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.

OPENING BRIEF OF APPELLANT KEVIN JAMERSON

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NATURE OF THE CASE

This case involves a product liability action, wherein the plaintiff, a volunteer firefighter, was severely injured when a custom fabricated metal platform (made for use with a custom fabricated slide pole) that he was standing on failed, causing the plaintiff to fall approximately fifteen feet to the concrete floor below. The plaintiff sustained a laceration to the lip; damage to three teeth; facial bruising, concussion; degloving of the left heel; injuries to the left foot include: fractures of the heads of the second, third and fourth metatarsal, fracture at the base of the second metatarsal, dislocation of the metatarsals from the calcis, open calcaneous fracture with posterior degloving, and fracture dislocation of the Lisfranc joints; injuries to the right foot include: non-displaced fracture of the lateral malleolous, fracture arising from the os calcis, bony fragments displaced toward the heel, extensive complex Lisfranc fracture dislocation of the right foot, and the Lisfranc joint was fractured and dislocated from the navicular cuneiform joint. As of January 2009, the Plaintiff had incurred $422,307.75 in medical expenses. To date, the Plaintiff continues to treat for the injuries sustained in this incident.

This custom manufactured platform and pole were supplied to the

Moneta Volunteer Fire Department by Defendant Coleman-Adams Construction, Inc. The platform and slide pole components were, as indicated in the hearing transcript, jointly manufactured and supplied by Defendants Virginia Steel & Building Specialties, Inc. and Coleman-Adams Construction, Inc.

The defendants filed pleas in bar, asserting that the cause of action was barred by Virginia Code §8.01-250. Discovery was limited to the plea in bar issue and an ore tenus hearing was had as to the Defendants' pleas in bar on February 2, 2009.

At the hearing, the trial court ruled that Defendant Coleman-Adams Construction, Inc. was a "supplier", pursuant to Virginia Code §8.01-250, but that it was not a "manufacturer", pursuant to Virginia Code §8.01-250. The trial court ruled that Defendant Virginia Steel & Building Specialties, Inc. was a "manufacturer" and a "supplier" pursuant to Virginia Code §8.01-250.

The Court also ruled that the platform and slide pole were not "equipment" or "machinery" or "other article" pursuant to the exception in Virginia Code §8.01-250, and sustained the Defendants' pleas in bar. Jamerson's Petition was accepted on all three points of error, as were the

defendants' alleged cross errors.

ASSIGNMENTS OF ERROR

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.

II. The trial court erred in ruling that Coleman-Adams Construction, Inc. was not also a "manufacturer", pursuant to Virginia Code §8.01-250.

III. The trial court erred in excluding evidence regarding the Moneta Volunteer Fire Department's training of fire fighters with respect to the slide pole and platform.

IV. The trial court erred in finding that Coleman-Adams was a "supplier" of a steel platform and pole within the meaning of Virginia Code §8.01-250. (Coleman-Adams' assignment of Cross-Error)

V. 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. (Virginia Steel's assignment of Cross-Error)

QUESTIONS PRESENTED

I. Whether 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. (Error I)

II. Whether the trial court erred in ruling that Coleman-Adams Construction, Inc. was not also a "manufacturer", pursuant to Virginia Code §8.01-250. (Error II)

III. Whether the trial court erred in excluding evidence regarding the Moneta Volunteer Fire Department's training of fire fighters with respect to the slide pole and platform. (Error III)

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

V. Did the trial court 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)

STATEMENT OF FACTS

In 1997, the Moneta Volunteer Fire Department contracted with Coleman-Adams Construction, Inc. (hereinafter referred to as "Coleman-Adams") for the construction of a new fire station. App. 259. Coleman-Adams acted in a "design build" capacity, meaning that they would design and build the building. App. 257, 259. The designated contact for the fire department was fireman Ricky Tuck. App. 257. The primary contact for Coleman-Adams was Charles Evans. App. 272. The original design of the building included two floors consisting of meeting rooms, training rooms, sleeping quarters, a recreational room and a kitchen. App. 494. The building also contained a garage area to house the firemen's lockers and the fire and rescue trucks. App. 537, 538, 539.

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 egress to reach the fire trucks and to shorten their response times. App. 280-281,329. The Moneta Volunteer Fire Department's contact person, Ricky Tuck, approached Coleman-Adams' Project Manager, Charles Evans about available options. App. 279.

Eventually Coleman-Adams offered, and the Moneta Volunteer Fire Department accepted, a slide pole and platform. App. 281, 315. This platform and slide pole were done as a change order, since they were not contemplated in the original design build contract. App. 275-277, 327. The building was to be modified, in that a window overlooking the garage area, as depicted in the original building plans, was to be changed into a doorway, so the firemen could use the platform and slide pole. App. 280-281, 327.

Coleman-Adams then contacted one of its usual manufacturers, Virginia Steel & Building Specialties, Inc. (hereinafter referred to as "Virginia Steel") for a price quote for the manufacture of the platform and slide pole. App. 283. Virginia Steel knew that the platform and slide pole

were going to be used in the Moneta Volunteer Fire Department. App. 361. Virginia Steel had the building plans for the Moneta Volunteer Fire Department because it had also supplied structural steel for the project. App. 362. The building plans indicated that the wall that the platform would be mounted to was concrete block. App. 142, 143.[1]

Coleman-Adams received a price quote from Virginia Steel of $820.00 for the custom manufacture of a slide pole and platform for the Moneta Volunteer Fire Department. App. 283, 513. Coleman-Adams then prepared a lump sum price quote of $3,256.00 to install and supply the subject platform and slide pole to the Moneta Volunteer Fire Department. App. 326, 516. Based upon Coleman- Adams internal documents, the $3,256.00 price was based upon the following: steel $820.00; paint $250.00; install $700.00; door $435.00; labor $400.00 then a 25% markup to the total ($651.00). App. 291. A "shop drawing" is a drawing that is used by a manufacturer to fabricate something. App. 318, 341. The shop drawing also contains installation instructions, and accompanies the final

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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.

product out in the field. App. 299, 317-319. This shop drawing was sent to Coleman-Adams for review and final approval prior to manufacture of the platform and slide pole. App. 297, 317. Therefore, Coleman-Adams had authority to completely revise the drawing if it did not meet their needs or if they were dissatisfied with it. Coleman-Adams did make revisions to the drawing consisting of "trim to top of grating this side only", and then approved the drawing prior to Virginia Steel's fabrication of the platform and slide pole. App. 349-350. Neither Ricky Tuck nor any member of the Moneta Volunteer Fire Department had any role in the approval of the shop drawing. Coleman-Adams also admitted that it reviewed the drawing and checked the dimensions and sizes were what was necessary, and that it confirmed the dimensions on site to make sure it would work with what was there. App. 297.

The subject platform and slide pole was a custom-made, one-of-a-kind piece. App. 370. One could not go to a store and buy it off the shelf. The designer of the platform and slide pole selected the length, width, thickness, and configuration of the platform, including the supporting braces and handrails. App. 369. The platform was subject to a quality control process. App. 328, 386. The platform was welded together by a

Virginia Steel employee who was an American Welding Society certified welder. App. 386. This means that the welder was certified to weld structural and miscellaneous metals after passing a special test. App. 386. The welds and fabrication were subjected to inspection after construction of the platform was completed. App. 386-387. The inspection consisted of an inspection of the welds and "whether the platform matched the shop drawing". App. 388. The shop drawing, contained among other things, the configuration and size of the holes, dimensions of the platform and braces. App. 387-388, App. 522. The steel would also be inspected for cracks or other defects. App. 387-388. The platform and pole passed inspection. Virginia Steel then delivered the platform and slide pole to the job site along with the shop drawing. App. 317, 361. Appellee Coleman-Adams' employee, Charles Evans, the Vice President of Coleman-Adams and the project manager, admitted that Coleman-Adams also would have inspected the platform and all of its parts prior to installation. App. 328.

While it does not appear that Virginia Steel supplied a written warranty, Virginia Steel testified that if Coleman-Adams inspected the platform upon delivery and did not like a weld, or thought something was off in any way, shape or form, they could have contacted Virginia Steel to

come fix it. App. 389-390. Ms. Fleshman was reluctant to call that a warranty, but admitted that is what she called it in her deposition. App. 390. Virginia Steel Vice President, Tina Fleshman, testified that this was applicable even two (2) years down the road if someone told Virginia Steel that something was wrong with the platform. App. 389.

The shop drawing provided by Virginia Steel to Coleman-Adams with the platform included instructions specific to the installation of the subject platform, including installation methods and the size and type of hardware that should be used. App. 382. While Virginia Steel disputes this, Appellee Coleman-Adams' project manager admitted that the shop drawing was meant to accompany the product out in the field and that it contained installation instructions. App. 317-318.[2] This is further supported by Appellee Coleman-Adams' attorney's questions:

> Q: And as indicated in the shop drawings, how was the platform to be installed, generally?

Appellee's counsel quickly realized what he had done as he interrupted his client who had started to say:

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[2] Early in her direct testimony, while discussing a portion of the shop drawing illustrating the slide pole, Ms. Fleshman stated: "There's a connection shown here. It's - -it would be how you connected the top. " App. 346.

A. "According to the shop drawing, it was to be --" App. 299.

For this platform, the shop drawing instructed the installers to use ½" thick Kwik bolts, that were 4 1/4" long or "thru bolts if possible". App. 382. A "kwik bolt" is an expanding specialty bolt used in construction. App. 96. A thru bolt is a steel rod that is pierced thru the block wall and then fastened on the other side of the wall with a washer and nut. Virginia Steel typically supplied the installation hardware. App. 382-383. Virginia Steel was unable to prove that it did not supply the specified attachment hardware. App. 383.

Virginia Steel claimed that it did not design the subject platform, but that it received detailed specifications for the platform, including a detailed engineering drawing from Coleman-Adams. App. 349-350, 360, 369-370. Allegedly, an engineering drawing is provided first, and the shop drawing is based upon that. App. 336-337. Tina Fleshman, Vice President of Virginia Steel denies that she or any other employee prepared an engineering drawing for the platform. App. 349. However, Ms. Fleshman could not find an engineering drawing of the platform. App. 377-378. Virginia Steel produced similar engineering drawings done by employees of Coleman-Adams for this project, as proof that Coleman-Adams had the ability to

construct such drawings in house and did so on prior occasions. App. 372-374, 377, 492. Coleman-Adams' Vice President, Charles Evans, the project manager of this job, was a professional engineer. App. 320. He had previously designed water and sewer lines and highways. *Id.* He admitted that he could have provided general knowledge of what the platform looked like, and could have provided a three dimensional image of it. App. 321-322. He admitted that he had to have provided more information to Virginia Steel than simply "three by three platform and slide pole", as indicated on the fax coversheet. App. 323, 513.

Coleman-Adams contracted with the Moneta Volunteer Fire Department for the manufacture, supply, and installation of the subject platform and slide pole. App. 326, 513. Coleman-Adams billed the Moneta Volunteer Fire Department for the subject platform and slide pole and their associated installation. App. 491. The Moneta Volunteer Fire Department never received any bills from Virginia Steel for the subject platform and slide pole. App. 384. Virginia Steel confirms that it did not bill the Moneta Volunteer Fire Department for the subject platform and slide pole and that its contract was with Coleman-Adams only. App. 361, 384.

At the time of the incident, Kevin Jamerson was a probationary

volunteer firefighter for the Moneta Volunteer Fire Department. App. 417-418. Kevin Jamerson testified that prior to this incident, he received training from the Moneta Volunteer Fire Department on how to use the platform and slide pole. App. 419. Mr. Jamerson testified that the platform and slide pole were only to be used for emergency calls; and that the public was not allowed to use the slide pole. App. 423-424.

Despite having worked as many seven hundred and fifty projects, Coleman-Adams Vice President, Charles Evans testified that this was the first pole and platform he had ever furnished for a customer. App. 319. Tina Fleshman, Vice President of Virginia Steel, admitted that she had been involved in thousands of projects and this was the first platform and slide pole project she had done. App. 385. To date, the platform has not been replaced, however, the building still remains useable without the platform. App. 328. The certificate of occupancy was issued for this building on March 1, 1999. Mr. Jamerson was injured on November 4, 2006. Mr. Jamerson has incurred over $422,307.75 in medical expenses and sustained fractures of the left metatarsals; dislocation of the left metatarsals from the left tarsus; fracture of the left calcis; open heel fracture with degloving; fracture dislocation of the left Lisfranc joints;

fracture of the right lateral malleolus; fracture from the right calcis; extensive complex fracture dislocation of the right foot; and fracture of the right Lisfranc joint at the medial cuneiform, resulting in dislocation from the navicular cuneiform joint, facial bruising and laceration, concussion and dental damage.

STANDARD OF REVIEW

This Court previously stated that, "the party asserting the plea in bar bears the burden of proof". *Baker v. Poolservice Company*, 272 Va. 677, 688, 636 S.E.2d 360, 366 (2006) (Internal citation omitted). "When, as here, the trial court heard evidence ore tenus and the trial court decided 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.*

However, this case involved the issue of statutory interpretation and application of that law to facts. Statutory interpretation presents pure questions of law. *Boynton v. Kilgore*, 271 Va. 220, 227 623 S.E.2d 922, 925 (2006). This Court has said that it reviews questions of law de novo, including those situations where there is a mixed question of law and fact.

Uninsured Employer's Fund v. Gabriel, 272 Va. 659, 663, 636 S.E.2d 408, 411 (2006).

ARGUMENT

I. The trial court erred in ruling that the platform and slide pole at issue were not "equipment, machinery and/or other articles" and in granting the Appellees' plea in bar.

The trial court erred in ruling that the platform and slide pole at issue were not "equipment or other articles" and thus ruling that the plaintiff's cause of action is barred by Virginia Code §8.01-250 (the statute of repose). The trial court incorrectly made up its own test to determine whether the platform and slide pole were "equipment" or "other articles". The trial court determined that in order to be equipment, the product at issue must "do something" App. 484-488.

This "do something" test has never been approved by this Court as a factor to determine if the product at issue is "equipment, machinery or other articles". Furthermore, the trial court ignored the "ordinary building materials doctrine" set forth by this Court, and disregarded the defendant manufacturer's and suppliers' control over the manufacture, installation and use of the subject platform and slide pole. Therefore, the trial court's findings and conclusions even under a more stringent standard of review

are plainly wrong and/or without sufficient evidence to support them.

Virginia Code §8.01-250 states in pertinent part:

> No action to recover for . . .bodily injury . . . arising out of the defective and unsafe condition of an improvement to real property. . . 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.

There is an exception to this portion of the statute. An exception is granted to the "manufacturer" or "supplier" of "equipment, machinery or other articles installed with a structure upon real property..." Virginia Code §8.01-250. This Court has never defined the term "equipment", "machinery" or "other article". Instead, this Court has focused on defining characteristics of "ordinary building materials", since that is what the statute was intended to protect. This Court has relied on such things as mass production, assembly of parts beyond control of the manufacturer or supplier and lack of any quality control.

Based on the legislative history of Virginia Code §8.01-250, this Court in *Cape Henry Towers, Inc. v. National Gypsum Co.*, 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985) and its subsequent line of cases has interpreted Virginia Code §8.01-250 to bar actions against those "who

furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers or suppliers." *Luebbers v. Fort Wayne Plastics, Inc.*, 255 Va. 368, 372, 498 S.E.2d 911, 913 (quoting *Cape Henry Towers*, 229 Va. at 602, 331 S.E.2d at 480). Thus, the pertinent question in any statute of repose case is whether the product (i.e. the platform and slide pole in this matter) in question is ordinary building material or equipment, machinery or other article. If the product is ordinary building material then Virginia Code §8.01-250 bars any action against the manufacturer or supplier of the product.

This "ordinary building materials doctrine" as this Court has called it, has been used by the Court in all statute of repose cases since *Cape Henry* to date. See *Cape Henry Towers, Inc. v. National Gypsum Co.*, 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985); *Grice v. Hungerford Mechanical Corp.*, 236 Va. 305, 306, 374 S.E.2d 17, 17 (1988); *Luebbers v. Fort Wayne Plastics, Inc.*, 255 Va. 368, 498 S.E.2d 911 (1998); *Cooper Industries*, supra; and *Baker v. Poolservice Company,* 272 Va. 677, 636 S.E.2d 360 (2006). According to relevant case law, ordinary building materials are not "equipment or machinery or other articles."

The purpose of the statute makes sense. Why should the

manufacturer of ordinary building materials such as plywood, nails, or sheetrock be held accountable for injuries caused by their products when they have absolutely no control over how their products are used or incorporated into a structure? Notably different are the facts of the case at bar, which prove that the manufacturer and supplier of the platform and slide pole had complete control over the manufacture, design, assembly, delivery, sale and installation of the platform and slide pole. This was not a staircase or balcony for everyday use. It was special equipment designed and built for use in emergencies for those trained in its use. Furthermore the characteristics of the platform and slide pole itself indicate that it was "equipment" or "other article" as contemplated by the statute and legislative history.

In *Cape Henry v. Natl. Gypsum,* 229 Va. 596, 331 S.E.2d 476 (1985), this Court found that exterior wall panels used in the construction of condominium units were "ordinary building materials" and not "equipment" within the meaning of Virginia Code §8.01-250, Id. These panels were purchased from a building supply company and were sprayed with a coating on the building site. Id. at 598, 331 S.E.2d at 478. This Court interpreted Virginia Code §8.01-250 to bar actions against those "who

furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers or suppliers." Id. at 602, 331 S.E.2d at 480. This Court further stated that "[u]nlike 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 . . . " *Id.*

In the case at bar, the subject platform was subject to quality control at the factory and had a warranty, both characteristics of equipment as set forth in *Cape Henry*. The platform was welded together by a Virginia Steel employee that was an American Welding Society certified welder. This means that the welder was specifically certified to weld structural and miscellaneous metals after passing a special test. The welds and fabrication were subjected to inspection after construction of the platform was completed. The inspection consisted of an inspection of the welds and confirming that the platform and slide pole matched the drawing (dimensions and configuration, and size of the holes and braces). The kind of steel used in the platform and pole was specified and approved by the appellees. App. 352-353. The steel was also inspected for cracks or other defects. Id. at p. 388. The platform and slide pole were also

inspected by the supplier, Coleman-Adams. App. 328.

The platform and slide pole also had a warranty. App. 389-390. While it does not appear that Virginia Steel supplied a written warranty, Virginia Steel testified that if Coleman-Adams inspected the platform and slide pole upon delivery and did not like a weld, or thought something was off in any way, shape or form, they could have contacted Virginia Steel to come fix it. Virginia Steel Vice President, Tina Fleshman, testified that this was applicable even two (2) years down the road if someone told Virginia Steel that something was wrong with the platform. App. 389-390.

Unlike the ordinary building materials in *Cape Henry*, the subject platform and slide pole were not purchased from a retailer or distributor, it was a one of a kind, custom manufactured, product. App. 370. The platform and slide pole were manufactured by Appellee Virginia Steel, and supplied to the Moneta Volunteer Fire Department by Appellee Coleman-Adams, made specifically for this particular building, and for a particular location within the building. The manner of its incorporation into the building could only be (and was) controlled by both Virginia Steel and Coleman-Adams by their specific installation instructions. App. 522.

In *Grice v. Hungerford Mechanical Corp.*, 236 Va. 305, 374 S.E.2d

17 (1988), the defendant bought the electrical panel box and its several component parts at issue on separate occasions; and then assembled and installed the unit on the building site according to the plans for the house as part of the electrical system of the house. Id. at 309, 374 S.E.2d. at 19. This Court held that the electrical panel box and its parts, purchased separately and without instructions for assembly or installation from the manufacturer, and assembled on-site by the subcontractor according to the house plans, were ordinary building materials. *Id.*

Contrary to the ordinary building materials in *Grice*, the subject platform and slide pole were not fabricated on the job site, nor were they assembled on site from a number of component parts, but instead were constructed by appellee Virginia Steel (the manufacturer) at its plant and delivered completed with instructions as to how to install them in the building. The shop drawing specified how the platform and slide pole were to be installed and recommended two different types of attachment methods and hardware. App. 522. The platform and slide pole were then installed by appellee Coleman-Adams (the supplier). App. 317, 361.

In *Luebbers v. Fort Wayne Plastics*, 255 Va. 368, 498 S.E.2d 911 (1998), the plaintiff sued over component parts of a residential swimming

pool. The plaintiff alleged that the decedent had died in a swimming pool accident, resulting from the negligent design, manufacture and installation of the pool's component parts. *Id.* at 371, 498 S.E.2d at 913. This Court held that steel panels, braces and vinyl liners used in the construction of a swimming pool were "ordinary building materials" and not "equipment" under Virginia Code §8.01-250. *Id.* at 372-374, 498 S.E.2d at 913-914.

This Court relied on the fact that the distributor purchased these component parts in bulk from the manufacturer and then held them for resale to swimming pool contractors as parts of swimming pool kits. *Id.* at 372, 498 S.E.2d at 913. This Court said that the component parts at issue were interchangeable with other component materials in swimming pool construction; and explained that pre-fabricated structural component materials were "clearly fungible. . . [i]ndividually, 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 discussed in *Cape Henry Towers*." *Id.* The manufacturer in *Luebbers* had no control over how these parts which were sold in bulk by the manufacturer, were cut up and put together by the company that put the pool package together. *Id.* These were ordinary building materials used for constructing

swimming pools. *Id.*

Unlike the ordinary building materials in *Luebbers*, the subject platform and slide pole were not sold in bulk. They were a custom made, one of kind item and could not be purchased at a store. Furthermore, the subject platform and slide pole were not a collection of component parts, assembled at the work site. The subject platform and slide pole were delivered to the site, and need only be attached to the wall. The subject platform and pole were delivered to the site with instructions from the manufacturer for its installation. The platform and slide pole were not generic parts of a larger kit as were the parts in *Luebbers*. The platform and slide pole were pre-assembled by the manufacturer and manufactured for a specific purpose and function, unique to this job and building. Virginia Steel delivered a finished product to Coleman-Adams, not a bunch of steel in bits and pieces to be welded together on site to create a platform and slide pole, however Coleman-Adams decided to put it together.

Lastly, unlike *Luebbers*, the <u>manufacturer and supplier</u> of the subject platform and slide pole (Virginia Steel and Coleman-Adams) <u>did have control</u> over how the platform was manufactured, assembled, supplied and installed. Both Coleman-Adams and Virginia Steel reviewed and

approved the detailed design drawing of the platform and slide pole, which contained installation instructions, prior to their fabrication. The shop drawing contained instructions for installation, which were also reviewed by both Coleman-Adams and Virginia Steel. Lastly, it was Appellee supplier Coleman-Adams that contracted to install the platform and slide pole and that billed Moneta Volunteer Fire Department for their installation.

In *Baker v. Poolservice Company*, 272 Va. 677, 636 S.E.2d 360 (2006) the plaintiff sued a pool service company, and the manufacturer of a pool drain cover after a seven year old drowned when he became pinned to an underwater drain cover. This Court determined that this mass produced drain cover for installation in swimming pools and spas was not equipment. *Id.* at 690, 636 S.E.2d at 368. The drain cover was sold "primarily, if not exclusively, to distributors". *Id.* This Court said that the drain cover individually served no function other than as generic material to be included in the larger whole. *Id.* at 690, 636 S.E.2d at 367-368.

Unlike the ordinary building materials in *Baker*, the subject platform and slide pole were not sold in bulk and were not generic parts to be included in the larger whole. The platform and slide pole were not sold to distributors. The platform and slide pole were constructed at the

manufacturer's plant and delivered to the job site. This one-of-a-kind platform and slide pole were built specifically for the Moneta Volunteer Fire Department and served a specific purpose and function, a means for quick access for the Moneta Volunteer Firefighters to get to the fire truck and lockers. This platform and slide pole were not common components when supplied to the Moneta Volunteer Fire Department.

Unlike *Cape Henry, Grice, Luebbers* and *Baker,* in which the subject materials were manufactured in bulk without a specific end user in mind, the components at issue in this case were manufactured specifically for the Moneta Volunteer Fire Department, in accordance with detailed drawings prepared and approved by Appellees Virginia Steel and Coleman-Adams, for use in the Moneta Volunteer Fire Department only. The platform and slide pole are not "fungible" or "interchangeable" like the swimming pool components in *Luebbers* or purchased from a distributor like the wall panels in *Cape Henry*. The platform and slide pole were made to be used together in the fire station as equipment for speeding up movement from the second floor to the garage bays, for use by the Moneta Volunteer Fire Department personnel only.

The "quality and quantity of the component parts" of the platform and

slide pole were determined by Virginia Steel and Coleman-Adams, not by the owner (Moneta Volunteer Fire Department) as in *Grice*. Moreover, the instructions for installing the platform and slide pole were prepared by the manufacturer of the platform (Virginia Steel) and specifically approved by the supplier (Coleman-Adams), unlike the situation in *Grice*. Also the platform and slide pole were actually assembled at the Virginia Steel plant, and merely had to be installed in the building on site, similar to the facts in *Cooper.* How they were installed on site was controlled by how they had been manufactured by Virginia Steel, and approved by the supplier, Coleman-Adams.

Similar to the circuit breakers in *Cooper* that "had been tested at the factory and needed only to be placed in a switchgear that contained a compatible cradle", the platform and slide pole had been tested and inspected at the Virginia Steel plant and needed only to be installed on site by connecting the platform to the wall and the slide pole from floor to ceiling. *Cooper* 260 Va. at 595, 537 S.E.2d at 590. Detailed instructions showing how to properly connect the platform and slide pole were also sent to the site by Virginia Steel and Coleman-Adams. While not offering a written warranty, Virginia Steel testified that it would repair or replace

defects in the platform up to two years after its manufacture. This too was recognized as a characteristic of "equipment or machinery" as defined in *Cape Henry.*

Both Virginia Steel and Coleman-Adams exhibited and maintained the control referred to in *Cape Henry* as being indicative of a manufacturer and supplier of "equipment" rather than a manufacturer of "ordinary building materials". They controlled the manufacture and assembly of the platform and slide pole and their installation in such a manner and to such an extent that they should be held liable for the equipment's failure that occurred in this case.

The subject slide pole and platform are not similar to stairs. Stairs are everyday use structures in buildings, and a building cannot function without them. Contrarily, the platform and slide pole are emergency equipment, made specifically for this building, whose sole purpose was to provide quicker access to the fire trucks and firefighter's gear. Their use was restricted to fire fighting personnel for emergency use. The fire department's building still functions today, without the platform and slide pole.

Virginia Steel prepared the final drawings of the subject platform and

slide pole, manufactured and assembled the components, and delivered them to the job site. Coleman-Adams, the designer and builder of the Moneta Volunteer Fire Department building, selected the platform and slide pole, approved and made changes to the platform and slide pole's final design drawings, and installed the already assembled/pre-fabricated subject platform and slide pole, in the Moneta Volunteer Fire Department building that it had designed and manufactured.

The platform and slide pole were not installed in the Moneta Volunteer Fire Department by contractors or subcontractors chosen by the building's owner, as was the case in *Cape Henry, Grice* and *Luebbers*. The platform and slide pole were installed by the supplier/manufacturer, Coleman-Adams. The platform and slide pole were installed as-is. They were not cut, shaped, trimmed, altered or modified in any way, as the parts were in *Luebbers*.

Lastly, the platform and slide pole were used and treated as equipment by the volunteer firefighters themselves. The firefighters received special training on how to use the equipment, i.e. how to properly grip and land in order to assure safe usage. The equipment was restricted to use by firefighters only and the equipment was to be used only in

emergency situations.

Alternatively, the subject platform and slide pole were "other articles" as stated in Virginia Code §8.01-250. While this Court concluded some twenty five years ago in *Cape Henry v. National Gypsum*, that the "words or any 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: "the manufacturer or supplier of any equipment or machinery", *(Cape Henry v. National Gypsum*, 229 Va 596, 603, 331 S.E.2d. 476, 481 (1985)), it is difficult to conclude that these words mean nothing.

Presumably, if the words meant nothing, then there was no need for the General Assembly to add these words to the statute. **"[E]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary"**. *Jackson v. Commonwealth,* 274 Va 630, 634, 652 S.E.2d. 111, 113 (2007) (internal citation omitted). **"The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd"**. *Gibson v. Commonwealth*, 50 Va. App. 285, 294, 649 S.E. 2d. 214, 218, (2007). The logical reason that this language was included was that the General Assembly understood that

there might be items that did not fit nicely into the definition of "equipment" or "machinery" and the phrase "other articles" was included to enlarge the scope of what might be exempted under the statute.

Essentially, the statute of repose exceptions allow the injured party to look through the overall building structure (something like piercing the corporate veil) to hold liable the manufacturers and suppliers of certain items which were within the ability of the manufacturer and supplier to control the quality and use of those products. The subject platform and slide pole are such products and Coleman-Adams and Virginia Steel are the manufacturers and suppliers who controlled the quality and use of these products.

The trial court erred in ruling that the subject platform and slide pole were not "equipment" or "other articles" within the meaning of Virginia Code §8.01-250. The conclusion should be inescapable that the platform and slide pole constitute "equipment" or "other article" within the meaning of Virginia Code §8.01-250, thus Coleman-Adams' and Virginia Steel's pleas in bar should have been denied. Therefore, Kevin Jamerson respectfully requests this Court to reverse the trial court and find that the subject product is "equipment" or "other articles", and remand this case for

a trial on the merits.

II. The trial court erred in ruling that Coleman-Adams Construction, Inc. was not also a "manufacturer", pursuant to Virginia Code §8.01-250.

The word "manufacturer", as used in Virginia Code §8.01-250, is not defined by that statute. Similarly, no Virginia Supreme Court case has defined the word "manufacturer" as used in Virginia Code §8.01-250.

When the language of a statute is unambiguous, the Supreme Court is bound by the plain meaning of that language. *Bostic v. About Women OB/GYN, P.C.*, 275 Va. 567, 659 S.E.2d 290 (2008). This Court need not look any further than Merriam-Webster's Dictionary (and its own common sense), for the common meaning of the word manufacturer. Merriam-Webster defines "manufacturer" as "one that manufactures". Merriam-Webster's dictionary defines "manufacture" as "the act or process of producing something". In the case at bar, Coleman-Adams was involved in the process of producing the subject platform. According to Virginia Steel's evidence, it was Coleman-Adams that provided them with the design of the subject platform. By all accounts, Coleman-Adams reviewed the design and its instructions for assembly, and made changes to the design. Clearly then, Coleman-Adams was involved in the process of

producing this platform. Therefore, Coleman-Adams is a "manufacturer" under Virginia Code §8.01-250.

Coleman-Adams asserts that since it installed the subject pole and platform, it is entitled to the protection fo the statute of repose, pursuant to this Court's holding in *Eagles Court Condominium Unit Owner's Ass'n v. Heatilater, Inc.*, 239 Va 325, 329, 389 S.E.2d 304, 306 (1980). This assertion is wrong. First, the "installer" in *Eagles Court* was not involved as a "manufacturer" or "supplier" of the product at issue in that case. Secondly, neither the Statute of Repose, nor this Court, has ever held that a party that wears the hat of designer or installer <u>and</u> the hat of "manufacturer" or "supplier" is entitled to the protection of the Statute of Repose. Certainly Appellee Coleman-Adams is liable in its capacity as a "supplier", but nothing in the statute or case law prevents the "supplier" (or "manufacturer") from being liable for other conduct (while acting as "installer" or "designer"), under a plain reading of the statute.

The trial court erred in ruling that Coleman-Adams Construction, Inc. was not also a "manufacturer" within the meaning of Virginia Code §8.01-250. Therefore, Appellant respectfully requests this Court to find that Coleman-Adams is also a "manufacturer" within the meaning of Virginia

Code §8.01-250.

III. The trial court erred in excluding evidence regarding the Moneta Volunteer Fire Department's training of fire fighters with respect to the slide pole and platform.

Upon further review, and based upon admissions by the appellees, contained in their previously filed Briefs in Opposition, the Appellant respectfully withdraws all assertions regarding Assignment of Error III, as this evidence was accepted by the trial court.

IV. The trial court did not err in ruling that Coleman-Adams and/or Virginia Steel was a "supplier" of the platform and pole under Virginia Code §8.01-250. (Coleman-Adams' and Virginia Steel' assignments of Cross-Error)

The word "supplier" as used in Virginia Code §8.01-250 (the statute of repose), is not defined by that statute. Similarly, no Virginia Supreme Court case has defined this word as used in Virginia Code §8.01-250.

Coleman-Adams contracted to supply the platform and slide pole to the Moneta Volunteer Fire Department. Coleman-Adams occupied many roles in the fire department project. Coleman-Adams not only occupied the role of general contractor on the job; but it was Coleman-Adams that: conceived the idea of a slide pole and platform; participated in the design of the slide pole and platform; approved and made changes to the design of the slide pole and platform; selected the physical manufacturer of the

slide pole and platform; and Coleman-Adams that installed the slide pole and platform. It is hard to imagine how an entity could have more control over how a product was designed, supplied, manufactured and installed, than Coleman-Adams had over the subject platform and slide pole.

Furthermore, Coleman-Adams never produced any evidence that it even advised the owner of the building, the Moneta Volunteer Fire Department, that the platform and slide pole were being manufactured by someone else. It was Coleman-Adams that contracted with the Moneta Volunteer Fire Department to provide the platform and slide pole. App. 491, 515-520. All billing by the manufacturer Virginia Steel was sent directly to Coleman-Adams. App. 526. The original price quote provided by Coleman-Adams to the fire department never even identified that the slide pole and platform were being manufactured by anyone other than Coleman-Adams. App. 491.

Coleman-Adams refers this Court to *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 331 S.E.2d 476 (1985) for the proposition that the statute of repose was intended to immunize contractors. *Defendant Coleman-Adams Brief in Opposition* p. 21. No such blanket immunity was given in *Cape Henry* to contractors, and furthermore, the passage cited by the Appellee

Coleman-Adams merely stands for the premise that the statute of repose was intended to protect those who furnish ordinary building materials. As stated earlier, the subject platform and slide pole are not ordinary building materials. Further, the subject platform and slide pole were selected, designed, manufactured, assembled and installed within the control of the "manufacturer" and "supplier". In this case, the "supplier" also happened to be the contractor.

The case of *State Bd. for Contractors v. Sedwick Building Supply*, 234 Va. 79, 80-81, 360 S.E.2d 169, 170 (1987) cited previously by the Appellee Coleman-Adams, offers no assistance to this Court in determining who a "supplier" is. *Sedwick* concerned a building supply company attempting to recover under the Virginia Contractor Transaction Recovery Act, and whether the supply company met the definition of a "vendor". *Id.* This is completely unrelated to the statute of repose. The other cases cited by Coleman-Adams, *Bergen v. Fourth Skyline Corp.*, 501 F.2d 1174 (4th Cir. 1974) and *Hipp v. Sadler Materials Corp.*, 211 Va. 710, 180 S.E.2d 501 (1971) concern the workers' compensation bar. Again, an issue completely unrelated to the statute of repose issue pending before this Court.

Coleman-Adams also references code sections having nothing to do with Virginia Code §8.01-250. For instance, Virginia Code §54.1-1100 et seq., cited by the Appellee Coleman-Adams, provides regulations for contractors. There is no reference in that code section to the statute of repose. 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.

Virginia Steel also refers this Court to terms defined or contained in statutes and/or 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), which was rejected by this Court.

Virginia Steel's attempt is no different. For instance, Virginia Code §36-98; 13 VAC §5-63-10(B); and Section 1702.1 of the Uniform Statewide Building Code, all cited and relied upon by Virginia Steel, contain no reference to Virginia Code §8.01-250, and offer no definition of

"manufacturer" or "supplier" that can be relied upon. Likewise, *R.G Pope Constr. Co. v. Guardrail of Roanoke, Inc.*, 219 Va. 111, 114, 244 S.E.2d 774, 776 (1978), cited by the Virginia Steel, was a breach of contract case. This Court's reference to a "fabricator" and "supplier" was mere dicta, and simply an explanation of the roles of the parties involved in the contractual dispute over a highway construction job. Id.

Both appellees twisted attempt at statutory interpretation is improper and does not follow accepted rules of statutory construction as set forth by this Court. **Courts cannot add language to a statute that the General Assembly has not seen fit to include and are not permitted to accomplish the same result by judicial interpretation**. *Couplin v. Payne*, 270 Va. 613, 129 S.E.2d 592 (2005). **When the language of a statute is unambiguous, the Supreme Court is bound by the plain meaning of that language**. *Bostic v. About Women OB/GYN, P.C.*, 275 Va. 567, 659 S.E.2d 290 (2008).

This Court need not look any further than Merriam-Webster's Dictionary (and its own common sense), for the common meaning of the word "supplier", which is defined as one who "furnishes or provides". *Merriam-Webster Online Dictionary* (2008). Coleman-Adams selected,

furnished and provided the platform and slide pole to the Moneta Volunteer Fire Department. It was Coleman-Adams that conceived the idea of a slide pole and platform; approved and made changes to the design of the slide pole and platform as furnished to it by the manufacturer; selected the manufacturer of the slide pole and platform; and it was Coleman-Adams who personally installed the slide pole and platform. Therefore, Coleman-Adams was a "supplier" in that it selected/supplied/furnished/provided the platform and slide pole to the Moneta Volunteer Fire Department.

Virginia Steel supplied and furnished the completed platform and slide pole to the Moneta Volunteer Fire Department. Therefore, Virginia Steel was a "supplier" in that it supplied/furnished/provided the platform and slide pole to the Moneta Volunteer Fire Department and Coleman-Adams.

For the aforementioned reasons, the trial court correctly ruled that Coleman-Adams and Virginia Steel were each a "supplier" with respect to the platform and slide pole at issue.

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)

The word "manufacturer", as used in Virginia Code §8.01-250, is not

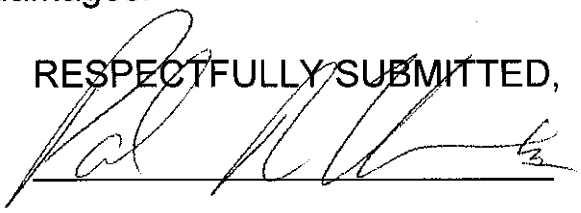
defined by that statute. Similarly, no Virginia Supreme Court case has defined the word "manufacturer" as used in Virginia Code §8.01-250. This Court need not look any further than Merriam-Webster's Dictionary (and again its own common sense), for the common meaning of the word "manufacturer". Merriam-Webster defines "manufacturer" as "one that manufactures". Merriam-Webster's dictionary defines "manufacture" as "the act or process of producing something". *Merriam-Webster Online Dictionary* (2008). It is undisputed that Virginia Steel physically assembled the parts to produce the subject platform and slide pole, and delivered them to the job site. Virginia Steel seeks special treatment since it has labeled itself a "fabricator". According to Merriam Webster, "fabricator" means to "construct, manufacture". *Merriam-Webster Online Dictionary* (2010). Therefore, Virginia Steel is a "manufacturer" as defined with either term, under the statute of repose. Lastly, Virginia Code §8.01-250 provides no immunity to "fabricators". Essentially, Virginia Steel adopts a definition of "manufacturer" that would call for an individual or entity not only to assemble raw materials, but to have personally manufactured them. This is illogical and would produce absurd results. Accepting Virginia Steel's definition of "manufacturer" would mean that General Motors was

not a manufacturer, because it did not personally manufacture the steel used in its automobiles, or that BIC was not the manufacturer of its lighters unless it also personally manufactured the plastic and metal used in the components that are assembled to make its lighters. This is not the law in this state. For the aforementioned reasons, the trial court correctly ruled that Virginia Steel was a "manufacturer" with respect to the platform and slide pole at issue.

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 the Court to reverse the trial court's ruling and remand the case to the trial court for a new trial, as to liability and damages.

RESPECTFULLY SUBMITTED,



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CERTIFICATE

On this 16th day of February, 2010, I did file by hand in the Office of the Clerk of the Supreme Court of Virginia, 12 true copies of this OPENING BRIEF OF APPELLANT KEVIN JAMERSON and an electronic copy by CD to the Clerk's Office 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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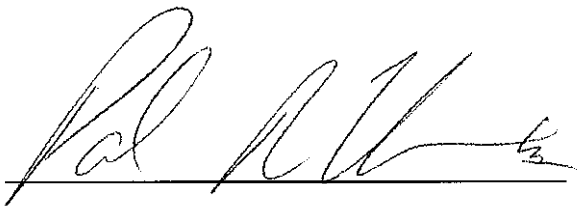
Appellant does request oral argument before a Panel of this Court.



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