In The

Supreme Court of Virginia

RECORD NO. 091993

**ROYAL INDEMNITY COMPANY,
AS SUBROGEE OF FIRST CENTRUM, LLC AND
CENTRUM PRINCE WILLIAM, LP, AND
AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,
AS SUBROGEE OF FIRST CENTRUM, LLC AND
CENTRUM PRINCE WILLIAM, LP,**

***Appellants*,**

v.

TYCO FIRE PRODUCTS, L.P. AND SIMPLEXGRINNELL, LP,

Appellees.

REPLY BRIEF OF APPELLANTS

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STATUE

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STATEMENT OF THE CASE

Tyco's claim of minor procedural irregularities should not distract this Court from addressing the merits of the case. The Trial Court's Order, as supplemented by the Court's letter opinion, dismissed Counts I, III, IV, V, VII and VIII of the Plaintiffs' Amended Motion for Judgment. (JA713) The Order dismissed Count VIII which was the post sale duty to warn count. The Court failed to articulate the basis for dismissing Count VIII. Nevertheless, the appellants properly objected to the Order (JA715). The basis for the Court's dismissal was either that a post-sale duty to warn was not an accepted cause of action in Virginia or that, as a tort claim, it was barred by the statute of repose. These issues are properly before this Court.

STATEMENT OF FACTS

While suggesting that the appellants' statement of facts contains improper argument and false statements, Tyco's "facts" are a series of conclusions which Tyco believes support its argument that its F960 sprinkler head is an "ordinary building material." The record shows that Tyco manufactured "lots of sprinklers, in the millions." (JA195) Tyco characterizes this as "mass production" in the belief that this is an important factor in classifying their product as "an ordinary building material." Although the record clearly shows that the F960 sprinkler heads are individually packaged in cardboard boxes and that approximately 20 to 30 individually

boxed sprinklers are shipped in a larger box (JA58; Stipulated Fact 28), Tyco characterizes this as a sale "in bulk." Sales in bulk generally refer to commodities which are shipped without mark or count such as grain, rice, sugar and coal. Tyco apparently believes that a sale in "bulk" is an important factor for the Court to consider. The F960, as a sidewall sprinkler, was installed on the sidewall of an exterior balcony at River Run. Tyco erroneously suggests that the F960 was not designed for this purpose. It is designated as a sidewall sprinkler.

The most egregious misstatement in Tyco's statement of facts is its misuse of the current corporate status of Tyco and Simplex Grinnell, suggesting it applies to the circumstances of the sale and installation of the F960 sprinkler head. These sprinklers were manufactured in 1996 by the Grinnell Corporation and were installed in 1997 by a division of that company, the Grinnell Fire Protection Systems Company. As is noted in the argument section of this brief, a division of a corporation is, in fact, the corporation itself. (*See* p. 6, infra.) By arguing the status of the current successor entities as distinct and separate companies, the Court could be misled into thinking that such separation of functions existed at the time of sale and installation. It did not. Grinnell Fire Protection Systems Company was not an independent

distributor which purchased these sprinkler heads. Rather, the record shows that the F960 heads were selected from Grinnell inventory. (JA301-308)

Tyco claims that it does not perform installations and exercised no control over the installation process. This is a material misstatement of the facts. Grinnell issued installation requirements and its division performed the actual installation. The manufacturer actually controlled all aspects of the installation.

Tyco suggests that the F960 sidewall sprinkler heads were "interchangeable" with other brands of sprinklers and that the installers were independent and free to install the F960 heads in any manner they chose. The record contradicts this statement. The F960 sprinklers are not generally interchangeable with other sprinklers. (JA58; Stipulated Fact 26) Even choosing a different sidewall sprinkler would require that it still be suitable for the job (JA196; Stipulated Fact 7, "provided they were suitable for this type installation.")

Finally, Tyco suggests that the voluntary recall of the "O ring" sprinklers was "unrelated to the F960" and that the appellants' reference to these facts is somehow misleading or disingenuous. This also is untrue. The "O ring" technology which was found deficient was common to the F960 which was part of a testing program with which Grinnell (Tyco) was

entirely familiar since its chief engineer, Jerome Pepe, was on the ad hoc committee. Many F960 sprinklers failed to open during this testing. (JA929-982) The problem which led the other "O ring" sprinklers to be recalled was the precise problem in the instant case; the sprinkler did not open during a fire. The point of these facts is that the defendant was well aware of this deficiency and was in a position to issue warnings so that users of the F960 could protect themselves from the expected consequence that the F960 sprinkler heads might fail to open during a fire.

STANDARD OF REVIEW

The Plaintiff does not disagree with the law concerning the standard of review. However, when the court's fact findings are mere conclusions or are plainly wrong they are not entitled to deference under Cooper Industries Inc. v. Melendez, 260 Va. 578, 537 S.E.2d 580 (2000). The court's application of fact to the law is, thus, reviewed *de novo* here. The trial court's analysis of fact and law appears in the last two paragraphs of the court's letter opinion. (JA711-12). The court concluded that the F960 sprinkler heads were similar to rolls of swimming pool liner which were purchased in bulk and for which the manufacturer exercised no control or oversight in their installation. The court failed to recognize, however, the corporate identity of the manufacturer and installer, and it erroneously

found that the technical data sheet merely provided "guidelines" rather than mandatory installation requirements. But the record contains clear evidence that the installation instructions were mandatory requirements. (JA727-32; JA247-51). The court's further conclusion that the sprinkler heads were "essential to the building," were required by the "building code" and were fungible goods is equally unsupported. No provision of the building code was cited that required sidewall sprinklers on open apartment balconies. The Court should, thus, review the trial court's rulings *de novo*.

ARGUMENT

Tyco's argument that the F960 sprinkler heads are ordinary building materials has selectively taken non-controlling "factors" from various decisions of this Court and has assigned them controlling significance. Tyco's arguments are plainly contrary to the true nature of the F960 sprinkler head, however, and relegate that precisely-engineered product to the non-functional status of a roll of roofing paper or a perforated swimming pool drain. This is not the nature of the F960 sprinkler head.

Extracting the phrase of a sale in bulk through a distributor from the Luebbers,[1] case Tyco argues that the F960 heads were sold in bulk through distributors. Apparently, Tyco believes that this factor is important to its legal position. The F960 heads are not a bulk commodity like fertilizer

[1] Luebbers v. Ft. Wayne Plastics, Inc., 255 Va. 368, 498 S.E.2d 911 (1998).

or fuel. They are individually engineered and manufactured mechanical devices designed to provide specific water spray patterns at designated discharge pressures. They are not sold without mark or count but are individually boxed and sold in lots of 20 to 30 sprinkler heads per box. They clearly are not sold "in bulk."

Tyco's argument that the F960 heads have no "independent function" until they are connected to a water delivery system begs credulity. Any equipment which requires a power source or, in this case, a water supply will have no independent function if it is never removed from the box or installed as intended. Any such device could be characterized as a mere "paperweight" if it is not used as intended. The same pointless argument could be made about a refrigerator: if it is not plugged it into an electric outlet, it is just a large paperweight with no independent function.

Tyco apparently suggests that the sprinkler heads must be designed exclusively for the River Run Apartments in order to be classified as equipment. The statute of repose, however, imposes no such requirement. The statute refers to "any equipment or machinery installed in a structure upon real property." Va. Code Ann. §8.01-250. If exclusive design for the particular structure is required, the exception for manufacturers of "any equipment or machinery" becomes meaningless.

One factor applied by this Court in resolving this issue is whether the equipment was installed at the direction of architects, engineers or contractors or was controlled in some manner by the manufacturer. Cape Henry Towers, Inc. v. National Gypsum Co., 299 Va. 596, 331 S.E.2d 476 (1983). Tyco, referencing its current separate corporate identity, asserts that it exercised no control over the installation of the F960 sprinkler heads. Control is evident, however, from the mandatory installation instructions provided by Grinnell and the fact that its sister corporation handled the installation. The technical data sheet does not contain mere "guidelines" but contains installation requirements. Contrary to Tyco's argument, those requirements are not discretionary, but are couched in mandatory terms. (JA60-62). Indeed, Tyco's engineer conceded this fact. (JA247-251). The record thus demonstrates that Grinnell and its sister corporation completely controlled the installation of the F960 sprinkler heads. Legally, Grinnell and its division were one and the same. "A division of a corporation is not a separate entity, but is the corporation itself." In re Sugar Industrial Antitrust Litigation, 579 F.2d 13, 14 (3d Cir. 1978).

The trial court's comment that the sprinklers were "essential to the building" is unclear. The F960 heads are not a construction material needed for the integrity of the building; they are added fire protection for the

balconies. And neither the court's opinion nor any argument advanced to the court establishes that the Virginia building code required sidewall sprinklers on outside balconies.

Tyco's position that the trial court's "findings of fact" should be given great deference has little meaning or impact on the conclusions reached by the court. The critical undisputed facts in the record are that the F960 is an engineered piece of equipment completely assembled and quality tested by the manufacturer and sold as a completed product. These undisputed facts were ignored by the trial court in reaching its conclusion that the F960 heads were ordinary building materials. That conclusion is reviewable *de novo*, and should be reversed.

THE TRIAL COURT ERRED IN APPLYING THE FACTS TO THE LAW CONCLUDING THAT THE F960 Q46 SPRINKLER HEADS WERE ORDINARY BUILDING MATERIAL

In its argument, Tyco asserts that it exercised no control over the installation of the sprinkler heads, that the sprinkler heads were not specifically manufactured for the River Run Apartments and had no use unless they were connected to the water supply. Tyco also argues that the sprinkler heads were fungible goods and generic material, like rolls of pool liner, or drain covers. Those arguments mischaracterize the F960's nature; they transparently seek to cast the sprinkler head as an ordinary building

material, to gain protection of the statute of repose. But the F960 sprinkler head is not like a roll of roofing paper, a bushel of grain or a tank of gas. F960 heads could not be cut to size and nailed into place to make a door jam like a piece of lumber. They must be installed precisely in accordance with manufacturer's instructions, or they will not work. Architects and engineers did not decide how the F960 heads were to be assembled or tested, nor did they decide how they should be installed. The manufacturer performed those functions.

Grinnell's control over the entire manufacturing and installation process is evident from the singular identity of the manufacturer and installer as Grinnell Corporation. The installation instructions in the technical data sheet are requirements, not discretionary "guidelines." Tyco's argument, attempting to separate itself from Simplex Grinnell, fails to recognize the true facts at the time of sale and installation. Grinnell Fire Protection Systems Company was not an independent distributor who purchased the F960 heads in bulk for this job. Rather, the installer removed them from Grinnell's inventory. (JA301-306). Tyco argues that the F960 sprinklers were not specifically manufactured for River Run or for balconies. As previously noted, the statute of repose makes no such requirement. It is the product's nature, manufacture and function which are

critical factors. Tyco unduly emphasizes irrelevant factors in its argument. The fact that this sprinkler was used in a sidewall application did not change the nature of the F960 as a completed, engineered product. Furthermore, the sprinkler heads are not fungible: Fungible goods are measured by weight, not piece count. The technical data sheets and drawings show that the F960 is a highly engineered piece of equipment which has detailed material specifications, design parameters and installation requirements. It is fully assembled and tested, and must be installed in accordance with manufacturer's instructions for it to operate as designed. Tyco disingenuously attempts to equate the F960 with a drain cover, but its contention that the F960 has no use except as a paperweight if not connected to a water supply rings hollow: any piece of equipment, if left in the box, must fail in its designated purpose.

Tyco's argument concerning control of the installation lacks support. As noted above, Grinnell Corporation and its sister, Grinnell Fire Protection Systems Company, constitute a single entity. The technical data sheet imposes installation requirements which must be met. Here, the manufacturer, by law, is the installer as well. The technical data sheet is provided so that the F960 heads will operate properly. It is not up to the discretion of the designers and installers to install them in any manner they

choose. Grinnell intended that its sprinkler heads be installed precisely in accordance with its instructions. Otherwise, the sprinklers would fail to operate. A drain cover, by contrast, requires no such specs.

Tyco improperly suggests that the appellants have distorted the facts to support its argument. But Tyco's argument that various pieces of lumber are similar to the F960 sprinkler heads cannot be used to convert “non-interchangeable” different size pieces of lumber into pieces of machinery or equipment. The lumber's essence is still preserved, *viz.*, pieces of lumber. To illustrate the fallacy of this argument, there are numerous refrigerators which can be plugged into an outlet in a kitchen. The fact that they may all be plugged in, and might be “interchangeable” in that sense, does not make any of them any less a piece of equipment: a refrigerator. Again, Tyco has isolated a singular “factor” and has attempted to make it controlling as to the nature of the F960 sprinkler head. Interchangeability is not the issue in this case. This Court must decide whether an engineered sprinkler head is a piece of fire protection equipment or a building material from which a building may be constructed. Similarly, Tyco’s building code argument lacks force as a controlling factor. A building code may require the installation of equipment. Because the code requires certain equipment, that does not convert the equipment into “ordinary building

materials." Tyco's approach ignores the essence of the tests set out in the Cape Henry and Cooper[2] cases and, instead, selects isolated factors which are not controlling on the issue. The court in Cooper held that the switch gear was a piece of equipment rather than an ordinary building material not because of an interchangeability factor, but because its essence was machinery and equipment.

THE MINNESOTA CASES

The two Minnesota cases cited by Tyco are not controlling here. In Red Wing Motor Investors v. Red Wing Fire Department, 552 N.W.2d 295 (Minn. Ct. App. 1996) the owner sued a contractor for improperly pitching interior pipes in a sprinkler system. The pipes were viewed by the court as ordinary building materials and the installing contractor was protected by the statute of repose. There was no issue concerning defective design or manufacture of sprinkler heads. Importantly, the court noted that if the sprinkler heads were defective, there may be a different result. That case does not reach the issue that this Court is required to decide. The Red Wing court's comment, however, suggests that defectively engineered sprinkler heads would not be held to be "ordinary building materials."

The other Minnesota case, Integrity Floor Covering, Inc. v. Broan Nutone LLC, 521 F.3d 914 (8th Cir. 2008), is also not precedential. The

[2]Cooper Industries, Inc. v. Melendez, 260 Va. 578, 537 S.E.2d 580 (2000).

Federal Court predicted what the Minnesota Supreme Court might decide if faced with the issue before it. The question was whether an interior bathroom fan was ordinary building materials. The court suggested that because the fan was incorporated into the building structure and was required by a building code it should be considered ordinary building materials. The Minnesota Supreme Court has not, to date, adopted the Eighth Circuit's view. Moreover, the fact that an item is incorporated into a building is not a disqualifying factor under the Virginia Statute of Repose; nor is there any requirement that the equipment be "large scale," as found by the Eighth Circuit. The Integrity Floor Covering case is, therefore, not controlling or persuasive here.

DUTY TO WARN ISSUES

The trial court's dismissal of the appellants' post-sale duty to warn Count (VIII) was properly preserved for this appeal. The appellants, not given an articulated basis for the court's order, analyzed that either (1) the court believed no valid cause of action existed in Virginia law or (2) if valid, the tort claim was barred by the statute of repose. The appellants raised those issues in this appeal based on their proper objection. Additionally, they have provided the Court ample factual support showing that Grinnell (Tyco) knew of the specific defects in the "O ring" technology in the F960

sprinkler head but failed to provide adequate warning to the appellants or other users. There is a clear and continuing relationship between Tyco and the Grinnell corporate entities that manufactured and installed this sprinkler. In accordance with Harris v. TI, Inc., 244 Va. 63, 413 S.E.2d 605 (1992), this Court should recognize a post sale duty to warn because there is close interaction between a successor company and original manufacturer and installer. Here, such a relationship exists where it was absent in Harris. Contrary to Tyco's suggestions, a post sale duty to warn theory cannot be encompassed by the statute of repose as such cause of action did not arise until Tyco (Grinnell) obtained specific knowledge that the "O ring" technology in the F960 sprinkler was deficient. The time for running of the statute of repose is measured from the completion of construction. The duty to warn issue would not arise until such time as the manufacturer learned facts which required a duty to speak. In any circumstance, if this Court holds that the F960 sprinkler head is equipment, the statute of repose would not apply to either tort claim, and neither claim would be barred.

WARRANTY OF FUTURE PERFORMANCE

It is apparent from the record that the trial court misunderstood the nature of the warranty claim. The trial court appeared to focus on the one

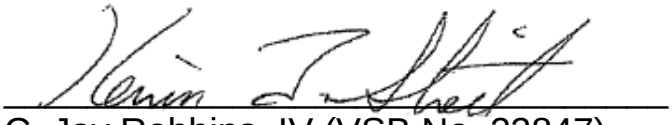
year standard warranty (JA1208), and failed to consider undisputed testimony that the sprinkler head could not be tested or functioned to determine whether it would work. But no "magic words" are required to create a warranty under the Virginia Uniform Commercial Code. Tyco acknowledges that its intent in describing the F960's function was to describe its intended future performance – an affirmation of fact describing the future performance of the F960 sprinkler head. The time parameter is set as the time of the fire. That is the essence of the sprinkler's purpose. A purchaser would be justified in believing that the sprinkler head would operate when a fire occurs. This Court should hold that the language provided by the manufacturer constitutes a warranty of future performance taking it outside the Uniform Commercial Code's statute of limitations.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Trial Court Order and hold that the statute of repose does not apply to Tyco or Simplex Grinnell as manufacturers and suppliers of equipment. This Court should also reverse the trial court's dismissal of Count VIII of appellants' Amended Motion for Judgment and allow the cause of action for post sale duty to warn to proceed to trial.

Respectfully submitted, this 10th day of September, 2010.

By Counsel:



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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 5:26(h) on this 10th day of September, 2010, fifteen bound copies of this Reply Brief of Appellant have been hand-filed with the Clerk's Office of the Supreme Court of Virginia, and three bound copies of the Reply Brief of Appellant have been served via UPS Ground Transportation to opposing counsel at the following address:

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Date: September 10, 2010

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