In the

Supreme Court of Virginia

At Richmond

Record No. 091685

KEVIN JAMERSON,

Appellant,

– v. –

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

Appellees.

BRIEF OF APPELLEE
VIRGINIA STEEL & BUILDING SPECIALTIES, INC.

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IN THE
SUPREME COURT OF VIRGINIA

KEVIN JAMERSON	)	
	)	
Appellant,	)	
	)	
	)	
v.	)	
	)	**Record No. 091685**
	)	
COLEMAN-ADAMS	)	
CONSTRUCTION, INC., and	)	
	)	
VIRGINIA STEEL & BUILDING	)	
SPECIALTIES, INC.	)	
Appellee.	)	
	)	
_____	)	

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Virginia:

Virginia Steel & Building Specialties, Inc., Appellee, by counsel, hereby submits this Brief of Appellee.

STATEMENT OF THE NATURE OF THE CASE

On or about November 30, 2007, Kevin Jamerson ("Jamerson) filed his third amended complaint against Coleman-Adams Construction, Inc. ("Coleman-Adams") and Virginia Steel & Building Specialties, Inc. ("Virginia Steel") seeking damages for personal injuries he received on November 4,

2006 when, while at the Moneta Volunteer Fire Department ("fire department"), a second-story steel platform on which he was standing collapsed. (J.A. 1).

In response to the amended complaint, both Virginia Steel and Coleman-Adams filed, among other things, pleas in bar, asserting that Jamerson's claim was barred by Virginia Code § 8.01-250. (J.A. 56; J.A. 59).

On February 2, 2009, the trial court heard evidence *ore tenus* regarding the pleas in bar of Coleman-Adams and Virginia Steel. After hearing the evidence, the trial court ruled that Coleman-Adams was a supplier, and that Virginia Steel was a manufacturer and supplier, of the platform and pole, but that the platform and pole were not equipment, machinery or other articles under Virginia Code § 8.01-250. (J.A. 198-99). Consequently, the trial court sustained the pleas in bar of Coleman-Adams and Virginia Steel, finding that Jamerson's claims were time barred by the five-year statute of repose as set forth in Virginia Code § 8.01-250, and dismissed the complaint with prejudice. A final order was entered by the trial court on May 19, 2009. (J.A. 198-99).

This Court granted Jamerson's Petition for Appeal, and on February 16, 2010, Jamerson filed his Opening Brief of Appellant. Virginia Steel submits this brief in response to Jamerson's Opening Brief of Appellant.

ASSIGNMENT OF CROSS-ERROR

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 because the evidence adduced at trial and otherwise contained in the record clearly established that, as a matter of law, Virginia Steel was merely a supplier of steel fabrication services and structural steel as defined and regulated by the Uniform Statewide Building Code.

QUESTIONS PRESENTED

I. Did the trial court err in ruling that the platform and pole were not "equipment" or "machinery" and granting the pleas in bar of Virginia Steel and Coleman-Adams? (Jamerson's Assignment of Error I).

II. Did the trial court err in excluding evidence regarding the fire department's training of fire fighters with respect to the slide pole and platform? (Jamerson's Assignment of Error III).

III. Did the trial court err in ruling that Virginia Steel was a "manufacturer" and/or "supplier" of the platform and pole under Virginia Code § 8.01-250? (Virginia Steel's Assignment of Cross-Error).

STATEMENT OF FACTS

I. Virginia Steel Disagrees With The Statement Of Facts Contained In Jamerson's Petition For Appeal In The Following Respects:

A. Virginia Steel Was Not One Of Coleman-Adams's "Usual Manufacturers"

Jamerson characterizes Virginia Steel as one of Coleman-Adams's "usual manufacturers." (Opening Brief of Appellant at 5). Virginia Steel was not one of Coleman-Adams's usual manufacturers. Instead, Virginia Steel is, and at all times was, a steel fabricator. (J.A. 331). Virginia Steel has done hundreds of fabrication jobs for Coleman-Adams, but has done nothing other than steel fabrication (J.A. 334).

Coleman-Adams did not contact Virginia Steel about the platform and pole because Virginia Steel was one of its usual manufacturers. Rather, Coleman-Adams contacted Virginia Steel because Virginia Steel was providing the structural and miscellaneous steel for the project. (J.A. 313).

B. Virginia Steel Did Not Provide A Price Quote To Coleman-Adams For The Custom Manufacture Of A Slide Pole And Platform.

Jamerson states that Coleman-Adams received a price quote from Virginia Steel for the "custom manufacture of a slide pole and platform." (Opening Brief of Appellant at 6). However, Virginia Steel did not provide a price quote for "the custom manufacture of a slide pole and platform."

Rather, it provided a quote to provide the steel and fabrication services for: "One 3'-0 X 3'-0 Grating Platform With Rails"; "One 3" Diameter Pipe With Base Plate and Brace Angles"; and "All Steel Prime Painted." (J.A. 283-84; 513). The quote contains no mention of "custom manufacture," nor does it mention a "slide pole."

C. Virginia Steel Provided No Installation Instructions With The Platform Or Pole.

Jamerson asserts that the shop drawing used by Virginia Steel to fabricate the platform and pole contained installation instructions. (Opening Brief of Appellant at 9). In fact, the shop drawing used by Virginia Steel to fabricate the platform and pole did not contain installation instructions. In the steel fabrication industry, shop drawings serve two purposes: they are submitted to a contractor for approval before fabrication begins, and they are used by the steel fabricators to fabricate the steel. (J.A. 341). Virginia Steel's purpose in preparing the shop drawing for the platform and pole was not to provide installation instructions (J.A. 356-57).

II. In Addition To The Statement Of Facts Contained In Jamerson's Petition For Appeal (With Disagreements As Noted Herein), Virginia Steel Further States The Following As Additional Facts:

Virginia Steel is, and at all times relevant to this case was, in the business of providing steel fabrication services. (J.A. 331). A steel fabricator is hired by a general contractor to acquire steel for a particular

job (J.A. 331), and to fabricate the steel per the designs provided by the general contractor or by an architect or engineer hired by the owner (J.A. 331-337). Virginia Steel employs no engineers, architects, design specialists, nor does it provide any design services (J.A. 333).

After Virginia Steel is hired to provide steel fabrication services for a particular construction project, it prepares shop drawings from the designs provided by the general contractor, architect or engineer. (J.A. 333). The shop drawings serve two purposes: they are submitted to a contractor for approval before fabrication begins, and they are used by Virginia Steel's fabricators to fabricate the steel. (J.A. 341).

Virginia Steel has provided steel and steel fabrication services to Coleman-Adams for hundreds of building projects over approximately twenty years. (J.A. 334). Virginia Steel had never done anything for Coleman-Adams other than steel fabrication. (J.A. 334).

In this case, Virginia Steel was hired by Coleman-Adams to provide the steel and steel fabrication services for the construction of the fire department. (J.A. 313; see Coleman-Adams Exhibit No. 2, J.A. 510; Virginia Steel Exhibits No. 2A, 2B, and 2C, J.A. 537-39).

Initially, Virginia Steel fabricated steel columns, angles, beams, stairs, rails, pipe bollards, and angle lintels (J.A. 335; Coleman-Adams Exhibit No.

2, J.A. 510; Virginia Steel Exhibits No. 2A, 2B, and 2C, J.A. 537-39). The process by which this steel was fabricated was identical to the process by which the platform and pole were later fabricated. (J.A. 358). Specifically, for the platform/pole and the other steel (including the beams and stairs), Virginia Steel received the information from Coleman-Adams, prepared shop drawings, submitted the shop drawings for approval to Coleman-Adams, acquired the necessary steel from a steel supplier, fabricated the items in Virginia Steel's shop, and delivered the items to Coleman-Adams at the job site. (J.A. 335-42). The steel column referred to as the fire pole was no different, from the fabricators point of view, than the other steel columns fabricated by Virginia Steel. (J.A. 347).

Virginia Steel delivered the ***fabricated*** steel platform and pole to Coleman-Adams on or before January 13, 1999, at which time its involvement in the fire department project ended. (J.A. 355).

PRINCIPLES OF LAW, ARGUMENT, & AUTHORITIES

I. With Regard To Jamerson's First Assignment of Error, The Trial Court Did Not Err In Finding That The Platform And Pole At Issue In This Case Were Not "Equipment" Or "Machinery" Under Virginia Code § 8.01-250.

Pursuant to Virginia Code § 8.01-250, the trial court sustained the pleas in bar filed by both Coleman-Adams and Virginia Steel (J.A. 488). Virginia Code § 8.10-250 provides in pertinent part:

> 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 . . . .

Virginia Code § 8.01-250.

General words "or any other articles" add no new or further category to those excluded from the operation of the statute by the specific words of the second paragraph:" the manufacturer or supplier of any equipment or machinery." *Cape Henry Towers, Inc. v. Nat'l Gypsum Co.*, 229 Va. 596, 331 S.E.2d 476 (1985).

"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." Baker v. Poolservice Co., 272 Va. 677, 688, 636 S.E.2d 360, 366 (2006) (quoting Cooper Industries, Inc. v. Melendez, 260 Va. 578, 594, 537 S.E.2d 580, 590 (2000)). "The party asserting the plea in bar bears the burden of proof." Id. When the trial court hears the evidence *ore tenus* and the trial court decides the issue rather than submitting it to a jury, "the trial court's 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."*** Id. (quoting Cooper Industries, 260 Va. At 595, 537 S.E.2d at 590) (emphasis added).

In this case, the trial court heard the evidence regarding the pleas in bar of Coleman-Adams and Virginia Steel *ore tenus* and decided the issue rather than submitting it to a jury. (J.A. 222-489). The court's findings were supported by the evidence are were not plainly wrong. Thus, the court's findings should not be disturbed.

A. The Trial Court Did Not Ignore The "Ordinary Building Materials Doctrine"

Va. Code §8.01-250 distinguishes suppliers of ordinary materials and suppliers of machinery or equipment. It excludes suppliers of machinery or equipment.

In finding that the platform and pole were not equipment or machinery, but were ordinary building materials, the trial court provided a thorough review of this Court's precedent with regard to Virginia Code § 8.01-250. (J.A. 476-488). The court specifically discussed this Court's holdings in Cape Henry Towers, Inc. v. National Gypsum, 229 Va. 596, 331 S.E.2d 476 (1985), Grice v. Hungerford Mechanical Corp., 236 Va. 305, 374 S.E.2d 17 (1988), Luebbers v. Fort Wayne Plastics, Inc., 255 Va. 368, 498 S.E.2d 911 (1998), Cooper Industries, Inc. v. Melendez, 260 Va. 578, 537 S.E.2d 580 (2000), and Baker v. Poolservice Co., 272 Va. 677, 636 S.E.2d 360 (2006). (J.A. 205-214).

In providing its review of this Court's precedent, the trial court expressly acknowledged the "ordinary building material" doctrine (J.A. 207-209), and recognized that in the context of Virginia Code § 8.01-250 there are two categories: ordinary building materials and equipment or machinery. (J.A. 208). The court further stated that, in determining whether the platform and pole were ordinary building materials or equipment or machinery, it was considering various factors, such as how it was manufactured, whether it was mass produced, whether it's unique, whether there's a warranty, and whether it's subject to quality control. (J.A. 209).

After reviewing the ordinary building materials doctrine, the trial court stated, "[a]nd I think, most certainly, that I am required to apply that standard in this case because the Supreme Court has said so." (J.A. 209). So rather than ignoring the ordinary building materials doctrine, the trial court expressly recognized the doctrine and its applicability to this case.

B. The Trial Court Properly Considered The Function Of The Platform And Pole In Finding That They Were Not Equipment Or Machinery.

Jamerson argues that the trial court incorrectly made up its own test to determine if the platform and pole were equipment or other articles. Specifically, Jamerson argues that the trial court determined that in order to be equipment, the product at issue must "do something." (Opening Brief of Appellant at 14).

The trial court did not create a new test. Rather, in applying this Court's precedent under the ordinary building materials doctrine, it considered, among other things, the function of the platform and pole.

This Court has considered the function of items in discussing the ordinary building material doctrine. In analyzing whether steel panels, braces, and vinyl liners used in swimming pool construction were ordinary building materials, this Court considered the function of those items. In concluding that the steel panels, braces and liners were ordinary building

materials, the Court noted that "these items served no function other than as generic materials to be included in the larger whole . . . ." Luebbers v. Fort Wayne Plastics, Inc., 255 Va. 368, 373, 498 S.E.2d 911, 913 (1998).

In the 2000 case of Cooper industries Inc. v. Melendez, , the Court considered whether a switchgear and circuit breaker installed on a pier to provide power to submarines were ordinary building materials. 260 Va. 578, 537 S.E.2d 580 (2000). As a part of its analysis, the Court examined the function of the switchgear and circuit breakers and noted that they were not part of the electrical system of the pier, but comprised the electrical system for submarines docked at the pier. Id. at 595, 537 S.E.2d at 590.

In this case, the trial court properly examined the function of the platform and pole as part of its analysis of whether they were ordinary building materials. In examining the function of the platform and pole, the court specifically referenced Cooper Industries and compared it to another case involving circuit breakers, Grice v. Hungerford Mechanical Corp., 236 Va. 305, 374 S.E.2d 17 (1988). (J.A. 211-215).

In examining the function of the platform and pole, the trial court found that the platform and pole, once installed, became a part of the structure and served the same function as the building's stairs (which

Virginia Steel had also fabricated for the Moneta Volunteer Fire Department). (J.A. 217).

Jamerson's assertion that the trial court created a "do something test" for an item to be classified as equipment is without merit. Indeed, the trial court created no new test. Rather, in discussing the characteristics of equipment, the court noted:

> 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 an integrative part?

(J.A. 215) (emphasis added).

The court expressly stated that equipment or machinery does not always "do something." Furthermore, that statement by the trial court was made in the context of a discussion of whether the items served a function other than being included in the larger whole. (J.A. 215). That is an entirely appropriate consideration. Indeed, this Court, in considering whether an item constituted ordinary building materials, looked at whether an item served a function "other than as generic materials to be included in the larger whole." Luebbers, 255 Va. at 373, 498 S.E.2d at 913.

In discussing whether the platform or pole did something other than just serve as part of the entire structure, the trial court was simply employing the same analysis as was used in Luebbers.

C. The Trial Court's Findings That The Platform And Pole Were Not Machinery, Equipment Or Other Articles Was Supported By The Evidence And Was Not Plainly Wrong.

In deciding whether an item constitutes machinery or equipment, a court considers a number of factors, such as whether the item is subject to close quality control at the factory and independent manufacturer's warranties, Cape Henry Towers, Inc. v. Nat'l Gypsum Co., 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985), Cooper Indus., Inc. v. Melendez, 260 Va. 578, 595, 537 S.E.2d 580, 590 (2000); whether the quality and quantity of the component parts are determined by the manufacturer, Grice v. Hungerford Mech. Corp, 236 Va. 305, 308, 374 S.E.2d 17, 19, (1988); whether instructions as to installation are received from the manufacturer, Id.; and whether the items serve a function other than as generic materials to be included in the larger whole, Luebbers v. Fort Wayne Plastics, Inc., 255 Va. 368, 498 S.E. 2d 911 (1998).

Considering the above factors, it is clear that the platform and pole at issue in this case were not equipment or machinery.

(i) The Platform And Pole Were Not Subjected To Close Quality Control By Virginia Steel, and Virginia Steel Provided No Warranty.

Contrary to Jamerson's assertions, Virginia Steel did not subject the platform and pole to "close quality control," and did not subject the platform

and pole to independent manufacturer's warranties, as contemplated in Cape Henry Towers, Inc. v. Nat'l Gypsum Co., 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985) and Cooper Indus., Inc. v. Melendez, 260 Va. 578, 595, 537 S.E.2d 580, 590 (2000).

In Cape Henry Towers, the Court held that certain wall panels were ordinary building materials. 229 Va. at 603, 331 S.E.2d at 481. The Court reasoned that equipment is distinguished from ordinary building materials on the grounds that "unlike ordinary building materials, . . . equipment [is] 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." Id. at 602, 331 S.E.2d at 480.

In Cooper Indus., the switchgear and circuit breakers at issue, which were found not to be ordinary building materials, were "established standard tested products of the manufacturer" and "they had been tested at the factory." 260 Va. at 578, 537 S.E.2d at 590.

In this case, the platform and pole were not established standard tested products of Virginia Steel. Indeed, the platform and pole were fabricated for a specific project – the Moneta Volunteer Fire Department – and were not an established standard tested product of Virginia Steel.

Virginia Steel was not in the business of manufacturing platforms and poles, and it performed no testing of the platform and pole. In addition, any inspection performed by Virginia Steel did not rise to the level of "close quality control," but was simply a review of the items.

Counsel for Jamerson specifically asked Tina Fleshman, a director, officer, estimator, and project coordinator of Virginia Steel ("Fleshman"), whether the shop foreman "looks at the dimensions of it to make sure it matches up to the - -" (J.A. 388). Fleshman responded, "He probably would ***not*** have double checked the dimensions behind someone; no, sir." (J.A. 388) (emphasis added). Instead, she explained, "It's a comparison thing. If there's two columns, you make sure there's two columns." (J.A. 388).

Also, Virginia Steel did not perform a "close visual inspection" of the welds and fabrication. Indeed, Jamerson's counsel and Fleshman engaged in the following colloquy on that very issue:

> [Counsel]: And your shop foreman inspects all of this work before it goes out, right?
>
> [Fleshman]: He looks over everything that goes out. He's not an inspector.
>
> [Counsel]: Okay. ***But all the welds and the fabrication itself is subject to a close visual inspection after it's complete, right?***

[Fleshman]: ***No, sir.***

[Counsel]: It's not? You don't care how the products come out of your shop?

[Fleshman]: Sure, I do.

[Counsel]: So there is a quality control process? You do review the product before it goes out?

[Fleshman]: I'm sorry. ***I was distinguishing between a close inspection and a review.***

(J.A. 386-87) (emphasis added).

After this exchange, Fleshman went on to describe a process, consistent with her above testimony, that was nothing more than a review, and not a close visual inspection. (J.A. 387-88).

It is undisputed that Virginia Steel provided no written warranty for the platform or pole. (Opening Brief of Appellant at 8-9). And despite Jamerson's attempts to equate an unspoken business philosophy with an oral warranty, no oral warranties were given either.

Tina Fleshman of Virginia Steel testified that if Coleman-Adams had a problem with any of the fabricated steel, Virginia Steel would make it right. (J.A. 389-90). However, she explained that this was never communicated to Coleman-Adams (J.A. 392-93). Rather, it was simply Virginia Steel's business philosophy (J.A. 393), and "more of a customer service." (J.A.

390). Fleshman further testified that Virginia Steel gave no written or verbal warranties to anyone concerning the platform (J.A. 357-58).

Any attempt to equate an unspoken business philosophy with some type of warranty finds no support in the record.

(ii) The Platform and Pole Served No Function Other Than As An Integrated Part Of The Moneta Volunteer Fire Department Building.

In Luebbers v. Fort Wayne Plastics, Inc., the Court found that the materials at issue – swimming pool components – served no function other than as generic materials to be included in the larger whole. 255 Va. 368, 373, 498 S.E.2d 913 (1998).

The platform and pole at issue in this case served no function other than as generic structural steel materials to be incorporated into the construction of the fire department building. Specifically, the platform was affixed permanently to a second story wall within the building. (J.A. 299; See Virginia Steel Exhibit No. 3, J.A. 540).

The platform and pole were part of a change order to the construction contract between Coleman-Adams and the fire department. As part of that change order, a second floor window that had previously been constructed was removed, the second story wall was structurally altered to accommodate a new door, and the platform was permanently affixed to the

second story wall such that the new door opened onto the platform. (J.A. 299; Virginia Steel Exhibit No. 3, J.A. 540). In short, the incorporation of the platform and pole into the building was part of a larger and permanent reconfiguration of the building.

The trial court found that the platform and pole served absolutely no function apart from their inclusion in the larger whole. (J.A. 216). With regard to the platform, the court found:

> [U]ntil 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.
> . . . .
>
> [T]he platform serves as something to stand on.

(J.A. 216). With regard to the pole, the trial court found:

> The pole enables a person to get from the upper level to the lower level faster than if he takes the stairs. That's its function, and it does nothing else. And once its installed it becomes part of the structure, I feel, just the same as stairs, and has the same function as a set of stairs.

(J.A. 217).

(iii) Virginia Steel Did Not Determine The Quality And Quantity Of The Component Parts Of The Platform And Pole, And Did Not Provide Instructions As To Their Installation, Use, Or Maintenance.

As in Grice v. Hungerford Mech. Corp, 236 Va. 305, 374 S.E.2d 17 (1988), Virginia Steel did not determine the quality and quantity of

the component parts of the platform and pole. In Grice, "the quality and quantity of the component parts of an electrical panel box and the instructions for assembling, wiring, grounding, and installing the unit during construction of a particular building" were determined "by the plans and specifications provided by the architect or other design professional" and no instructions were received from the manufacturer. Id. at 309, 374 S.E. 2d at 19. Thus, the Court affirmed the trial court's judgment that the electrical panel box and its component parts were ordinary building materials under Virginia Code § 8.01-250.

In this case, the quality and quantity of the parts were determined by someone other than Virginia Steel even before Virginia Steel was invited to bid on the project by the general contractor. Indeed, Virginia Steel was invited to bid on providing specific steel and fabrication services for "One 3'-0 X 3'-0 Grating Platform With Rails"; "One 3" Diameter Pipe With Base Plate and Brace Angles"; and "All Steel Prime Painted." (J.A. 283-84; Coleman-Adams Exhibit No. 4, J.A. 513).

The quality of the steel was determined by someone other than Virginia Steel by virtue of the fact that the bid invitation did not request something other than the standard grade of steel. (J.A. 353). Tina Fleshman of Virginia Steel explained that "construction standard is A36

steel. It's a mild steel. Unless otherwise noted, you would use the standard grade of steel." (J.A. 353). In other words, Virginia Steel did not determine the quality and quantity of what was fabricated, but merely fabricated what was requested out of standard steel materials.

Jamerson asserts that the shop drawing used by Virginia Steel to fabricate the platform and pole contained installation instructions. (Opening Brief of Appellant at 9). In fact, the shop drawing used by Virginia Steel to fabricate the platform and pole did not contain installation instructions. In the steel fabrication industry, shop drawings serve two purposes: they are submitted to a contractor for approval before fabrication begins, and they are used by the steel fabricators to fabricate the steel. (J.A. 341). Virginia Steel's purpose in preparing the shop drawing for the platform and pole was not to provide installation instructions (J.A. 356-57).

When asked by Jamerson's counsel whether the shop drawing served a third purpose, to assist the person installing the product, Fleshman replied that the shop drawing "wouldn't help them with installation" (J.A. 379). Fleshman explained that the mere fact that the shop drawing mentioned the bolts did not assist in installation. Specifically, she explained that installing a bolt is a process that has "a lot of instructions" (which were not contained on the shop drawing), that the shop

drawing did not instruct someone how to attach the pole to anything, and that Virginia Steel did not even know the material or thickness of the wall onto which the platform was being affixed. (J.A. 380-82).

In addition, Fleshman testified that the shop drawing provides no information as to what size holes one would need to drill in the wall to install the platform, nor does the shop drawing explain what sort of wall the platform could be affixed to. (J.A. 394).

Counsel for Jamerson asked Fleshman if the shop drawing "tells an attachment method for the bracket for the top of the pole." (J.A. 381). Fleshman responded the shop drawing in no way provided instructions as to how the pole was to be attached at the top. (J.A. 381-82).

Aside from the fact that the shop drawing referred to bolts, Jamerson can point to no facts to support his blanket assertion that the shop drawing constitutes "installation instructions."

In Grice, because the quality and quantity of the component parts were not determined by the manufacturer, and because no use and installation instructions were provided by the manufacturer, this Court found that the electrical panel box and its component parts were ordinary building materials. 236 Va. at 308, 374 S.E.2d at 19.

In this case, because the quality and quantity of the component parts were not determined by Virginia Steel, and because Virginia Steel provided no instructions as to installation, use, maintenance, or repair, the trial court correctly found that the platform and pole did not constitute equipment or machinery.

D. Jamerson's Argument That The Platform And Pole Constitute "Other Articles" Is Without Merit.

Jamerson argues that the platform and pole constitute "other articles" under Virginia Code § 8.01-250. This argument is contrary to this Court's long-standing interpretation of § 8.01-250. In Cape Henry, this Court rejected a similar argument. Indeed, invoking the doctrines of *ejusdem generis* and *noscitur a sociis*, the Court held that "the general words 'or any other articles' add no new or further categories to those excluded from the operation of the statute." 229 Va. 596, 603, 331 S.E.2d 476, 481 (1985).

In Grice, the Court, citing Cape Henry, again invoked the doctrines of *ejusdem generis* and *noscitur a sociis* in rejecting an argument that an electric panel box constituted "other articles" under Code § 8.01-250. 236 Va. at 309, 374 S.E2d at 19.

In light of this Court's earlier holdings in Cape Henry and Grice, Jamerson's argument that the platform and pole are "other articles" under Code § 8.01-250 is without merit.

E. Under Jamerson's Analysis, All Fabricated Steel Would Be Considered Equipment.

Jamerson urges on this Court an analysis that would effectively classify all fabricated steel as equipment or machinery for purposes of Virginia Code § 8.01-250. According to Jamerson, the platform and pole are equipment or machinery because the platform and pole (i) were subject to quality control, (ii) were subject to an alleged warranty, (iii) were custom made, (iv) were not fabricated on the job site, and (v) were not sold in bulk.

In addition to fabricating the platform and slide, Virginia Steel also fabricated steel columns, angles, beams, stairs, rails, pipe bollards, and angle lintels for the Moneta Volunteer Fire Department project. (J.A. 335). The process by which these structural steel components were fabricated was identical to the process by which the platform and pole were fabricated. (J.A. 358). Specifically, for the beams, stairs, columns, angles, rails, pipe bollards, and angle lintels, Virginia Steel received the design information from Coleman-Adams, prepared shop drawings, submitted the shop drawings for approval to Coleman-Adams, acquired the necessary steel from a steel supplier, fabricated the items in Virginia Steel's shop

using certified welders, and delivered the items to Coleman-Adams at the job site. (J.A. 335-42). The steel column referred to in this case as the fire pole was no different, from the fabricators point of view, than the other steel columns fabricated by Virginia Steel. (J.A. 347).

Under Jamerson's analysis, the stairs, steel beams, and other fabricated steel would necessarily qualify as equipment in that they were subject to the same "quality control" and "warranty" alleged by Jamerson, were all "custom made" and not fabricated on the job site, and were not sold in bulk. They were all accompanied by shop drawings (J.A. 537-39).

Neither stairs nor steel beams can reasonably be said to be equipment, even though they would qualify as such under Jamerson's analysis. The platform and pole are no different. Like stairs and steel beams, the platform and pole were fabricated steel to be incorporated into a construction project. They were not equipment or machinery.

In light of the foregoing, it is clear that the trial court's ruling that the platform and pole did not constitute machinery or equipment within the meaning of Virginia Code § 8.01-250 was sound and was consistent with this Court's prior decisions. Thus Virginia Steel respectfully request that the trial court's decision be affirmed.

II. With Regard To Jamerson's Third Assignment of Error, The Trial Court Did Not Exclude Evidence Regarding The Fire Department's Training Of Firefighters With Respect To The Platform And Pole.

Jamerson's assertions to the contrary notwithstanding, the trial court did not exclude any evidence regarding the fire department's training of firefighters with respect to the platform and pole. (J.A. 419-23). Indeed, Jamerson testified that he received training from the fire department as to the use of the platform and pole. (J.A. 419-20). Specifically, he testified that he was shown "the best way to unhook the chain, grip the pole, and how to slide and land on my feet", and that he was told how to grip the pole and how to land. (J.A. 419-20).

After Jamerson had provided the above testimony, counsel for Coleman-Adams objected on the basis of a previous discovery dispute. (J.A. 420-21) In response to the objection, the trial court stated, "But if you're just going to ask him if he received training on how to slide down the pole, and if that's it, ***I'm going to allow it*** . . ." (J.A. 421) (emphasis added). In allowing Jamerson to testify as to training he had received from the fire department, the trial court correctly noted, "I don't see where that helps me class – as I understand this case law, the instructions didn't come from any manufacturer or any supplier." (J.A. 422).

After allowing evidence of Jamerson's training, the court then asked Jamerson's counsel, "Now what else do you want to ask him? And then I am going to see whether it's anything I'm going to allow or not." (J.A. 423). In response, Jamerson's counsel made absolutely no further attempts to offer any other evidence of training. Instead, he moved on to elicit testimony from Jamerson about access to the platform and pole. (Tr. 202). After Jamerson testified that non-members of the fire department were not allowed to use the platform or pole, the court stated, "All right. ***I'm going to allow that***, and then move on to something else." (J.A. 423) (emphasis added). Only after counsel for Jamerson continued to elicit further testimony from Jamerson about access to the platform or pole did the court state, "All right. That's the extent of it. Anything further? Objection sustained. Move on to something else." (J.A. 424).

In sustaining the objection, the court did not exclude any evidence of training. Indeed, at the time objection was sustained, no evidence of training was being elicited. Rather, after having completed his testimony as to training (which the court explicitly allowed), and after having testified as to access to the platform and pole, Jamerson continued to testify as to access to the platform and pole. (J.A. 424). It was only after Jamerson

continued to testify as to access, rather than training, did the court sustain the objection.

For the foregoing reasons, Virginia Steel respectfully requests that the trial court's decision be affirmed.

III. With Regard To Virginia Steel's Assignment of Cross-Error, Virginia Steel Was Not A Manufacturer or Supplier of Platforms or Poles, But Was Merely A Fabricator And Supplier Of Structural Steel.

Virginia Steel does not believe that the trial court erred in its disposition of the case. Indeed, once the trial court determined that the platform and pole at issue were not machinery or equipment within the meaning of Virginia Code § 8.01-250, which was the dispositive factual determination, it had no need to consider whether Virginia Steel was a "manufacturer" and/or "supplier" of the platform or pole in order to dispose of the matter. See Cooper Indus., Inc. v. Melendez, 260 Va. 578, 592, 537 S.E.2d 580, 588 (2000); Eagles Court Condo. Unit Owners Ass'n v. Heatilator, Inc., 239 Va. 325, 330, 389 S.E.2d 304, 307 (1990).

The trial court having found, however, that Virginia Steel was the "manufacturer" and/or "supplier" of the platform and pole, Virginia Steel believes that it is compelled to assign cross-error to that finding to preserve its argument to the contrary for review. See Wells v. Shoosmith, 245 Va. 386, 388 n.1., 428 S.E.2d 909, 910 n.1 (1993).

A. Virginia Steel Is Is A Supplier Of Steel And Fabrication Services.

Virginia Steel is not, and never was, a manufacturer or a supplier of platforms or poles. Virginia Steel did not hold itself out as being a platform or slide pole provider. (J.A. 333-34). Coleman-Adams did not engage the services of Virginia Steel because of any reputation for providing platforms (J.A. 313). Rather, Coleman-Adams engaged the services of Virginia Steel because Virginia Steel was providing the steel for the project. (J.A. 313). In fact, Virginia Steel had provided steel and fabrication services to Coleman-Adams for approximately twenty years, having worked on hundreds of jobs for Coleman-Adams over that time. (J.A. 334). Virginia Steel had never done anything for Coleman-Adams other than steel fabrication. (J.A. 334).

In this case, Virginia Steel did nothing more than furnish structural steel, an ordinary building material, and furnished the construction service of steel fabrication. Virginia Steel is, and always has been, nothing more than a supplier of steel and steel fabrication services.

Jamerson concedes that Virginia Steel was a furnisher of steel fabrication services. Indeed, paragraph 8 of Jamerson's Third Amended Complaint states that Coleman-Adams contracted with Virginia Steel for the "custom fabrication of a metal platform assembly and slide pole." (J.A. 2). However, after conceding that Virginia Steel was a steel fabricator and that

the platform was a product of the steel fabrication process, Jamerson then incorrectly equates steel fabrication with manufacturing.

B. Virginia Steel Is Not, And Never Was, A Manufacturer.

Steel fabrication and manufacturing are not one and the same. Indeed, the role of a "fabricator" is clear and unambiguous under Virginia construction law and is clearly spelled out in the Virginia Uniform Statewide Building Code. See Virginia Code § 36.98 (authorizing the Board of Housing and Community Development to adopt and promulgate the Virginia Uniform Statewide Building Code) and 13 VAC § 5-63-10(B) (incorporating the International Building Code).

Section 1702.1 of the Building Code defines a "Fabricated Item" as "Structural, load bearing or lateral load-resisting assemblies consisting of materials assembled prior to installation in a building or structure or subjected to operations such as heat treatment, thermal cutting, cold working or reforming after manufacture and prior to installation in a building or structure." Virginia Uniform Statewide Building Code, Part I, § 1702.1 (1996).

The Building Code further provides that the steel fabrication process is part of structural steel construction. It is not part of a manufacturing process. Indeed, section 2203.1 provides that "structural steel

construction used in all buildings and structures shall be ***fabricated*** from materials of uniform quality which are free from defects that vitiate the strength or stability of the structure." Id. at § 2203.1 (1996) (emphasis added).

Jamerson points to the fact that the steel was fabricated in Virginia Steel's fabrication shop as support for his argument that the platform and pole were "manufactured." The Building Code, however, recognizes that steel fabrication occurs in a fabricator's shop. Section 1705.2 provides for the inspection of fabricators (a duty imposed on the owner of the building being constructed by section 1705.1), and specifically states that "where fabrication of structural load bearing members and assemblies is being performed on the premises of a fabricator's shop, special inspection of the fabricated items shall be required." Id. at § 1705.2 (1996).

In this case, Virginia Steel's fabrication of the steel involved welding. Jamerson relies on this fact in support of his argument that this was actually a manufacturing process. However, section 1705.3.1 of the Building Code expressly recognizes that welding is part of the fabrication process. Id. at § 1705.3.1 (1996) ("Special inspections of the steel fabrication process shall not be required where the fabricator does not perform any welding . . . .').

It is clear that under Virginia construction law, Virginia Steel is a steel fabricator, and that the platform was something that resulted from the fabrication process. The trial court, however, in ruling that Virginia Steel was a "manufacturer" failed to recognize that there is a distinction between a fabrication process and a manufacturing process. There is a distinction. Indeed, as the Building Code clearly shows, fabrication is a service furnished in the building construction process. In fact, the Building Code itself makes a distinction between fabrication and manufacturing. See Id. at §§ 306.1 (2006) ("Factory Industrial Group F occupancy includes, among others, the use of a building or structure, or a portion thereof, for assembling, disassembling, fabricating, finishing, manufacturing, packaging, repair or processing operations . . . .).

As a steel fabricator engaged in steel fabrication, which under the Building code constitutes "Steel Construction", Virginia Steel's role was that of a subcontractor, similar to the role played by the swimming pool construction company in Luebbers, 255 Va. 368, 498 S.E.2d 911 (1998). In that case, the contractor purchased component parts for a swimming pool, which the contractor used in the construction of the swimming pool according to dimensions and shapes desired by a particular customer. The

contractor assembled those parts and incorporated them into the real estate as part of constructing a swimming pool.

In the instant case, Virginia Steel was hired by a general contractor to provide the steel and fabrication services for a platform and pole for a particular building. Virginia Steel acquired structural steel from a steel supplier, which it assembled in the fabrication of the platform and pole according to the dimensions and shapes desired by a particular customer – the general contractor, Coleman-Adams. The platform and pole were then incorporated into the real estate by the general contractor.

The platform incorporated in to the real estate is nothing more than a balcony. The pre-fabricated structural component material of the platform or balcony was steel, which is clearly fungible and constitutes ordinary building materials. See Luebbers, 255 Va. at 373, 498 S.E.2d at 913 (1998). Individually, the pre-fabricated steel components served no function other than as generic materials to be included in the larger whole, and are indistinguishable, in this context, from the steel panels in Luebbers. Id.

A "balcony" is "a ***platform*** projecting from the wall of a building and enclosed by a railing or balustrade: balconies usually open onto an upper story." Webster's New World Dictionary 111 (1964) (emphasis added).

Virginia Steel was hired by Coleman-Adams to fabricate "One 3'-0 X 3'-0 Grating Platform With Rails." (J.A. 513). That platform with rails, after incorporation into the fire department building, projected from the wall of the building and opened onto the fire department's second story. (See J.A. 540). in other words, Virginia Steel fabricated a steel balcony using steel, an ordinary building material.

A balcony is clearly not equipment or machinery. It is a part of a building, and it serves no purpose apart from its incorporation into the structure of the building. In fact, Virginia Code § 8.01-250 has been applied by at least one Virginia trial court to bar an action for the negligent construction of a balcony. See Hess v. Snyder Hunt Corp., 240 Va. 49, 392 S.E.2d 911 (1998). It should be noted that this Court, in Hess, did not consider whether the balcony constituted machinery or equipment. Rather, the issue before the Court was the constitutionality of Virginia Code § 8.01-250.

In this case, Virginia Steel did nothing more than provide the steel and fabrication services for the construction of a balcony and a steel column. Had the fire department desired a wooden balcony, a carpenter (who essentially provides wood and wood fabrication services) could have gone to the project site and, using wood materials, constructed something

nearly identical to the platform at issue in this case. And had the balcony been constructed of wood, it is highly unlikely that a viable argument could be made that the balcony constituted machinery or equipment. Indeed, wood is an ordinary building material.

Steel is also an ordinary building material. See Luebbers, 255 Va. at 373, 498 S.E.2d at 913. Because of the nature of steel construction, however, steel fabrication takes place in a fabrication shop instead of at the project site. But that is essentially the only difference between a balcony constructed of wood and one constructed of steel. The end result – a balcony – would serve the same purpose: to provide a place to step onto when exiting the second story door.

Because Virginia Steel was a fabricator involved in furnishing structural steel and steel fabrication services, the trial court erred in ruling that Virginia Steel was a “manufacturer” and/or “supplier” of the platform and pole.

CONCLUSION

For the foregoing reasons, the appellant, Virginia Steel & Building Specialties, Inc. respectfully asks that the Court affirm the ruling of the trial court. Alternatively, Virginia Steel & Building Specialties, Inc. respectfully asks the Court to reverse the trial court's ruling that Virginia Steel was a manufacturer and supplier of the platform and pole and grant final judgment for Virginia Steel.

Respectfully submitted,

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CERTIFICATE

The undersigned hereby certifies that on this 10th day of March, 2010, fifteen (15) copies of the foregoing Brief of Appellee were hand delivered to the Clerk of the Supreme Court of Virginia and a copy was filed electronically on CD, and that three (3) copies each were mailed or delivered to Counsel for Kevin Jamerson, Appellant, and Counsel for Coleman-Adams Construction, Inc., Appellee, at the following addresses:

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