Virginia Steel knew what they were manufacturing.

As seen from the shop drawing, and as indicated in Virginia Steel's own testimony, Virginia Steel was aware that the platform and slide pole were going to be used in a fire station. App. 522. As indicated by Virginia Steel's own testimony, it was already familiar with this fire station project as it had earlier provided structural steel for this project, and knew that the platform was for the fire station. App. 361-362. Virginia Steel had the building plans for the Moneta Volunteer Fire Department. App. 362. Virginia Steel knew from the building plans that the wall that the platform

would be mounted to was concrete block. App. 142, 143.[1] Coleman-Adams Project Manager, Charles Evans admitted that he had discussions with the Moneta Volunteer Fire Department's representative about use of a slide pole and platform to increase response times for firefighters to get to their trucks. App. 280-281, 314, 329. Both defendants knew what the platform and slide pole were going into a fire station and they knew what they were going to be used for.

ARGUMENTS AND AUTHORITIES

I. The trial court erred in ruling that the platform and slide pole at issue were not "equipment, machinery or other article", and granting the Appellees' Plea in Bar.

A. The Trial Court Was Plainly Wrong.

Coleman-Adams cites to the trial court's reliance on the *Grice v. Hungerford Mechanical*, 236 Va. 305, 374 S.E.2d 17 (1988) and *Cooper v. Melendez,* 260 Va. 578, 537 S.E.2d 580 (2000) cases. Brief of Appellee Coleman-Adams Construction, Inc., P. 12-13. The trial court's decision was plainly wrong as the trial court incorrectly concluded from its reading of

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[1] The abbreviation CMU was contained on the building plans designating the wall the platform was attached to. This abbreviation is commonly understood to mean concrete masonry unit or as it is more commonly known, cinder block.

these cases that a crucial part of its analysis in determining if the product at issue is equipment or machinery is whether the product at issue "does something". This is plainly wrong.

The distinction between *Grice* and *Cooper* was the fact that in *Grice*, the Statute of Repose applied because the parts for the circuit panel box were bought separately by the electrician and assembled on site by the electrician per the plans for the house that had been drawn up by an architect, and there were no instructions received from the manufacturer. *Grice*, 236 at 309, 374 S.E.2d at 19. However, in *Cooper*, the product at issue was a collection of parts, assembled at a factory, not on site, that had been tested, inspected and assembled at the factory, and merely had to be installed in the building on site by others. *Cooper*, 260 at 595, 537 S.E.2d at 590. The subject pole and platform is more like the *Cooper* case than the *Grice* case. Neither case discussed the need of the product to "do something".

The trial court's determination that the subject pole and platform serve as nothing other than part of the structure of the fire station, is also plainly wrong. The subject pole and platform are not like the wall panels in *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 331 S.E.2d 476 (1985), or the

swimming pool components buried inside the structure in *Luebbers v. Fort Wayne Plastics*, 255 Va. 368, 498 S.E.2d 911 (1998). The subject slide pole and platform have a function independent of the structural components in *Cape Henry* and *Luebbers*. The subject pole and platform were designed and constructed as equipment for getting firefighters quickly and efficiently from the second floor to the first floor area where the emergency vehicles and lockers with other fire fighting gear were located. Their function was to get the firefighters down as quickly as possible, and faster than the existing stairs. These were not generic materials that were bought in bulk, then cut and assembled on site and incorporated into a structure, outside of the control of the manufacturer or supplier like the pool parts in *Luebbers*, supra. Lastly, the fire station still functions today without the platform. App. 328.

The trial court's comparison of the platform and slide pole to a set of stairs also misses the mark. By the trial court's logic, the same could be said of an elevator. An elevator gets someone from one point of a building to another. Clearly, an elevator consists of machinery and/or equipment, yet it provides the same function as the platform and slide pole at issue. To view function in a manner that would treat stairs the same as an

elevator is plainly wrong.

Coleman-Adams claims that the trial court was justified in relying on the plain meaning of the term "equipment". Brief of Appellee Coleman-Adams Construction, Inc., P.18. This Court has never defined the term "equipment". The trial court never defined the plain meaning of the term "equipment". Merriam-Webster's Online Dictionary defines "equipment" as "the set of articles or physical resources serving to equip a person or thing: as (1) : the implements used in an operation or activity". As stated previously, the subject platform and slide pole were used by the firefighters in the station in an emergency "operation or activity"; rapidly exiting the second floor to get to the vehicles and their lockers faster than use of the stairs or an elevator.

Coleman-Adams and Virginia Steel also reference building and/or state code sections having nothing to do with Virginia Code §8.01-250. A similar attempt was made by the Plaintiff in *Grice v. Hungerford Mechanical Corp.*, 236 Va. 305, 374 S.E. 2d 17 (1988). In *Grice*, this Court rejected that plaintiff's attempt to rely upon the Virginia Code §36-97 definition of "equipment". *Grice*, 236 Va. At 307-308, 374 S.E.2d at 18. Any such reference to unrelated code sections by the appellees in this case should

be rejected as well.

In addition to Coleman-Adams and Virginia Steel's citation to building codes being improper under the case of *Grice*, supra, their reliance on these sections also requires this Court to disregard the subject slide pole and consider only the platform. One cannot view the platform and slide pole separately in this case. The subject pole and platform are part of a system. Neither would be present without the other. Neither would function for its intended purpose without the other. Neither was meant to be used or installed without the other, and they function together as a system.

Both Defendants have also attempted to equate the platform to a balcony. Unlike a "balcony", the platform had railings, only on two sides, not three. See App. 493, 522. The third side of the platform that faced the slide pole, had a detachable chain, in lieu of a handrail, so the firefighter could jump onto the slide pole. See App. 493, 522. With the addition of the adjacent slide pole, the platform required interaction of the user to jump or step off onto the adjacent slide pole. Clearly, this platform served a different function than a " balcony" and would be subject to forces that a "balcony" would not be subject to, such as firefighters jumping or pushing off of the platform to grab onto the adjacent slide pole.

B. Control Exercised By Virginia Steel And Coleman-Adams

The allegation that "[n]either Virginia Steel nor Coleman-Adams demonstrated control over the fabrication process consistent with the manufacture of a piece of 'equipment'" is pure fiction. Brief of Appellee Coleman-Adams Construction, Inc., P. 8. As seen from the evidence, Virginia Steel and Coleman-Adams had complete control over the manufacture, design, assembly, delivery, sale and installation of the platform and slide pole. Virginia Steel admitted manufacturing the subject platform and slide pole, although it would rather refer to this manufacturing process as "fabrication". App 358-360. It took raw materials and made them into equipment that would be the first equipment used by the volunteer firefighters in responding to an alarm.

At the plea in bar hearing, Virginia Steel alleged that it could not have designed this platform without input from Coleman-Adams. App. 368-369. Virginia Steel alleged that the "whole configuration of the platform would have to have been provided by Coleman-Adams". App. 369. Virginia Steel testified that it would have had to have received "a lot of input" from Coleman-Adams before it could manufacture the pole and platform. App. 370. At trial, Coleman-Adams denied that it designed the subject platform

or slide pole. App. 294-298, 319. At trial, Coleman-Adams' interrogatory answers were read into evidence. App. 365-366. Coleman-Adams' interrogatory answer alleged that "Virginia Steel designed, engineered, manufactured, assembled, tested and shipped the subject platform and slide pole." App. 366.

There was no evidence presented at trial that anyone other than Virginia Steel or Coleman-Adams could have designed this platform and slide pole. Virginia Steel admitted that it had no interactions with the Moneta Volunteer Fire Department on this platform and slide pole. App. 384. The evidence was undisputed that Virginia Steel assembled the subject platform and slide pole at its facility, and delivered the finished product to the fire station. App. 360-361. Coleman-Adams admitted that it sold the the platform and slide pole to the Moneta Volunteer Fire Department and reluctantly admitted that it installed those products. App. 314, 326, 491, 515-516. As seen from Coleman-Adams' trial Exhibits 5 and 6, Coleman-Adams contracted with the Moneta Volunteer Fire Department to supply and install the platform and slide pole. App. 515, 516. Lastly, Virginia Steel admitted that this platform was a one of a kind item. App. 370.

The shop drawing which illustrated the subject platform and slide pole, was prepared by Virginia Steel. App 522. Furthermore, as seen from the shop drawing and the platform itself, it was Virginia Steel who determined the grade of steel, determined the type of steel (in terms of shape, length, width, thickness), the manner of fabrication/welding and the assembly of the materials used to construct the platform and slide pole. App. 522. It was Virginia Steel who selected and assembled the component parts and materials. App. 522. It was Virginia Steel who selected the size (9/16"), number and location of the holes on the platform and pole base for use with the installation hardware. App. 522. It was Virginia Steel who supplied the installation hardware, and it was Virginia Steel who instructed the installers of the attachment methods; to use thru bolts or ½" thick, 4 1/4" long kwik bolts for attaching the platform, and ½" thick, 4 1/4" long kwik bolts for attachment of the slide pole base. App. 379-380, 513-514, 522. When comparing the specification quote provided by Virginia Steel to Coleman-Adams, to the later produced shop drawing, it is clear that Virginia Steel made these selections. App. 513-514, 522. Virginia Steel testified that normally they provide the installation hardware, and admitted that the shop drawing tells the installer where to use the

installation hardware. App. 379-380, 513-514, 522. This shop drawing was reviewed and approved by Coleman-Adams prior to the manufacture of the actual slide pole and platform. App. 317. Coleman-Adams testified that this shop drawing was supposed to accompany the platform and slide pole out in the field, and that the shop drawing contained installation instructions. App. 317.

C. Inspection By Virginia Steel And Coleman-Adams.

Upon receipt of the pole and platform, Coleman-Adams admitted that it would have inspected the platform and all of its parts. App. 328. Virginia Steel admitted that all of the welders that welded the subject platform and slide pole were AWS certified welders. App. 386. With respect to the inspection process, clearly, the Virginia Steel witness, Tina Fleshman, had been coached and/or cautioned about this particular testimony, as evidenced by the word games in her testimony.

When the Virginia Steel Vice President, Tina Fleshman, was asked:

> Q. [A]nd your shop foreman inspects all of this work before it goes out, right?
> A: He looks over everything than goes out. He is not an inspector.
> Q. Okay. But all the welds and the fabrication itself is subject to a close visual inspection after it's complete, right?
> A. No, sir.

Q. It's not? You don't care how the products come out of your shop?
A. Sure, I do.
Q. So there is a quality control process? You do review the product before it goes out?
A. I'm sorry. I was distinguishing between a close inspection and a review.
Q. You inspect the steel, probably before you start manufacturing the platform, before you use it, right?
A. Inspect it for what?
Q. Defects, rust, cracks. Do you inspect any of the steel before you use it?
A. We look at it.
Q. Okay. And then you would have inspected the welds on this product to make sure they were secure before it went out, right?
A. Yes, sir. I thought you were talking about inspecting to an AWS Standard.
Q. Okay. But your shop foreman does do inspection of the work, inspects the steel before it's used in the product and then inspects the final project before it goes out?
A. He makes sure that it -- that it is the same as what's on the shop drawings.
Q. Okay.
A. It's a comparison thing. If there's two columns, you make sure there's two columns. If there's -- yes, sir.
Q. And he also looks at the dimensions of it to make sure it matches up to the --
A. He probably would not have double checked the dimensions behind someone; no, sir.
Q. Okay. But he does inspect the welds themselves to make sure that it's a solid weld? I'm not saying that he's -- it's an AWS inspection process, but he inspecting the welds to make sure the welds are complete?
A. That they're there; yes, sir.

App. 386-388

Coleman-Adams also admitted that it reviewed the shop drawing and checked the dimensions and sizes were what was necessary, and that it "confirm[ed] the dimensions on site to make sure it would work with what was there". App. 297. Appellee Coleman-Adams' employee, Charles Evans, the Vice President of Coleman-Adams and the project manager, also admitted that Coleman-Adams also would have inspected the platform and all of its parts prior to installation. App. 328.

As seen from this testimony, Virginia Steel and Coleman-Adams inspected the products at issue, at different points in the assembly process, including completion, and they did it in a manner that they deemed necessary to assure the quality for these particular products. What constitutes a close quality control inspection will vary from product to product, case to case. Depending on the product at issue, the same level of quality assurance may not require the same type or time and attention to testing and inspection. In *Cooper*, supra, the product at issue was electrical equipment that obviously required more than a visual inspection to determine whether it was in working condition.

D. The Subject Platform And Slide Pole Are Not Bulk Items.

Virginia Steel repeatedly attempts to characterize the subject

platform as bulk items. The subject platform and slide pole were supplied as installation ready, individual items, for use as a platform and slide pole in a fire station, as seen in the shop drawing and evidenced in the aforementioned testimony. Virginia Steel requests this Court to disassemble the platform and slide pole and consider it only as bulk steel beams, rails, angle iron etc. Following this flawed reasoning, no product (including the switchgear in *Cooper*) would ever qualify as equipment or machinery. The Court would have to ignore the final form of the product as completed and delivered. This Court has never adopted the method suggested by Virginia Steel for determining whether something is ordinary building materials or machinery and equipment.

Virginia Steel's argument could have merit if it had sold and delivered raw steel to Coleman-Adams at the jobsite, for Coleman-Adams to cut and weld and fashion into a platform and slide pole per the instructions supplied by the architect or owner. However, this is simply not the case. Virginia Steel delivered a completed, finished product, the platform and slide pole, that it had constructed at its own facility, that need only be mounted to the wall and floor to function as a fast access for the firefighters. Virginia Steel did not just supply Coleman-Adams with raw

materials to be assembled however Coleman-Adams deemed necessary.

V. The trial court did not err in ruling that Virginia Steel was a "manufacturer" of the platform and pole under Virginia Code §8.01-250. (Virginia Steel's assignment of Cross-Error)

Virginia Steel's attempts to distinguish "manufacturing" from "fabrication" find no support in the law. The statute of repose makes no reference to the building code. The general assembly made no reference to the building code or to exemptions for "fabricators" or "fabrication". In light of *Aetna Casualty v. U.S. Plywood*, 211 Va. 720, 180 S.E.2d 689 (1971), this is a distinction without a difference. In *Aetna*, U.S. Plywood supplied materials to American Steel Equipment Company, Inc.

> Davis purchased from American a movable aluminum partition system with glass weld panels to be made up in accordance with certain specifications. American purchased material for the partition on the open market, cut it to size, and fabricated or manufactured it to fit the plans and specifications. Plywood sold American a material known as glass weld, which was used by American in fabricating the partitions.
> *Aetna*, 211 Va. at 721, 180 S.E.2d at 690.

Davis paid American for the completed partitions, but American did not pay Plywood for the glass weld material. *Id.* **This Court held that "[i]t is clear that American was a <u>manufacturer or fabricator of the partitions</u>** and under the provisions of §11-20 and was exempt from the requirement of executing a payment bond. *Id.* (emphasis added).

Therefore, there is no difference whether the subject platform and slide pole were "manufactured" or "fabricated" by Virginia Steel, as the terms are interchangeable. As suggested in the appellant's opening brief, the use of either of these terms results in the same conclusion, Virginia Steel is a manufacturer.

CONCLUSION

On the basis of these arguments and facts presented by the record, the appellant respectfully requests that this Court find that the trial court erred in ruling that the subject product at issue in this action was not "equipment", "machinery" or "other article" within the meaning of Virginia Code §8.01-250, and in granting the Appellees' Plea at Bar; and for this Court to reverse the trial court's ruling and remand the case to the trial court for a trial as to liability and damages.

RESPECTFULLY SUBMITTED,

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CERTIFICATE

On this 24th day of March, 2010, I did file by hand in the Office of the Clerk of the Supreme Court of Virginia, ffiteen true copies of this REPLY BRIEF OF APPELLANT KEVIN JAMERSON and sent to the Office of the Clerk, Supreme Court of Virginia, one electronic copy by email in PDF format, and on the same day I mailed, first-class, postage prepaid, three true copies of this OPENING BRIEF OF APPELLANT KEVIN JAMERSON to the counsel for both Appellees stated below:

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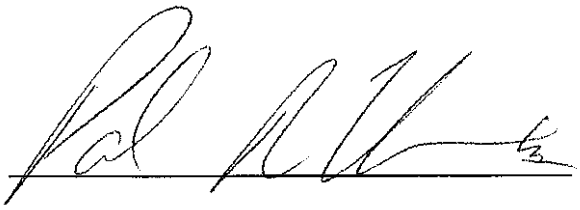
Appellant does request oral argument before a Panel of this Court.



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