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.,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE[1]

This is the appeal of the Prince William County Circuit Court's ("trial court") February 27, 2009 and June 30, 2009 Orders dismissing Royal Indemnity Company's and American Empire Surplus Lines Insurance Company's (collectively "Plaintiffs") claims against Tyco Fire Products, L.P. ("TFP").

This underlying subrogation action stems from a fire that started on February 8, 2003 on the balcony of an apartment at the River Run Apartments. (JA 55) The apartment building contained a fire protection system that included F960/Q46 fire sprinkler heads, manufactured by TFP. (JA 54) On March 30, 2006, Plaintiffs filed an Amended Motion for Judgment against TFP in the trial court for property damages paid to their insureds, First Centrum, LLC and Centrum Prince William, LP for the loss. (JA 1-21) The Amended Motion for Judgment alleged that certain sprinkler heads at the property did not activate during the fire and asserted claims for negligent design and/or manufacture of the sprinkler heads, failure to warn, and breach of express warranty. (*Id.*) Plaintiffs also filed claims

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[1] Plaintiffs' "assignments of error" have no citations to the record where the issues were properly preserved as required by Virginia Supreme Court Rule 5:27(c), and this appeal should fail. TFP entirely disagrees that Plaintiffs' post-sale duty to warn assignment of error was ever raised, much less preserved and, therefore, denies that the issue is properly before this Court.

against SimplexGrinnell LP ("SimplexGrinnell"), the designer and installer of the fire sprinkler system. (*Id.*)

On April 25, 2006, TFP filed its answer to Plaintiffs' Amended Motion. (JA 22-38) After the course of discovery, TFP noticed its Plea in Bar, seeking dismissal of Plaintiffs' claims on the grounds that: 1) Plaintiffs' tort claims were barred by Virginia's five-year statute of repose; and 2) Plaintiffs' breach of warranty claim was barred by the Virginia Commercial Code's four-year statute of limitations. Contrary to Plaintiffs' assertion in its appellant brief, TFP never filed a plea in bar on the ground that "[TFP] owed no duty in law to the owners of the River Run Apartments to warn them of the known defects of the F960 sprinkler head." (Appellants' brief, p. 2) (JA 42-45) Instead, TFP moved to dismiss all of Plaintiffs' tort claims—including the failure to warn claim—on the ground that they were barred by the statute of repose.

On February 27, 2009, after conducting an evidentiary hearing and holding oral argument, the trial court issued an Order dismissing all of Plaintiffs' tort claims as time-barred by Virginia's five-year statute of repose. (JA 713-714) Among other things, the statute of repose bars any action in tort for property damage arising from a defective improvement to real property unless such action was commenced within five years of the

improvement. (*Id.*); *See* VA. CODE ANN. § 8.01-250. Although the statute has a narrow exception for manufacturers of "equipment or machinery," the trial court specifically found that TFP's F960 sprinkler heads were "ordinary building materials" as contemplated by the statute, rather than "equipment or machinery." As a result, Plaintiffs' tort claims were barred, including any post-sale duty to warn claim, the existence of which is not supported by Virginia law. (JA 705-712)

In its June 30, 2009 Order, the trial court also found that Plaintiffs' breach of warranty claim—the only remaining claim against TFP—was barred by the Virginia Commercial Code's four-year statute of limitations, which provides that any action for breach of warranty must be brought within four years from tender of delivery, regardless whether the aggrieved party had knowledge of the breach. (JA 1312-1313); *See* VA. CODE ANN. § 8.01-250. Plaintiffs argued that TFP had issued an indefinite warranty of future performance when it included a Technical Data Sheet in the sprinkler head packaging. The trial court dismissed this argument, finding that the "warranty of future performance" exception did not apply. (JA 1312-1313)

Despite Plaintiffs' mischaracterizations of the trial court's holdings in their brief, the court did not issue three rulings. The post-sale duty to warn issue Plaintiffs are now trying to raise was never raised, ruled upon,

objected to, or otherwise preserved. That is, TFP's Plea in Bar sought to dismiss *all* of Plaintiffs' tort claims, including the tort claim premised upon an unrecognized cause of action for post-sale duty to warn. Plaintiffs did not argue in their opposition briefing that the statute of repose somehow would not apply to a tort claim based on a non-existent post-sale duty to warn theory. Nor did Plaintiffs object on these grounds when the trial court granted TFP's Plea in Bar and dismissed *all* of Plaintiffs' tort claims. In short, Plaintiffs cannot claim that the trial court's ruling was erroneous when the issue was never raised and the trial court was never given the opportunity to accept or reject Plaintiffs' argument. Because the issue was not preserved for appeal, it should not be considered for the first time here. As such, there are two preserved rulings upon which this appeal can proceed, and neither should be disturbed on appeal.[2]

STATEMENT OF THE FACTS

Plaintiffs' Statement of Facts is replete with improper argument and false statements. Moreover, most of their assertions lack citations from the record, in violation of Virginia Supreme Court Rule 5:27(b). It is universally recognized that "[s]tatements [in briefs] unsupported by argument,

[2] Plaintiffs' initial petition for appeal was denied by way of Order dated March 25, 2010, finding there was no reversible error. Following the Court's granting of Plaintiffs' petition for rehearing, this appeal ensued.

authority, or citations to the record do not merit appellate consideration." *Buchanan v. Buchanan*, 14 Va. App. 53, 56, 415 S.E.2d 237, 239 (1992). Courts generally will not search the record for errors in order to interpret an appellant's contention or correct deficiencies in an appellate brief. *Id.* As such, Plaintiffs' undocumented assertions should not be considered by this Court.

SimplexGrinnell installed a fire sprinkler system at the River Run Apartments no later than June of 1997. (JA 55) TFP manufactured and sold the 1996 ½" orifice F960/Q46 side wall sprinkler heads used in this sprinkler system, which were delivered to the River Run Apartments and installed no later than June 19, 1997. (JA 54-55) The fire began on February 8, 2003 on the balcony of an apartment at the River Run Apartments. (JA 55) Plaintiffs commenced this action on December 30, 2005. (JA 1)

The sprinkler heads at issue are mass produced by TFP. (JA 196) As with many products, the sprinkler heads are sold in bulk to distributers. (JA 195) Once purchased by the distributors, the distributors may decide to sell any number of units at a time, not under any direction or control of the manufacturer. (JA 215-216)

The sprinkler heads were not specifically manufactured for use in the River Run Apartments' sprinkler system, (JA 55), nor were they specifically designed for use on a balcony, such as they were used at River Run. (JA 196-197; 285-286) Although it is true that sidewall sprinkler heads, such as the F960s, cannot be used in ceilings, they are suitable for many different applications and environments, including interior and exterior environments and wet and dry fire sprinkler systems. (JA 58) The designer and installer of the fire protection system at the River Run Apartments were at liberty to choose which sprinkler head to use—there was no requirement that TFP's sprinkler heads be used. (JA 54-55) The heads are intended for installation by a qualified sprinkler installation contractor. (JA 65) TFP does not perform installations. (JA 55) In fact, TFP did not exercise any control over the sprinkler heads after shipment to the distributor. (JA 55)

The sprinkler heads had no independent use prior to their installation and use in the sprinkler system. (JA 65) Once installed, however, the sprinkler heads were an integral part of the fire protection system and, thus, necessary for the building to comply with the Uniform Statewide Building Code, which requires four-story buildings like the River Run Apartments to have a working fire protection system. (JA 215; JA 321-597)

Plaintiffs' statement that F960 sidewall sprinklers are not interchangeable with other types of sprinklers is false and disingenuous. (See Appellants' brief, p. 8.) F960 sprinkler heads are interchangeable with other brands, lengths, and other temperature setting sprinkler heads—whatever the job specifications may require. (JA 59, 65)

The sprinkler head packaging contained standard instructions in the form of a Technical Data Sheet, generally applicable to the sprinkler heads. (JA 58) The instructions were not specific to any facility or project, but rather subject to the designer's and installer's judgment and application. (*Id.*) This same Technical Data Sheet was included with *all* 1996 date code ½" orifice F960/Q46 side wall sprinkler heads at the time of shipment, regardless of the particular project or its specifications. (JA 58)

In its Technical Data Sheet, TFP also provided an express warranty covering these sprinkler heads. (JA 64) This written warranty explicitly limited the warranty period: "Seller warrants a period of one year from the date of shipment (warranty period) that the products furnished hereunder will be free from defects in material and workmanship." (*Id.*)

Finally, and in direct response to Plaintiffs' lengthy discussion of TFP's alleged "recall" measures, TFP acknowledges that other, unrelated sprinkler heads have been voluntarily recalled in the past. (JA 778)

Plaintiffs' relentless attempt to link the heads at issue here with the unrelated recalled heads, however, is misleading, overly simplistic, disingenuous, and unavailing. Plaintiffs repeatedly note that the O-rings in the unrelated, recalled sprinkler heads were the source of the condition that led to the voluntary recall. Ergo, according to Plaintiffs' logic, the F960 sprinkler heads at issue here were defective and should have been recalled because they too had O-rings. (Appellants' brief, p. 5.) By the same logic, Toyota should recall every automobile it has manufactured because they all have brakes. Needless to say, Plaintiffs' false and misleading attempts to prove the merits of their defect claims are misplaced, as this is not the time to argue facts or to generate sympathy from a fact finder. All of these "facts" and arguments are meaningless to the issues ripe for this appeal.

STANDARD OF REVIEW

"A plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. The moving party has the burden of proof on that issue." *Hilton v. Martin,* 275 Va. 176, 179-80, 654 S.E.2d 572, 574 (2008). "On appellate review of a ruling on a plea in bar based on an *ore tenus* hearing, the trial court's factual findings will not be set aside unless plainly wrong or without evidence to support them." *Cooper Indus., Inc. v. Melendez,* 260 Va. 578, 595, 537 S.E.2d 580, 590

(2000), citing *Bottoms v. Bottoms*, 249 Va. 410, 414, 457 S.E.2d 102, 104-105 (1995); *see also Jennings v. Kay Jennings Family Ltd. P'ship*, 275 Va. 594, 659 S.E.2d 283 (2008) (same).

Because the trial court made its decision in the instant case following receipt of evidence from a witness *ore tenus* and the admission of documentary exhibits (JA 705-712), the findings of fact receive great deference and are entitled to the same weight as would be given to a jury verdict. *Cooper,* 260 Va. at 595. Therefore, if there is evidence that supports the findings, the findings must be affirmed on appeal. *Id.*

The application of the law to the determined facts is reviewed *de novo*. *Johnson v. Hart*, 279 Va. 617, 692 S.E.2d 239 (2010). As such, both the trial court's application of the existing case law to these decided facts and determination that the statute of repose applies, as well as its determination that the language on the Technical Data Sheet did not constitute a "warranty of future performance" under the Virginia Commercial Code, are reviewed *de novo.*

ARGUMENT

I. PLAINTIFFS' BRIEF DOES NOT COMPLY WITH THE VIRGINIA RULES AND SHOULD BE DISMISSED OR, AT A MINIMUM, PLAINTIFFS SHOULD BE DENIED ORAL ARGUMENT.

Plaintiffs' "assignments of error" have no citations to the record showing where the issues were properly preserved as required by Virginia Supreme Court Rule 5:27(c). This omission should cause this appeal to fail. Furthermore, a vast number of Plaintiffs' assertions of fact have no supporting citations, and are in violation of Virginia Supreme Court Rule 5:27(b). For these reasons, Plaintiffs have failed to file a complying brief in violation of Rules 5:1A and 5:26. As such, the Court should dismiss this appeal, or, at a minimum, Plaintiffs should not be allowed oral argument. Rules 5:1A; 5:26(i).

II. THE TRIAL COURT MADE FINDINGS BASED BOTH ON STIPULATED FACTS AND AN EVIDENTIARY RECORD, AND THOSE FINDINGS SHOULD BE GIVEN GREAT DEFERENCE BY THIS COURT.

In rendering its decision, the trial court considered stipulated facts and conducted an evidentiary hearing, which included admission of testimony and documentary exhibits. From the evidentiary hearing and record before it, the trial court made various factual determinations necessary to its ruling. These factual findings dealt specifically with the

various characteristics of the sprinkler heads and their installation—the factors at issue in this matter.

For instance, the trial court found that the sprinkler heads were not designed or specifically manufactured for the River Run Apartments. (JA 706) Rather, they were simply mechanical devices that were shipped from the factory fully assembled and sold in bulk to distributors. (JA 707, 711) Evidence related to this matter can be found in both the stipulated facts and Donald Pounder's testimony. (JA 58, 195-196) The trial court found that the sprinkler heads served no independent function until connected to the sprinkler system. (JA 65, 707)

The trial court determined that there was no requirement that SimplexGrinnell use TFP's sprinkler heads in the sprinkler system at the River Run Apartments. (JA 706, 54) The trial court also found, based on the testimony of Mr. Pounder and directly contrary to Plaintiffs' assertions, that the sprinkler heads were not designed exclusively for use on exterior balconies but could be used in various locations. (JA 706) The trial court also found that [TFP] "exercised no oversight in the installation of the sprinkler heads in the sprinkler system" and that the Technical Data Sheets offered merely a guide for the installation of the sprinkler heads. (JA 711) Based on the testimony of Mr. Pounder and the exhibits submitted, the trial

court reached the further determination that the sprinkler heads were essential to the building because they were required by the Building Code and constituted an improvement to real property. (JA 215, 321-597, 711)

The trial court's findings of fact receive great deference and are entitled to the same weight as a jury's verdict. *Cooper,* 260 Va. at 595. As such, they should not be disturbed on appeal if there is any evidence to support them. *Id.* As outlined herein, there is more than ample evidence to support the trial court's factual determinations. The trial court then took its factual findings, applied them to established legal precedent, and concluded that the sprinkler heads were "ordinary building material" and subject to the statute of repose's five-year limitation. (JA 711-712)

Because the law does not support their claims, Plaintiffs attempt to change the facts themselves. Such efforts, however, cannot detract from the true facts in this matter as found by the trial court and outlined *infra*, nor the correct conclusion the trial court reached based on those facts. As such, the trial court's decision should not be disturbed.

III. THE TRIAL COURT DID NOT ERR IN APPLYING THE FACTS TO THE LAW AND CONCLUDING THAT THE TFP F960/Q46 SPRINKLER HEADS ARE "ORDINARY BUILDING MATERIALS" FOR PURPOSES OF APPLYING THE VIRGINIA STATUTE OF REPOSE.

It is uncontested that Plaintiffs brought suit more than five years after

the delivery and installation of the sprinkler heads in question. (JA 1-38, 55) It is further undisputed that Virginia has adopted a five-year statute of repose that applies to real property and provides:

> No action 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, nor to any person in actual possession of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

VA. CODE ANN. § 8.01-250. Thus, whether the statute of repose bars Plaintiffs' tort claims against TFP necessarily hinges on the determination of whether the sprinkler heads are "ordinary building materials" or "equipment or machinery," as the statute applies to the former but not the latter. *See Cape Henry Towers, Inc. v. Nat'l Gypsum Co.*, 229 Va. 596, 599-602, 331 S.E.2d 476, 478-479 (1985).

Virginia courts, including this Court, have established significant precedent with respect to the determination of what constitutes "ordinary building material" under the Virginia statute of repose. In addition, Minnesota court opinions considering its statute of repose, modeled after Virginia's, have considered this precise issue. In the present case, the trial court correctly summarized and considered the relevant case law. It then properly applied the facts to the factors outlined by this Court to reach the correct and only reasonable conclusion that these sprinkler heads were "ordinary building materials" subject to the statute of repose.

A. Virginia case law detailing the factors to consider when classifying a product as "ordinary building material" or "equipment or machinery" supports the classification of these sprinkler heads as "ordinary building material."

Through a series of opinions beginning with *Cape Henry Towers*, the Supreme Court has interpreted the statute of repose and outlined several factors to consider in determining whether to classify a product as "ordinary building materials" or "equipment or machinery." The Court identified these factors as: 1) the level and control over the product and its application; 2) the general nature of the product at issue and its role in the overall construction project; and 3) the manufacturer's involvement in the installation of the product. The Court applied these factors to the facts in *Cape Henry Towers* and held that the statute of repose applied to a

manufacturer of exterior building panels, which the Court deemed to be "ordinary building materials." In reaching this determination, the Court cited the manufacturer's lack of involvement in the construction project and installation of the product:

> We conclude that the General Assembly intended to perpetuate a distinction between, on the one hand, those who furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers and suppliers, at the direction of architects, designers and contractors, and, on the other hand, those who furnish machinery and equipment.

Id. at 602. Thus, the Court found "ordinary building materials" to be those items that are incorporated into an improvement, and are typically done so based on the design or request of another. *Id.*

The Court further clarified the distinction between "ordinary building materials" and "equipment or machinery" in *Grice v. Hungerford Mechanical Corp.*, 236 Va. 305, 374 S.E.2d 17 (1988). The product at issue in *Grice* was an electrical panel box. After finding that the manufacturer had no involvement in the installation of the panel box, the Court concluded that the panel box was "ordinary building material." Specifically, the Court noted that the assembly and installation instructions were "determined by the plans and specifications provided by the architect or other design

professional" and that "[n]o instructions [were] received from the manufacturer." *Id.* at 309.[3]

The Court further refined its analysis of "ordinary building materials" in multiple subsequent opinions, thus providing even more guidance for the trial courts. For example, in *Luebbers v. Fort Wayne Plastics, Inc.*, 255 Va. 368, 498 S.E.2d 911 (1998), the Court concluded that various component materials for in-ground swimming pools, such as steel panels, braces, and vinyl liners were "ordinary building materials." *Id.* at 370. In doing so, the Court found that the pool materials were interchangeable, the materials were purchased in bulk and were used in construction of pools of varying dimensions and shapes, the manufacturer did not exercise any oversight in the construction of the pools, the specification guides sold by the manufacturer were general guidelines and did not address particular pool dimensions, and the materials were fungible components of the pool that individually served no function other than as generic materials to be included in the larger whole and were indistinguishable. *Id.* at 372.

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[3] Appellants' citation of *Eagles Court Condo. Unit Owners Assoc. v. Heatilator Inc.,* 239 Va. 325, 389 S.E.2d 304 (1990) adds nothing to the analysis at hand. The Court reversed the judgment in favor of the manufacturer because it found application of the statute depended on whether the fireplace at issue was machinery or equipment and a further factual hearing was necessary. The Court remanded the case for further proceedings, but no further case history is available.

On the other hand, in *Cooper*, the Court held that a switchgear attached to a Navy pier that serviced docked submarines was "equipment" and thus subject to the exception of the statute of repose. 260 Va. at 595. The switchgear was a large scale metal enclosure containing many component parts, including circuit breakers, selected by the manufacturer. *Id.* at 585-86. The switchgear operated virtually independently from the structure to which it was attached. Furthermore, the root of the Court's determination was a finding that the switchgear was not part of the pier's electrical system and, thus, not essential to the existence of the pier. Instead, it comprised a stand-alone electrical supply system for the submarines docked at the pier. *Id.* The Court further found the switchgear was not fungible or interchangeable because once a certain manufacturer's circuit breaker was selected to go with the switchgear, the cradle into which it was connected was mated with the selected gear. *Id.* In this way, switchgear of one manufacturer could not be swapped for another at a later time. *See also Washington v. Square D Company*, 2006 WL 637033 (Va. Cir. Ct., Feb. 6, 2006) (concluding that an electrical panel was equipment where the owner sent specifications to the manufacturer, the manufacturer prepared drawings based on those specifications, the owner approved the

drawings, and the manufacturer made and assembled the panel box accordingly).

And in the most recent opinion, *Baker v. Poolservice Co.*, 272 Va. 677, 636 S.E.2d 360 (2006), the Court found that a spa drain cover was "ordinary building material" for statutory purposes. Specifically, the Court found that the drain cover at issue was mass produced for installation into swimming pools and spas; the drain covers were sold primarily, if not exclusively, to distributors; and the manufacturer played no role in designing the pools and spas or installing the drain covers. *Id.* at 690. The Court further found the individual drain cover served no function other than as generic material to be included in the larger whole. *Id.*

B. Applying the facts to the factors set forth by the Virginia Supreme Court, the trial court did not err in classifying the sprinkler heads in question as "ordinary building materials."

As discussed *supra*, there is extensive precedent with respect to the judicial determination of what constitutes "ordinary building material." Taking note of this extensive authority, and considering the factors previously identified by this Court, the trial court correctly found that the sprinkler heads in question possessed the characteristics of "ordinary building materials" and concluded that the statute of repose barred Plaintiffs' tort claims.

1. TFP did not exercise control over the subject sprinkler heads and their use at the River Run Apartments.

Like the manufacturers and suppliers in *Baker*, *Luebbers*, and *Grice*, TFP did not exercise any control over its product after furnishing the order. (JA 55, 711) TFP is not in the construction business in the capacity of an architect, contractor or engineer, and is not in the business of designing or installing automatic fire sprinkler systems. (*Id.*) TFP did not design or install the automatic fire sprinkler system for the River Run Apartments and did not install the sprinkler heads at issue. (*Id.*) Furthermore, TFP played no role in the selection of the sprinkler heads at the River Run Apartments. (JA 56) There was no requirement to use TFP's sprinkler heads—the installer could have used heads designed by other manufacturers. (JA 54-55) As such, TFP's involvement with the subject sprinklers ended upon factory shipment.

2. The subject sprinkler heads were not specifically manufactured for the River Run Apartments and served no purpose independent of their inclusion into the overall sprinkler system.

The trial court also found that these sprinkler heads were not specifically manufactured for the River Run Apartments. (JA 55) Instead, they were mass produced and sold mostly to distributors, always for installation by others. (JA 195-196) Furthermore, contrary to Plaintiffs'

assertions, the court found that the sprinkler heads were not even specifically designed for use on an exterior balcony—much less the particular balconies at River Run. (JA 196-197) Rather, the sprinkler heads were suitable for different applications and environments, including interior and exterior environments and wet and dry fire sprinkler systems. (JA 58)

These sprinkler heads were fungible and interchangeable for the same reason as the drain cover in *Baker* and the swimming pool components in *Luebbers*. "Individually they serve[] no function other than as generic materials to be included in the larger whole. . . ." *Luebbers*, 255 Va. at 372. The sprinkler heads have no independent use prior to installation and use in a fire sprinkler system. (JA 65) Moreover, once installed, the sprinkler heads are simply part of the building's fire protection system as required by Code. (*Id.*; JA 215) Like a light bulb to a lighting system, a receptacle to an electrical system, and a faucet to a plumbing system, this sprinkler head is a stand-alone product that serves no purpose unless and until it is integrated into a corresponding sprinkler system. (JA 707, 65) Indeed, the trial court likened the sprinkler heads to light bulbs: "just because a light bulb, a particular light bulb, doesn't fit into a particular [socket] doesn't necessarily mean that it becomes something less because not all things fit in the same socket, does it?" (JA 162)

Because there was ample evidence produced to show that these sprinkler heads were not stand-alone, independent pieces of equipment designed specifically for River Run, the trial court's findings should not be disturbed.

3. TFP did not oversee the installation of the sprinkler heads into the sprinkler system.

TFP did not install the subject sprinkler heads (JA 55), and the trial court specifically found that TFP "exercised no oversight in the installation of the sprinkler heads into the sprinkler system." (JA 711) Like the ordinary building materials in *Luebbers*, the subject sprinkler heads were not accompanied by instructions or guidance tailored to a specific project. (JA 711) To the contrary, they were accompanied by standard instructions in the form of a Technical Data Sheet generally applicable to the sprinkler heads, but subject to the designer's and installer's judgment and application. (JA 58-59, 711) This same Technical Data Sheet was included with all 1996 date code 1/2" orifice F960/Q46 side wall sprinklers at the time of shipment, regardless of the particular project or project specifications. (*Id.*)

Even with these standard instructions, the architects, designers and installers of the River Run project still had to exercise their own judgment as to how best to design and install the sprinkler system. In fact, F960/Q46

sprinkler heads are intended for installation by a qualified sprinkler installation contractor. (JA 65) TFP is not in the business of performing such installations. (JA 55) Installers, in compliance with the Building Code, had to determine how to install the heads and the entire system in accordance with that Code. (JA 215, 321-597) Because there was sufficient evidence to show that TFP played no role whatsoever in the installation, the trial court's finding should not be disturbed.

4. Plaintiffs' reliance on *Cooper* is misplaced, and their attempts to mischaracterize case holdings and the facts of this matter are transparent.

The line of decisions addressing what constitutes "ordinary building material" is not helpful to Plaintiffs. Thus, they attempt to parallel the sprinkler heads here with the facts in *Cooper*. In doing so, however, they distort the facts and misstate the law. Moreover, they fail to support many of their contentions with any authority.

First, Plaintiffs argue that TFP designed and manufactured the sprinkler heads for the specific purpose to be used on the balconies of apartment buildings. (See Appellants' brief, pp. 25-26.) This is a callous misstatement of the undisputed facts. Although installation on an exterior balcony is indeed one possible use for the sprinkler head, as stated in the

stipulated facts and testimony, the product had many other uses. (JA 58, 65, 196-197, 285-86)

Second, Plaintiffs argue that only generic materials such as pipes and lumber can be interchangeable and, thus, considered ordinary building materials. (See Appellants' brief, p. 26, 32.) This is clearly not true. A builder cannot use any piece of wood to frame a house. If plans, for example, call for 2x4 treated spruce for framing, then a 1x4 piece of untreated birch would not be interchangeable. But one piece of appropriate 2x4 would be interchangeable with any other because it is an ordinary building material. The same holds true for piping. If specifications call for two-inch iron pipe, then any other two-inch iron pipe would be interchangeable. But pipes of other dimensions and construction would not be. The same is true of the sprinkler heads at issue. The designer and installer determined that a side wall sprinkler was needed for the balconies. A non-side wall sprinkler would be inappropriate. But any side wall sprinkler that met the installer's specifications and needs could be used. Thus, they are as equally generic and interchangeable as lumber and piping.

Plaintiffs also incorrectly assert that the sprinkler heads are "independent mechanical items." By itself, the sprinkler head is a useless

item—with no independent function. (JA 65) Only when it is integrated into the sprinkler system does it become part of the fire protection system. (*Id.*) A sprinkler head is not "preassembled" and "self-contained" any more than a light bulb or faucet. (See Appellants' brief, p. 26.) Simply because the sprinkler head has an O-Ring or brass plug inside, does not transform it into "equipment or machinery" any more than a light bulb or valve can be classified as "equipment" because they contain filaments or rubber seals. (JA 56)

Plaintiffs also assert that like the switchgear in *Cooper*, the sprinkler heads are not essential to the building. (See Appellants' brief, p. 24.) Yet, as found by the trial court based on the testimony of Mr. Pounder and evidence of the applicable Building Code, the sprinkler heads were essential to the fire prevention system required by the Building Code. (JA 711) Plaintiffs' overarching assertion that "[m]any buildings are without sprinklers," again, oversimplifies and misses the point. The Code may not require all buildings to have fire sprinklers—but it required River Run to have them. (JA 215; JA 321-597) Plaintiffs' argument that "they could be replaced by merely unscrewing them and replacing them with another sprinkler head" does not mean that they were non-essential. (See Appellants' brief, p. 26.) Obviously, without a sprinkler head in place, the

fire protection system would be unable to operate. Moreover, Plaintiffs' argument about the generic nature of the heads actually supports the trial court's conclusion that the sprinkler heads were interchangeable "ordinary building materials."

Plaintiffs also argue that, like *Cooper*, the sprinkler heads were tested and put through quality control. In *Cooper*, however, the switchgear was an enclosed piece of equipment, assembled with various component parts at the factory, and then tested *as a whole* at the factory. Although sprinkler heads are put through quality control tests to gain a UL stamp much like lighting and other products, the key point is that the fire sprinkler system cannot be tested for quality control until the heads are installed into the system as a whole—a process that occurs after shipment by TFP and outside of the control or supervision of TFP. Comparing the integrated switchgear in *Cooper* to a single sprinkler head here is truly an apples-to-oranges comparison.

In this matter, evidence was presented about the characteristics of the sprinkler heads, the nature of their sale, and the installation process. With that evidence, the court found that the heads are shipped and purchased in bulk (JA 196, 707, 711), the Technical Data Sheets—the only literature provided with the product—were merely a guide for installation

(JA 711), TFP exercised no oversight in the installation of the sprinkler heads, and the sprinkler heads were essential to the building because they were required by Building Code and constituted an improvement to real property. (Id.) All these determined facts, which are amply supported by evidence, separate this matter from the products in *Cooper* and *Square D* and put it in line with *Cape Henry* and the other Virginia precedent cited *supra*. As such, the trial court correctly concluded that the sprinkler heads are "ordinary building materials," and the statute of repose bars Plaintiffs' tort claims.

C. Applicable cases under Minnesota's statute of repose, which is modeled after Virginia's statute, further demonstrate that the sprinkler heads are "ordinary building materials."

Minnesota's statute of repose is modeled after the Virginia statute. The only significant difference between the two statutes is that Minnesota's statute extends ten years rather than five. MINN. STAT. §541.051; *Integrity Floorcovering, Inc. v. Broan-Nutone*, LLC, 521 F.3d 914 (8th Cir. 2008). Minnesota's statute adopts the same distinction involving "ordinary building materials" versus "equipment or machinery." *Id.* Finding that Minnesota courts had considered their statute in more factually-similar circumstances, the trial court accorded some weight to the relevant case law.

In *Integrity Floorcovering*, the Eighth Circuit Court of Appeals applied Minnesota's statute of repose to a set of facts similar to those presented here. The product at issue was an apartment's bathroom ventilation fan that allegedly malfunctioned and started a fire. Even though the ventilation fan had moving parts like the sprinkler heads at issue here, the court determined that the ventilation fan was "ordinary building material":

> On the one hand, the fan clearly is not an "ordinary building material" such as a nail, a screw or a window. Additionally, the fan is "subject to close quality control at the factory" and may be covered by "independent manufacturer's warranties." These factors indicate the fan qualifies as "equipment or machinery." On the other hand,. . . ventilation fans are commonly incorporated into the structure of buildings, particularly interior bathrooms. . . the fan in this case was required under Minnesota building codes. More significantly, such fans are "incorporated into construction work outside the control of their manufacturers and suppliers at the direction of architects, designers, and contractors." These factors indicate the fan is ordinary building material.

Id. at 919-920. Thus, just because the fan is something more substantial than a nail does not preclude it from being an "ordinary building material." In reaching its decision, the court recognized that "items integrally incorporated as part of a building structure, *such as a fire sprinkler system*, are considered ordinary building materials." *Id.* (emphasis added). The court further noted that "items considered 'equipment or machinery' are

typically large scale items, which are not integral or incorporated into the building, and could exist separately from the building structure." *Id.* at 920. As a result, the court concluded the ventilation fan was ordinary building material subject to Minnesota's statute of repose.

In another applicable Minnesota case, *Red Wing Motel Investors v. Red Wing Fire Department*, 552 N.W.2d 295 (Minn. Ct. App. 1996), the Minnesota Court of Appeals evaluated whether a building's fire sprinkler system was "ordinary building material" or "equipment or machinery" for purposes of the statute of repose. A motel owner sued the contractor who designed and supplied the parts for the building's fire sprinkler system. The owner alleged the pipes were improperly pitched and froze, thereby leading to significant water damage. *Id.* at 297. The court held that because the "pipes and sprinkler heads" were incorporated into construction work outside the control of their manufacturers and suppliers, at the direction of architects, designers, and contractors," they were "ordinary building materials" and subject to the statute of repose.[4] *Id.* (quoting, in part, *Cape Henry*, 229 Va. at 602).

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[4] In dicta, the court questioned whether the sprinkler heads would be considered ordinary building material had the sprinkler heads themselves failed. 552 N.W.2d at 297-298. Notably, this dicta was addressed directly in *Integrity Floorcovering, Inc. v. Broan-Nutone*, LLC, wherein the court concluded that the *Red Wing* court "earlier in its opinion found sprinkler

Just like the products at issue in *Integrity Floorcovering*, *Red Wing Motel Investors*, *Cape Henry Towers, Grice, Luebbers*, and *Baker*, the trial court here did not err in concluding that TFP's sprinkler heads constitute "ordinary building materials." The evidence presented at the trial level and the applicable factors and case law weigh heavily in favor of this determination, and the trial court's decision should be given great deference. *Cooper*, 260 Va. at 595. Plaintiffs' tort claims are time-barred.

IV. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' POST-SALE DUTY TO WARN CLAIM.

A. Plaintiffs did not properly preserve their new argument based on a tort cause of action based on a post-sale duty to warn.

Plaintiffs attempt to inject a new issue into this appeal—whether a tort based on a post-sale duty to warn is exempt from the statute of repose. Plaintiffs claim this issue is one of first impression and cite various cases in other jurisdictions inapplicable to this matter. (*See* Appellants' brief, p. 2.) Plaintiffs have never raised this issue during the arguments and briefing on TFP's Plea in Bar. As such, this issue was not preserved and should be summarily rejected. *See* Rule 5:25; *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 515, 675 S.E.2d 458 (2009) ("A basic principle of

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heads 'plainly' were ordinary building materials and not machinery or equipment. 521 F.3d 914, 920 n.6 (8th Cir. 2008).

appellate review is that, with few exceptions not relevant here, arguments made for the first time on appeal will not be considered.") (quoting *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005)).

TFP's Plea in Bar applied to *all* tort claims, and the trial court explicitly recognized this, providing, "[i]n this case, the issue is whether Plaintiffs' tort claims against the Defendants are barred by the statute of repose." (JA 705) In their briefing, Plaintiffs never argued that the statute of repose does not apply to post-sale duty to warn claims—a claim that does not even exist under Virginia law. Not once during the three days of evidence and oral argument on TFP's pleas and motion did Plaintiffs argue or explain legally why this non-existent cause of action, which sounds in tort, should be any different from any other tort and not be subject to the statute of repose. (See generally, JA 120-313; 628-702; 1147-1311.)

Furthermore, when the trial court ruled that the statute of repose barred *all* tort claims, Plaintiffs filed an objection as required by Virginia Supreme Court Rule 5:25, but the only basis for their objection was to the court's ruling that the sprinkler heads were "ordinary building materials." (JA 713-715) "No ruling of the trial court. . . before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling . . ." Rule 5:25.

A statement that the judgment or award is contrary to the law and evidence is insufficient. *Id.* Rule 5:25 provides that objections to a trial court's ruling must be timely and made with sufficient specificity to enable the trial judge to rule intelligently and be timely. *Townsend v. Commonwealth*, 270 Va. 325, 332 619 S.E.2d 71, 75 (2005); *Muhammad v. Commonwealth*, 269 Va. 451, 619 S.E.2d 16, 57 (2005). "Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." *Edwards v. Commonwealth*, 41 Va. App. 752, 760, 589 S.E.2d 444, 448 (2003) (en banc) *aff'd,* No. 040019 (Va. Sup.Ct. Order of 10/15/04).[5]

Here, the trial court was never given an opportunity to rule on this new issue. As such, Plaintiffs' failure to raise specific arguments before the trial court precludes them from raising those arguments for the first time on appeal. *Buck v. Commonwealth*, 247 Va. 449, 452-53, 443 S.E.2d 521, 525 (1992). As a result, this issue is not properly before the Court and cannot be considered. *Appalachian Voices*, 277 Va. 515, 675 S.E.2d 458 (2009). Because Plaintiffs failed to preserve this issue, their failure constitutes waiver, and there is nothing to review on appeal. *Id.*

[5] While this case dealt with Virginia Supreme Court Rule 5A:18, it has been recognized as the equivalent of Rule 5:25, and the purpose behind both is the same. *See Green v. Commonwealth*, 2010 WL 2998774 at *2 (Va. Ct. App., August 3, 2010).

B. Even if Plaintiffs' post-sale duty to warn argument had been properly preserved and could be considered, Virginia has never recognized such a cause of action, and any such action would nonetheless be barred by the statute of repose.

Virginia state courts have never recognized a post-sale duty to warn cause of action. *Hart v. Savage*, 2006 WL 3021110 (Va. Cir. Ct., Oct. 19, 2006). In *Hart*, the court examined applicable Virginia case law on this issue—including the *Harris v. T.I., Inc.*, 243 Va. 63, 413 S.E. 2d 605 (1992) opinion relied upon by Plaintiffs—and determined that no post-sale duty to warn exists under Virginia law. *Id.* at *3. In *Harris v. T.I. Inc.*, 243 Va. 63, 413 S.E.2d 605 (1992), the court assumed, for the sake of argument, that Virginia would recognize a post-sale duty to warn in instances of close interaction between a successor company and its predecessor's customers but found that such a relationship did not exist in that case. With this dicta, Plaintiffs now argue that TFP and SimplexGrinnell should be considered one company, subject to this so-called post-sale duty to warn. To do so, Plaintiffs intentionally and improperly misstate the corporate structure and history of TFP with no citation whatsoever. (See Appellants' brief, p. 37-38.) The reality is, TFP and SimplexGrinnell are legally separate entities, and Plaintiffs have not provided any factual support for this argument because it is false.

Furthermore, Count VIII is a negligence claim—*i.e.,* a tort claim. The statute of repose applies to all tort claims. Although Plaintiffs now assert that a post-sale duty to warn tort would somehow be exempt from the statute of repose, they provide absolutely no basis for this bold assertion. In fact, their brief contains one sentence with no citation to any authority. (See Appellants' brief, p. 34.)[6] Indeed, the statute creates no exception for negligent post-sale duty to warn claims, nor does it provide an exception for any tort. Obviously, the legislature knows how to make exceptions, as the history of the statute has shown it did exactly that for manufacturers of "equipment or machinery." If it intended to create another exception, it would have done so. VA. CODE ANN. § 8.01-250. It is not the role of the courts to draft legislation.

As is clear from the plain language of the statute, all tort claims—including Plaintiffs' post-sale duty to warn claim—are barred by the five-year statute of repose. The statute of repose is a public policy declaration that <u>*no claim*</u> shall be brought after a certain number of years. Plaintiffs'

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[6] Even jurisdictions that have recognized a post-sale duty to warn have not granted an exception for such a claim under the statute of repose. *See Mills v. General Motors Corporation*, 120 F.3d 262, 1997 WL 414338 (C.A.4 (N.C.), July 23, 1997) (finding continuing post-sale duty to warn does not extend beyond six-year statute of repose); *Dague v. Piper Aircraft Corporation*, 275 Ind. 520, 418 N.E.2d 207 (1981) (rejecting argument that allegations of continuing duty to warn avoid Indiana's statute of repose).

position is that duty should extend until the head discharges—whether that may be 10 years, 50 years, 100 years, or forever. Thus, Plaintiffs' position is there should be a lifetime guarantee of performance. This position is 180 degrees contrary to Virginia law.

V. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS BARRED PLAINTIFFS' BREACH OF WARRANTY CLAIM BECAUSE TFP'S WARRANTY DID NOT EXPLICITLY EXTEND TO FUTURE PERFORMANCE.

The trial court correctly determined that the applicable four-year statute of limitations barred Plaintiffs' breach of warranty claim. Virginia's Commercial Code provides that "an action for breach of contract for sale must be commenced within four years after the cause of action has accrued." VA. CODE. ANN. § 8.2-725(1). A cause of action accrues "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." VA. CODE. ANN. § 8.2-725(2). A breach of warranty occurs "when tender of delivery is made." *Id.*

Plaintiffs readily admit that TFP tendered delivery of the sprinkler heads more than four years before Plaintiffs commenced this action. Plaintiffs, however, seek to avoid the statutory bar by arguing that the following exception to the statute of limitations applies: "where a warranty <u>explicitly</u> extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action

accrues when the breach is or should have been discovered." *Id.* (emphasis added).

A. TFP's warranty explicitly limits the warranty period to one year from the date of shipment.

Plaintiffs' argument is easily disposed of because the first prong of the exception—that TFP's warranty explicitly extends to future performance—is not met. In fact, TFP's warranty, which is conspicuously absent from Plaintiffs' brief, does just the opposite. It explicitly limits the warranty period to one year from the date of shipment: "Seller warrants a period of one year from the date of shipment (warranty period) that the products furnished hereunder will be free from defects in material and workmanship." (JA 64) TFP did not provide any other warranties with the subject sprinkler heads, and this warranty in no way "explicitly extends to future performance." (*Id.*) Consequently, Plaintiffs' warranty claim is barred.

In a futile attempt to side-step TFP's actual warranty, Plaintiffs instead focus on a product description found in the sprinkler head's Technical Data Sheet:

> When the F960/Q46 is in service, water is prevented from entering the assembly by the Plug and O-ring Seal in the inlet of the Sprinkler. Upon exposure to a temperature sufficient to operate the Bulb, the Bulb shatters and the Bulb seat is

> released. The compressed spring is then able to expand and push the Water tube as well as the Guide Tube outward. This action simultaneously pulls outward on the Yoke, withdrawing the plug and O-ring seal from the inlet and initiating water flow.

Based on this language and this language alone, Plaintiffs contend that TFP created a warranty explicitly extending to future performance. (See Appellants' brief, p. 45-46, 49.) As the trial court correctly concluded, this is not a warranty of future performance, but rather a general description of how the product functions. (JA 1209, 1312)

Carried to its logical conclusion, Plaintiffs' argument would result in a potentially indefinite warranty for TFP's sprinkler heads, *i.e.,* the warranty would extend until some unknown time when/if a fire ever occurs. It would essentially apply a lifetime guarantee to all sprinkler heads until the day each particular head activates—whenever that may be. Not only is this an illogical result, but it directly contradicts the Commercial Code's objective to provide sellers with a date-certain end to liability.

Furthermore, Virginia law requires that any warranty of future performance must include a "specific guarantee or reference to a future time," which is completely absent from TFP's product description. *See Winchester Homes, Inc. v. Hoover Univ., Inc.*, 1992 WL 884416 at *3 (Va. Cir. Ct., Apr. 21, 1992).

B. Plaintiffs' reliance on *Chestnut Forks Tennis Club* and *St. Paul Fire & Marine* is misplaced.

Plaintiffs' reliance on *Chestnut Forks Tennis Club v. International*, 56 F.3d 60 (4th Cir. 1995) (unpublished) and *St. Paul Fire & Marine Ins. Co. v. Northern Fire & Safety, Inc.*, No. 90-8468 (Mich. Cir. Ct., County of Grand Traverse Oct. 20, 1992) is entirely misplaced because those decisions are factually inapposite. In *Chestnut Forks*, the seller explicitly warranted that the lifespan of its product would exceed the four-year statutory period. The seller guaranteed that the product "would last a lifetime" and "absolutely guaranteed this product to a point where [the buyer] decided to accept his deal. [The seller] again told [the buyer] that the product would last 80 to 100 years without question." *Id.* at *2.

In stark contrast to the warranty in *Chestnut Forks*, TFP never warranted that the lifespan of the sprinkler heads would exceed the four-year statutory period. To the contrary, TFP explicitly warranted the product for one year. (JA 64) Consequently, *Chestnut Forks* has no bearing on the instant analysis.

As for *St. Paul Fire & Marine*, an unpublished Michigan state court opinion, it too has no application here. First, another state court's unpublished opinion is of no precedential value in Virginia courts. *Fairfax*

County Sch. Bd. v. Rose, 29 Va. App. 32, 39 n. 3, 509 S.E.2d 525, 528 n. 3 (1999) (*en banc*). Second, this case is misapplied and factually inapplicable and, accordingly, of no persuasive value. The issue in *St. Paul Fire* was not whether the UCC's statute of limitations applied, but rather whether the economic loss doctrine barred the plaintiff's tort claims. *Id.* at 4. ("The essence of both motions is the applicability of the economic loss doctrine to the claims made by [the plaintiff] and, in turn, to the claims which underlie [the third-party plaintiff's] demand for contribution."). The plaintiff argued that application of the UCC, in place of tort remedies, would be "manifestly unfair" because a defect in the fire protection system could not have been discovered in a timely fashion. *Id.* at 11. The trial court rejected the plaintiff's argument because the UCC accounts for these types of issues where "a warranty explicitly extends to future performance . . . and discovery of the breach must await the time of such performance." *Id.* (quoting MSA 19.2725).

Although recognizing that the complaint was timely, the opinion focused solely on the second prong of the exception (*i.e.,* "discovery of the breach must await the time of such performance"). It never addressed the seller's warranty and failed to include any language from that warranty. Consequently, the opinion is entirely inapplicable to the issue in the instant

case. This is especially true in light of TFP's explicit limitation of warranty period—a fact that is noticeably absent from the *St. Paul Fire & Marine* opinion. In short, because TFP did not explicitly warrant its sprinkler heads to perform beyond one year, the trial court did not err in dismissing Plaintiffs' untimely warranty claim.

CONCLUSION

As demonstrated *supra*, Plaintiffs' numerous instances of non-compliance with the Virginia Supreme Court Rules should cause this Court to dismiss their Appeal. At a minimum, Plaintiffs should not be allowed oral argument.

If Plaintiffs' appeal is not dismissed, TFP asserts that the trial court made specific findings about the nature and characteristics of these sprinkler heads and the installation project at River Run Apartments, based both on stipulated facts and findings from an evidentiary hearing and documentary exhibits. Such facts are clearly supported by the evidence, and there is no reason to disturb those findings. When those findings are applied to the established case law, these particular sprinkler heads meet all of the criteria to be considered "ordinary building materials."

As such, the trial court's Orders should be affirmed because Plaintiffs have failed to demonstrate any error by the trial court. Plaintiffs' tort claims,

including the one premised on an unrecognized post-sale duty to warn, are barred by the five-year statute of repose because TFP's sprinkler heads are "ordinary building materials." Moreover, Plaintiffs' breach of warranty claim is barred by the Commercial Code's four-year statute of limitations because TFP's explicit warranty did not extend to future performance; rather it limits the applicable warranty period to one year from the date of shipment.

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CERTIFICATE

Pursuant to Rule 5:26, I hereby certify that: one electronic version of the Brief of Appellee was filed with the Clerk of the Court and served on opposing counsel. In addition, fifteen printed copies of the brief were filed in the office of the Clerk of the Court and three copies mailed, first class mail, postage prepaid, to counsel for appellant, this 27th day of August, 2010 at:

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Dawn E. Boyce

Circuit Court of Virginia, Richmond.
Walter WASHINGTON
v.
SQUARE D COMPANY, et al.
No. LS-672-4.

Feb. 6, 2006.

Dear Counsel:
JOHNSON, J.

*1 This action arises out of a work-place accident. The motion for judgment alleges that on March 22, 2002, plaintiff and a co-worker, employees of an electrical contractor, were installing an electrical panel in a room at James Center Tower Two, a large office building in Richmond. While doing so, a ground fault occurred involving bus duct, aluminum structures designed to receive electricity from one or more switchboards and distribute it to various switches and panel boxes which in turn distribute it to the many branch circuits and electrical outlets throughout the building. When the ground fault occurred, the switchboard and the "Ground Fault Circuit Interrupter," or circuit breaker, failed to interrupt the supply of electricity to the bus duct, thereby causing arcing, or "jumping," of electricity from one point to another, explosions, and fire, severely injuring plaintiff. Plaintiff filed suit against Square D Company, which manufactured the components of the electrical system involved in the accident, Eck Supply Company and Eck Enterprises, Inc., alleged to have been distributors of those components, Faison & Associates, LLC, alleged to have been the premises owner, Trammell Crow Services, Inc., the property manager, and Virginia Electric and Power Company, which supplied electricity to the site. Through dismissals and nonsuits, Eck Supply Company, Eck Enterprises, Inc., Faison & Associates, LLC, and Virginia Electric and Power Company are no longer parties. The action is presently before the court on Square D's plea of the five-year limitation contained in Va.Code § 8.01-250, a statue of repose.[FN1] An evidentiary hearing was held on January 19.

FN1. "A statute of repose differs from a statute of limitations in that the time limitation in a statute of repose commences to run from the occurrence of an event unrelated to the accrual of a cause of action.... The limitation period in a statute of limitations generally begins to run when the cause of action accrues." *Cooper Industries v. Melendez*, 260 Va. 578, n. 9, 537 S.E.2d 580 (2000) (citation omitted).

The statute of repose provides, in pertinent part, as follows:

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

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....

Under relevant case law, ordinary building materials are not "equipment or machinery or other articles" excluded from the five-year limitation by the second paragraph of the statute. Thus, the question is whether the electrical components manufactured and supplied by Square D are ordinary building materials, in which case the limitation applies, or equipment, in which case the limitation does not apply. Four Virginia Supreme Court cases are particularly relevant.

In *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 331

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S.E.2d 476 (1985), suit was filed to recover damages for construction defects in a condominium apartment building, including extensive water leaks through the exterior walls of the building. Construction of the building was completed in 1975. The manufacturer of the exterior wall panels used in the construction and the manufacturer of a chemical coating that was sprayed on the panels were brought into the suit in 1981. The panels had been purchased from an independent building supply company and were fastened to studs and sprayed with the coating on site. The manufacturers argued that the five-year limitation applied. The trial court agreed and dismissed the manufacturers from the suit. In affirming, the Supreme Court discussed the legislative history of the statute and two federal cases which, as the Court explained, helped shape its understanding of the legislative history. The Court then said:

*2 We conclude that the General Assembly intended to perpetuate a distinction between, on one hand, those who furnish ordinary building materials, which are incorporated into construction work outside the control of their manufacturers or suppliers, at the direction of architects, designers, and contractors, and, on the other hand, those who furnish machinery or equipment. Unlike ordinary building materials, machinery and equipment are subject to close quality control at the factory and may be made subject to independent manufacturer's warranties, voidable if the equipment is not installed and used in strict compliance with the manufacturer's instructions. Materialmen in the latter category have means of protecting themselves which are not available to the former. We construe § 8.01-250 to cover the former category and to exclude the latter.

229 Va. at 598.

Three years later, in *Grice v. Hungerford Mechanical Corp.*, 236 Va. 305, 374 S.E.2d 17 (1988), the Court was confronted with a case involving items similar to those at issue here-an electrical panel box and its component parts. In that case, the plaintiff administrator alleged that her decedents died of smoke inhalation during a fire at their rental home in 1984 caused by the malfunction of the panel box and its components. The panel box and its components were installed in 1979. Suit was filed in 1986. Defendants were the corporation and a subsidiary that had manufactured the panel box, the panel enclosure, the bus bar, the circuit breakers, and the grounding material, and the electrical subcontractor that purchased, assembled, and installed the items as part of the electrical system. By special pleas, the defendants invoked the five-year limitation of § 8.01-250. Again, the trial court sustained the pleas and the Supreme Court affirmed. In doing so, the Supreme Court rejected the plaintiff's argument that the term "equipment" should be given the meaning set out in Va.Code § 36-97(13), pointing out that such definition was limited to Chapter 6 of Title 36 of the Code. Instead, the Court relied on its decision in *Cape Henry* to hold that the panel box and its components were ordinary building materials and were subject to the five-year limitation. Specifically, the Court noted that "[a]ccording to the agreed statement of facts, 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 'are determined by the plans and specifications provided by the architect or other design professional' and '[n]o instructions are received from the manufacturer'." 236 Va. at 309.

Next, in *Luebbers v. Fort Wayne Plastics*, 255 Va. 368, 498 S.E.2d 911 (1998), the Court was called upon to decide whether components of a residential swimming pool were ordinary building materials or equipment. In that case, the plaintiff's decedent died in a swimming pool accident in 1995, allegedly from the negligent design, manufacture, and installation of the pool's component parts. The pool was completed in 1986. Among the defendants were the manufacturer of the component parts and the installer of the pool. The manufacturer made steel braces, panels, and vinyl liners and sold them in bulk to a distributor. The installer purchased from the distributor steel braces, panels, and a vinyl liner manufactured by the defendant manufacturer, as well as components made by other manufacturers, and used them in its installation. The trial court sustained those defendants' pleas of the five-year statute. Once again, the Supreme Court affirmed.

*3 As it had in *Grice*, the Supreme Court in *Luebbers* relied on its holding in *Cape Henry* in deciding that the component parts of the swimming pool manufactured by the defendant manufacturer and installed by the defendant installer were ordinary building materials. It noted that the materials were interchangeable in the swimming pool construction industry with

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component materials made by other manufacturers and were purchased by distributors in bulk to be used in the construction of swimming pools according to the dimensions and shapes desired by particular customers. The Court also noted that the manufacturer exercised no oversight over the construction of the pools and that the manufacturer's specification guides and installation manuals were general guides for the construction of generic swimming pools, not for the construction of a pool with the particular dimensions and shape of the one involved in the decedent's death. The court concluded:

Here, as in *Cape Henry Towers,* the materials manufactured by Fort Wayne and incorporated into the finished swimming pool by Crystal Pools were clearly fungible components of that pool. Individually, these items served no function other than as generic materials to be included in the larger whole and are indistinguishable, in this context, from the wall panels we addressed in *Cape Henry Towers.* As such, these materials were ordinary building materials and not "equipment" within the meaning of Code § 8.01-250.

255 Va. 373.

Lastly, in *Cooper Industries v. Melendez, supra,* the court took on another case involving electrical components. In that case, the plaintiff, a co-worker, and their supervisor were installing a circuit breaker in a switchgear, which is a large metal enclosure containing many component parts, underneath a submarine pier at the Norfolk Naval Base in 1994.[FN2] While doing so, an explosion occurred resulting in the death of the co-worker and injury to the plaintiff and the supervisor. The plaintiff brought suit against the manufacturers of the switchgear, collectively referred to in the opinion as "Cooper." Cooper, noting that the switchgear had been installed 17 years before plaintiff's injury, filed a plea under 8.01-250. The trial court held that the statute did not apply and denied the plea, and a jury returned a verdict for the plaintiff in the amount of $5,000,000. The Supreme Court affirmed.

FN2. From the description of switchgears in the opinion, they seem to be equivalent to the switchboards involved in this case. *See* 260 Va. at 578.

In affirming the trial court's decision, the Supreme Court rejected Cooper's argument that "the switchgear and circuit breakers were generic items that were 'incorporated into the construction of the pier' and were 'essential to the existence of the pier,' similar to the exterior panels in *Cape Henry Towers* and the electrical panel box in *Grice.*" 260 Va. at 594. To the contrary, the Supreme Court found that the switchgear and circuit breakers were not part of the pier at all. Rather, "they comprised the electrical system for submarines docked at the pier so that the submarines could receive electrical power from the shore rather than having to operate their engines and generators." *Id.* at 595. In fact, Square D cites that language to argue that *Cooper* has no bearing on the case-at-bar because it is uncontroverted in this case that the electrical components at issue *are* part of James Center Tower II. Contrary to Square D's argument, however, the Supreme Court's finding that the switchgear and circuit breakers were not part of the pier was not the only basis for its decision. Findings directly related to the "ordinary building materials" vs. "equipment" question were also important.

*4 First, the Court stated that "[un]like the collection of unassembled parts in *Grice,* the switchgear and circuit breakers were each self-contained and fully assembled by their respective manufacturers. Cooper manufactured the switchgear, and in doing so, specified in its Materials List the use of K-Don circuit breakers." 260 Va. at 595. The Court also noted that "[w]hen the circuit breakers left the manufacturer, they had been tested at the factory and needed only to be placed in a switchgear that contained a compatible cradle. ITE [FN3] supplied an instruction manual with each circuit breaker, and the Navy required that the switchgear and circuit breaker bear a nameplate containing certain information, including the manufacturer's name." The Navy also required that the equipment "be established standard tested products of the manufacturer, thoroughly coordinated and integrated by the manufacturer." *Id.*

FN3. ITE was the manufacturer of the K-Don circuit breakers.

Further, the Court noted that "the switchgear and circuit breakers were not fungible or generic materials. While the Navy specifications would have permitted the use of circuit breakers from different manufacturers, once Cooper specified the ITE K-Don

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breaker, another manufacturer's breaker could not have been used in Cooper's switchgear unless the cradle had also been changed.... Cooper assembled the switchgear and, in doing so, selected the component parts, including the circuit breakers, though they were shipped in separate containers to the end user." *Id.* The Court concluded that the switchgear and circuit breakers were "equipment" as contemplated by § 8.01-250. *Id.*

With the above cases in mind, the court now turns to the case-at-bar. As a preliminary matter, the court notes that while there is no indication in *Cape Henry, Grice, or Luebbers* that any party objected to the trial court ruling on the subject plea instead of submitting the question to a jury, the Supreme Court mentioned in two separate places in *Cooper* that the manufacturer in that case did make such an objection. The trial court overruled it. Plaintiff in the case-at-bar makes the same objection. Even though the Supreme Court never expressly said in *Cooper* whether the plea should have been decided by the trial court or by a jury, it is obvious from the fact that the Supreme Court affirmed the trial court's ultimate ruling against the manufacturer that the Supreme Court is of the opinion that the question need not be submitted to a jury in every case. It will not be submitted to a jury in this one.

The parties have stipulated that the materials at issue were installed more than five years before suit was filed. The court also finds, based on the evidence presented at the hearing, that there are several similarities between this case and the three cases discussed above that sustained pleas under § 8.01-250. Like *Grice,* the items under consideration are electrical components. In fact, Square D's expert, Gardner Barnstead, testified that the items at issue in this case are for all intents and purposes the same as the items at issue in *Grice,* just on a larger scale. Also, the items manufactured by Square D were installed in James Center Tower II by contractors and subcontractors chosen and employed by the building's owner, not by Square D. The same was true in *Cape Henry, Grice,* and *Luebbers.* There is also no evidence that Square D provided any on-site supervision of the installation of the electrical system, just as there was no on-site supervision of any of the systems involved in those three cases. Moreover, the electrical system at issue in this case was designed by, and manufactured in conformity with, specifications and drawings supplied or approved by the owners. In that regard, Square D's expert testified that the initial specifications and drawings were prepared by the owner and sent to Square D to be fashioned into a workable system.[FN4] Square D then prepared detailed drawings of a system and sent them to the owner for approval. Only after they were approved by the owner were the system and its components manufactured by Square D. There is also evidence that the instruction and installation manuals sent to the site with the manufactured components applied to the manufactured components generally, and not to the installation of the components into James Center Tower II specifically.

FN4. Actually, Square D's expert testified that no drawings prepared by the owner have ever been found but that in his experience a system of the size involved could not have been manufactured without them. Plaintiff presented no evidence that such a system could have been manufactured without drawings from the owner. The court finds that such drawings were prepared by the owner even though none have been found.

*5 On the other hand, there are several facts in this case that are vastly different from the facts of *Cape Henry, Grice,* and *Luebbers,* and are more consistent with the facts of *Cooper.* Unlike *Cape Henry, Grice,* and *Luebbers,* 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 James Center Tower II in accordance with detailed drawings prepared by Square D and approved by the owner for use in James Center Tower II only. They 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 "quality and quantity of the component parts" of the system were determined by Square D, not by the owner as was the case in *Grice.* Moreover, not only were the instructions for assembling the components not prepared by the owner's architect or other design professional, as was the situation in *Grice,* the units were actually assembled at one or more of Square D's manufacturing plants. They merely had to be connected to each other and to the building on site.

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The court also finds that the quality control and testing exhibited by Square D are more consistent with a finding that the five-year limitation does not apply than with a finding that it does. In this regard, Ronnie Rush, a senior staff engineer with Square D, testified that Square D selected the component parts for the busways (Rush Deposition at 13), the switchboards (Rush Deposition at 32), and the ground fault relays. Rush Deposition at 44.[FN5] Rush also testified about the extensive tests and inspections performed by Square D before the components left their respective plants. Rush Deposition at 16-17, 32-33, and 45-47. Detailed instruction manuals showing how to properly connect the components were also sent to the site by Square D. As previously noted, the components were already assembled when they arrived at the site. They just needed to be connected.

> FN5. The parties stipulated that the court could consider designated portions of Ronnie Rush's deposition in ruling on Square D's plea.

The court believes that the facts set out in the two previous paragraphs are more in line with *Cooper* than they are with *Cape Henry, Grice,* or *Luebbers.* Just as the switchgears and circuit breakers in *Cooper* "were each self-contained and fully assembled by their respective manufacturers," 260 Va. at 595, the busways, switchboards, and ground fault relays were each self contained and fully assembled by Square D. Rush Deposition at 12-13, 32, and 44-45. While the manufacturer in *Cooper* merely "specified in its Materials List the use of K-Don circuit breakers," 260 Va. at 595, a fact relied on by the Supreme Court to affirm the overruling of the manufacturer's plea of the statute, Square D actually selected and assembled the ground fault relay, or circuit breaker, that allegedly failed. Rush deposition at 44. In addition, just as the circuit breakers in *Cooper* "had been tested at the factory and needed only to be placed in a switchgear that contained a compatible cradle," 260 Va. at 595, all of the components manufactured by Square D had been tested and inspected at its plants and needed only to be connected and put into place on site. In *Cooper,* "the Navy required that the switchgear and circuit breaker bear a nameplate containing certain information, including the manufacturer's name." Id. Here, Square D placed on its components an Underwriters Laboratory listing label and other safety labels, and a label that has a date code "and what looks like a stamped serial number," so that Square D would know the date the product was manufactured and the shift and clock number of the person at the end of the assembly line. Rush Deposition at 17-18.

*6 In addition to the above, there are other similarities between this case and *Cooper.* The court has already discussed the fact that the components manufactured by Square D are not fungible or generic materials. They were manufactured and assembled by Square D specifically for James Center Tower II. This is identical to the finding that the switchgears and circuit breakers in *Cooper* "were not fungible or generic materials.... Cooper assembled the switchgear and, in doing so, selected the component parts, including the circuit breakers...." 260 Va. at 595.

In weighing the similarities and differences between the facts of the case-at-bar and the facts of *Cape Henry, Grice, Luebbers,* and *Cooper,* the following language from *Cape Henry,* already set out above, is particularly instructive:

> Unlike ordinary building materials, machinery and equipment are subject to close quality control at the factory and may be made subject to independent manufacturer's warranties, voidable if the equipment is not installed and used in strict compliance with the manufacturer's instructions. Materialmen in the latter category have means of protecting themselves which are not available to the former. We construe § 8.01-250 to cover the former category and to exclude the latter.
>
> 229 Va. at 598.

No evidence was presented in this case about manufacturer's warranties. The evidence that was presented, however, shows that Square D consistently exhibited and maintained the control referred to in *Cape Henry* as being indicative of a manufacturer of equipment rather than a manufacturer of ordinary building materials. Square D prepared the final drawings of the electrical system and components, manufactured the system and components, and assembled the system and components. The only control it did not exercise and maintain was connecting the assembled components to each other and to the building. That was done on site by persons not under Square D's control, just as the components manufactured and assembled by the manufacturer in *Cooper* were

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placed in their final positions by persons not under the control of that manufacturer. Nevertheless, just as the trial court and the Supreme Court held that the five-year limitation did not apply to the manufacturer in *Cooper*, and because the other facts discussed above are more consistent with the facts of *Cooper* than they are with the facts of *Cape Henry, Grice,* and *Luebbers,* the court holds that the five-year limitation does not apply to Square D in this action. Its plea will be denied.

A copy of an order consistent with this opinion is enclosed.

Va.Cir.Ct.,2006.
Washington v. Square D Co.
Not Reported in S.E.2d, 71 Va. Cir. 34, 2006 WL 637033 (Va. Cir. Ct.)

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H Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

Court of Appeals of Virginia.
Devainte J. GREEN
v.
COMMONWEALTH of Virginia.
Record No. 1782-09-2.

Aug. 3, 2010.

From the Circuit Court of The City of Petersburg, James F. D'Alton, Jr., Judge.
(James R. Traylor; James R. Traylor & Associates, on brief), for appellant. Appellant submitting on brief.

Susan M. Harris, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Present: FELTON, C.J., and ELDER and HUMPHREYS, JJ.

MEMORANDUM OPINION [FN*]

FN* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

FELTON, C.J.

*1 Devainte J. Green ("appellant") appeals his convictions for grand larceny in violation of Code § 18.2-95 and malicious wounding in violation of Code § 18.2-51. On appeal, appellant contends the evidence was insufficient to find him guilty of both crimes. For the reasons that follow, we disagree and affirm his convictions.

I. BACKGROUND

"Under well-settled principles of appellate review, we consider the evidence presented at trial in the light most favorable to the Commonwealth, the prevailing party below." *Bolden v. Commonwealth*, 275 Va. 144, 148, 654 S.E.2d 584, 586 (2008). "We also accord the Commonwealth the benefit of all inferences fairly deducible from the evidence." *Riner v. Commonwealth*, 268 Va. 296, 303, 601 S.E.2d 555, 558 (2004).

The evidence at trial proved that appellant was Letoria Wesson's boyfriend. On February 19, 2009, appellant and Wesson had been arguing for a "couple of hours." The argument turned "physical" when Wesson told appellant she was going to call the police. Appellant, who was about 6 feet, 5 inches tall and weighed 180 pounds, punched Wesson in the face and knocked her to the floor. Wesson, who was 5 feet, 4 inches tall and weighed 127 pounds, estimated appellant hit her four or five more times in the face while she was lying on the floor. Appellant then took $160 and a cell phone from Wesson's purse and left Wesson's home. A neighbor, hearing the commotion, called the police. When Officer K. Landon arrived at Wesson's home, Wesson's cheekbone was puffy and bruised, and her lip was split and bleeding. The officer estimated Wesson's lip was double its normal size. After a few minutes, Wesson's eye was swollen "[a]lmost completely shut."

At the close of the Commonwealth's case at trial, appellant moved to strike the evidence pertaining to the grand larceny of the phone because Wesson had testified appellant regularly used the cell phone. Appellant did not move to strike the Commonwealth's malicious wounding evidence. The trial court denied the motion.

Appellant then testified that he had argued with Wesson, "but it was no fight." He denied touching her face or head, but admitted pushing her out of the way

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when he left. Appellant also claimed that the cell phone was his and that it had been in his pocket during their argument. He admitted to once being convicted of a felony, but denied taking money from Wesson's purse.

After appellant presented his evidence, he renewed his earlier motion to strike, but did not argue further. The trial court overruled appellant's renewed motion to strike and requested argument pertaining to the sufficiency of the evidence.

In closing argument, appellant's counsel asserted that appellant had testified truthfully and that appellant would not be before the trial court but for the neighbor calling Petersburg police. Appellant's counsel also argued he deserved leniency because the case was a "boyfriend-girlfriend situation." The trial court found appellant guilty of malicious wounding and grand larceny.

II. ANALYSIS

A. Grand Larceny

***2** Appellant asserts that the evidence presented at trial was insufficient to convict him of grand larceny of Wesson's cell phone. However, in his brief on appeal appellant provides no argument as to why the evidence was insufficient nor does he cite any authorities in support of his assertion. Rule 5A:20(e) requires appellants to brief the "standard of review and the argument (including principles of law and authorities) relating to each assignment of error." " 'Statements unsupported by argument, authority, or citations to the record do not merit appellate consideration.' " *Epps v. Commonwealth*, 47 Va.App. 687, 718, 626 S.E.2d 912, 926-27 (2006) (en banc) (quoting *Buchanan v. Buchanan*, 14 Va.App. 53, 56, 415 S.E.2d 237, 239 (1992)). In *Jay v. Commonwealth*, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008), the Supreme Court concluded that "the Court of Appeals may ... treat a question presented as waived" if the Court determines the "failure to strictly adhere to the requirements of Rule 5A:20(e) is [ ]significant." *See Fadness v. Fadness*, 52 Va.App. 833, 851, 667 S.E.2d 857, 866 (2008) ("If the parties believed that the circuit court erred, it was their duty to present that error to us with legal authority to support their contention."). Because appellant failed to comply with the mandates of Rule 5A:20(e), he has waived his claim that the evidence was insufficient to find him guilty of grand larceny.

B. Malicious Wounding

On appeal, appellant asserts the evidence was insufficient to convict him of malicious wounding because he did not use a weapon during the assault on Wesson nor did Wesson's injuries show appellant had the requisite "intent to maim, disfigure, disable, or kill" Wesson as required by Code § 18.2-51. Appellant did not raise these arguments to the trial court, nor did appellant make any argument to the trial court regarding the sufficiency of the evidence to prove malicious wounding. We will not consider alternative arguments raised for the first time on appeal. *See* Rule 5A:18.

> The laudatory purpose behind Rule 5A:18, and its equivalent Supreme Court Rule 5:25, frequently referred to as the contemporaneous objection rules, is to require that objections be promptly brought to the attention of the trial court with sufficient specificity that the alleged error can be dealt with and timely addressed and corrected when necessary. The rules promote orderly and efficient justice and are to be strictly enforced except where the error has resulted in manifest injustice. Errors can usually be corrected in the trial court, particularly in a bench trial, without the necessity of appeal. Because our function is to review the rulings of the trial court, rather than superintend the proceedings, we will notice error for which there has been no timely objection only when necessary to satisfy the ends of justice.

Brown v. Commonwealth, 8 Va.App. 126, 131, 380 S.E.2d 8, 10 (1989). Appellant does not argue that we should invoke either the good cause or ends of justice exceptions to Rule 5A:18. *See Redman v. Commonwealth*, 25 Va.App. 215, 220-21, 487 S.E.2d 269, 272 (1997). The Court will not consider Rule 5A:18 exceptions *sua sponte*. *Edwards v. Commonwealth*, 41 Va.App. 752, 761, 589 S.E.2d 444, 448 (2003) (en banc).

III. CONCLUSION

***3** For the foregoing reasons, we affirm the judgment of the trial court.

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Affirmed.

Va.App.,2010.
Green v. Com.
Not Reported in S.E.2d, 2010 WL 2998774 (Va.App.)

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HOnly the Westlaw citation is currently available.

Circuit Court of Virginia.
Jordan HART, et al.
v.
Anthony W. SAVAGE, et al.
No. L-04-1663.

Oct. 19, 2006.

Adam R. Leighton, Esq., Cohen & Cohen, Washington, D.C.

David L. Littel, Esq., Taylor & Walker, Norfolk, Virginia.

Brian O. Dolan, Esq., Kaufman & Canoles, Norfolk, Virginia.

Gary J. Spahn, Esq., Troutman Sanders, Richmond, Virginia.

EVERETT A. MARTIN, JR., Judge.

***1** Dear Gentlemen:

This dental malpractice-products liability action is before the court on the plaintiffs' motion to amend the amended complaint and a motion and demurrers filed by recently added defendant and third-party defendant 3M Unitek Corporation ("3M"), the manufacturer of one of the components used in the orthodontic headgear that caused the young plaintiff's injuries.

Demurrer to American Orthodontics Corporation's Amended Third-Party Complaint

At the hearing Mr. Spahn conceded AOC would have a right to attorney's fees under indemnity and Mr. Littel conceded AOC would have no right to attorney's fees under contribution.

Demurrer to the Plaintiffs' Amended Complaint

Two of the demurrers went to issues the plaintiffs concede they are not raising and thus I need not rule on them. These are fraud (paragraphs 36f and 68) and breach of express warranty (paragraphs 49 and 51).

Negligence *Per Se*

In paragraph 38 of the amended complaint the plaintiff alleges 3M "negligently and carelessly violated the laws and regulations of the United States, as well as regulations (sic), and these violations constitute negligence *per se*." 3M complains that the plaintiff has failed to designate the specific statues or regulations violated. I sustain the demurrer. Although "an allegation of negligence ... is sufficient without specifying the particulars of the negligence," Rule 3:18(b), the "laws and regulations of the United States" fill probably two 8' by 4' book shelves (a half a cord of law) and it only seems reasonable to require the plaintiffs to tell the defendant specifically what statute or regulation it has violated.

"Otherwise Negligent"

The plaintiffs allege in paragraph 36h that 3M Unitek "was otherwise careless and negligent." This statement follows six specific allegations of negligence in paragraphs 36a-f. (There is no paragraph 36g.) As stated above, Rule 3:18(b) only requires that negligence be alleged without specifying the particulars. However, when the plaintiffs have alleged many specifics and seek $10,000,000 in damages they ought to be required to allege their specifics. If the plaintiffs do not do so in the second amended complaint, any affected defendant will be granted a bill of particulars if requested.

The Virginia Consumer Protection Act

Mr. Leighton conceded at the hearing that the device at issue is a prescription medical device regulated by

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the Food and Drug Administration. *See* 21 C.F.R. § 872.5500. Thus the sale of such a device is authorized by federal regulation and exempt from the Virginia Consumer Protection Act. *Code of Virginia* § 59.1-199(A). I sustain the demurrer to Count VIII of the amended complaint without leave to amend and I need not decide whether damages for personal injury may be recovered under the act. If required to decide the issue anew I might reach a different conclusion from that expressed earlier.

The Learned Intermediary Doctrine

*2 The Supreme Court of Virginia has never explicitly adopted this doctrine, but it seems to have approved it with regard to prescription drugs in *Pfizer, Inc. v. Jones,* 221 Va. 681, 684, 272 S.E.2d. 43, 44 (1980). The Fourth Circuit in applying Virginia law has applied the doctrine in cases involving medical devices. *Talley v. Danek Medical, Inc.,* 179 F.3d 154 (4th Cir.1999). The plaintiffs apparently concede this is Virginia law, but contend the issue ought not be decided on demurrer.

The Fourth Circuit succinctly stated the doctrine in *Talley:*

> ... in circumstances where (1) ... medical devices that can be prescribed or installed only by a physician are involved and (2) a physician ... installs the medical device after having evaluated the patient, the manufacturer of the ... device owes the patient only the duty to warn the physician and to provide the physician with adequate product instructions.

179 F.3d at 163. Thus 3M would owe no duty to the plaintiffs to warn them directly. However, there is one condition to the application of the doctrine. The physician "must be an intervening and independent party between patient and manufacturer," and this is apparently a question of fact. *Ibid.* Thus I overrule the demurrer to paragraphs 36c and e, 68, and 69 of the amended complaint.

The Sophisticated User Defense

This was raised in the demurrer, Count IV paragraph 2 and Count X paragraph 2, but not addressed in the brief. I assume it has been withdrawn.

Duty of Market Surveillance after Sale

I am aware of no duty of a seller at common law to conduct "post-sale market surveillance," and the plaintiff cited no authority to support the existence of this duty. I sustain the demurrer to paragraph 36d to the extent it alleges such a duty.

Duty to Warn after Sale

The Supreme Court of Virginia has not ruled on the existence of such a duty. Nothing in *Featherall v. Firestone Tire & Rubber Co.,* 219 Va. 949, 252 S.E.2d 358 (1979) or *Harris v. T. I., Inc.,* 243 Va. 63, 413 S.E.2d 605 (1992) compels either conclusion. No published Circuit Court opinion I could find addresses the issue.

The origin of the duty in Virginia law was an opinion by Judge Winter concurring in part and dissenting in part in *Large v. Bucyrus-Erie Co.,* 707 F.2d 94, 99 (4th Cir.1983). The issue there, however, was the date on which the statute of limitations began to run on the plaintiff's cause of action. Judge Winter's opinion was cited as the authority for existence of the duty in negligence cases in *Bly v. Otis Elevator Co.,* 713 F.2d 1040 (4th Cir.1983). However, the issue in *Bly* was an erroneous jury instruction regarding a manufacturer's duty to warn under a warranty of merchantability. Thus the statement about a duty to warn after sale in negligence cases was *dictum.*

In the other decision of the Fourth Circuit on the issue, *Island Creek Coal Co., v. Lake Shore Inc.,* 832 F.2d 274 (1987), the Court discussed the duty in deciding whether the district court had abused its discretion in denying the plaintiff leave to amend its complaint under the "ends of justice" rule. 832 F.2d at 280. Given this pedigree, it is not surprising that the judges of the Western District of Virginia cannot agree about the existence of the duty under Virginia law. In *McAlpin v. Leeds & Northrup Co.,* 912 F.Supp. 207 (W.D.Va.1996), a magistrate found the duty to exist. However, in *Ambrose v. Southworth Products Corp.,* 953 F.Supp. 728 (W.D.Va.1997), a U.S. district judge found no such duty in Virginia law. In *Kimmel v. Clark Equipment Co.,* 773 F.Supp. 828 (W.D.Va.1991), a magistrate found a limited duty to warn.

*3 Professor Prosser unequivocally held such a duty

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exists. *Law of Torts,* § 96, p. 645 (4th ed.1971). However, the law does not appear to be so certain. It appears the Supreme Court of Michigan, first created the duty in *Comstock v. General Motors Corporation,* 358 Mich. 163, 99 N.W.2d 627(1959). In the next twenty-five years a few other courts adopted it. An increasing number of courts have adopted it in the last twenty years and, contrary to 3M's assertion in its brief, it appears the majority of the courts that have considered the issue have imposed such a duty. See *Restatement (Third) of Torts: Products Liability* § 10 (1998); *Products Liability* § 12.08 (Matthew Bender 2006). However, the circumstances and conditions under which different courts have imposed the duty differ greatly and the editors of the *Restatement* observed "... an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers." *Restatement, supra,* Comment a.

Although the law of torts has developed primarily through the common law, I believe a circuit court judge should make policy only interstitially, if at all. If such a broad duty is to be created in Virginia, it ought to be by the General Assembly, where all interested persons have an opportunity to be heard in the drafting of legislation, or by the Supreme Court, where interested non-parties may at least file briefs *amici curiae.* Rule 5:30. I decline to adopt a post-sale duty to warn and I sustain 3M's demurrer to paragraph 63b.

Motion to Amend the Amended Complaint

It appears the plaintiffs named the wrong doctor in their motion for judgment. They then sought leave to amend to name the proper doctors as defendants, but I denied the motion as the statute of limitations had expired as to those doctors. I found *Code of Virginia* § 8.01-6 did not apply.

The plaintiffs then filed an amended complaint bringing 3M into the case as a defendant. The plaintiffs now seek leave to file a second amended complaint alleging acts of negligence by the other doctors without making them parties. They wish to do this to save their *respondeat superior* claim against the doctors' corporation. This issue is governed by *Code of Virginia* § 8.01-6.1.

I ruled in my letter of June 7, 2006, that the claim asserted in the previously rejected amended pleading (that is, the one attempting to make the other doctors defendants) arose out of the conduct, transaction, or occurrence set forth in the original pleading. After reading the dental malpractice defendants' brief in opposition and considering Mr. McFadden's arguments, I do not believe the corporate defendant has shown any substantial prejudice from the proposed amendment. The plaintiffs only allege that Drs. Sabol and Visser committed the acts previously attributed to Dr. Savage. All three doctors have been deposed and are available to testify at trial; no witnesses to Drs. Sabol's and Dr. Visser's acts (as distinct from those of Dr. Savage) have disappeared in the interim; no records have been lost or destroyed. There has been no claim that the corporate defendant has in any way changed its position because the acts were originally attributed only to Dr. Savage. The claim of prejudice is speculative.

*4 This leaves the diligence of the plaintiffs in asserting the amended claim. The infant plaintiff was injured on August 13, 2002. This action was filed on July 29, 2004, about two weeks before the statute of limitations would expire. Service was effected in February 2005.

The plaintiffs had the infant plaintiff's treatment record when they filed the action. *See* motion for judgment, paragraph 9. I do not know if it was legible. In answers to interrogatories on September 14, 2005, the defendants identified Dr. Sabol and Terri Ferheim as the only individuals involved in the infant plaintiff's treatment in the 60 days before August 18, 2002. The plaintiffs deposed Dr. Sabol on September 22, 2005, and he admitted he fit the infant plaintiff with the headgear.

The plaintiff deposed Dr. Savage on October 7, 2005, and he testified he did not give the headgear to the infant plaintiff. Dr. Visser testified at his deposition on December 7, 2005, that he last saw the child on February 28, 2002. Terri Fernheimer testified at her deposition of December 7, 2005, that Dr. Sabol treated the child on August 13, 2002.

Counsel for the plaintiffs should have been aware on September 14, 2005, that they had perhaps named the wrong doctor as a defendant. Any doubts were eliminated by December 7, 2005. On February 23, 2006, the plaintiffs filed a motion to amend to add Drs. Sabol and Visser as defendants. The motion was ar-

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gued on May 8 and denied on June 7. The plaintiffs thereafter filed the present motion to amend on July 24.

If one looks at only the time between the injury and the filing of the present motion to amend -almost 4 yearsone would say there has not been reasonable diligence. However, plaintiff's counsel in suits such as these ought not be penalized for trying to conduct as much investigation as possible without discovery or for attempting to settle the claim before the doctors are served and the costs of litigation escalate. Seven months passed between service and the deposition of the first doctor; less than ten months passed until the depositions of all the doctors were concluded. This is not inordinate in medical malpractice cases. Less than three months after the conclusion of the depositions the plaintiffs attempted to add the other two doctors as defendants, and less than two months after I denied that motion they filed the present motion to amend.

I find, under all the circumstances, that the plaintiffs' counsel has exercised reasonable diligence. I do, however, agree with Mr. McFadden's argument that given the pending trial date and the extensive discovery thus far conducted, the plaintiffs ought not to be able to claim, as they do in paragraph 20, breaches of the standard of care by "other health care providers" or a failure "to provide other appropriate dental/orthodontic care and treatment ... which will be determined and clarified during the course of further investigation and/or discovery."

I shall allow the plaintiffs twenty-one days to file a second amended complaint. It shall conform to the rulings stated in this letter. No new defendants or new claims shall be added.

Motion to Strike

*5 I defer ruling on the motion to strike for the reasons set for below. However, 3M will not be involved in any trial that may begin on January 29, 2007.

Separate Trials

I believe separate trials on dental malpractice and products liability would be beneficial for several reasons. If both matters are tried together there is a greater likelihood of jury fatigue, confusion, and prejudice. One trial would probably last at least the presently scheduled seven days. A separate medical malpractice trial could probably be concluded in three days. Evidence of the standard of care and the habits of the doctors, so important in malpractice cases, would be irrelevant in a products liability case. Evidence of defects in the design of the device and of notice to the manufacturer of similar injuries, highly relevant in a products liability suit, would be irrelevant in a medical malpractice case and highly prejudicial to the medical malpractice defendants, notwithstanding the limiting instructions that would have to be given.

Each defendant's attorneys' fees would almost certainly be reduced in separate trials. If only one trial is held the malpractice defendants' attorneys will have to participate in a repetition of depositions previously taken and other discovery Mr. Spahn will conduct. The plainiffs' expenses would be greater in separate trials, but I expect plaintiffs' counsel is on a contingent fee. The scheduling of the testimony of expert witnesses would be simpler in separate trials. Indemnity and contribution issues would not arise in a separate medical malpractice trial.

Furthermore, if separate trials are held, the dental malpractice trial could be conducted at the presently scheduled date, January 29, 2007. If only one trial is held, the case will have to be continued and given the number of lawyers involved, the continuance will probably be lengthy. It is regrettable to say, but litigation is a cost of doing business for many large corporations. For small businesses and professionals it is an annoyance and distraction, and for doctors a claim of malpractice is of great concern. Litigation also causes anxiety for many plaintiffs. By January 29, 2007, this case will have been pending against the malpractice defendants for almost two years since service. It is time to resolve those claims.

Before ordering separate trials, I am certainly willing to consider any specific problems you foresee with respect to damages, contribution, and indemnity should the plaintiffs recover in both trials. The letters you previously sent me were rather general in their objections. Please confer and advise me.

I have attached an order reflecting these rulings.

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Sincerely yours,

Everett A. Martin, Jr.

Judge.

Va. Cir. Ct.,2006.
Hart v. Savage
Not Reported in S.E.2d, 2006 WL 3021110 (Va.Cir.Ct.)

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120 F.3d 262, 1997 WL 414338 (C.A.4 (N.C.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 120 F.3d 262, 1997 WL 414338 (C.A.4 (N.C.)))

C NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals, Fourth Circuit.
William S. MILLS, Administrator of the Estate of Amy Geissinger, Plaintiff-Appellant,
v.
GENERAL MOTORS CORPORATION; Coach Crafters, Incorporated, Defendants-Appellees,
and
GRIMES AEROSPACE COMPANY, formerly doing business as Midland Ross Corporation, formerly doing business as F.L. Aerospace Corporation, formerly doing business as F.L. Aerospace Holdings Corporation, Defendant.
No. 96-2359.

Argued: May 9, 1997.
Decided: July 23, 1997.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, Sr., District Judge. (CA-94-733-1)
Jonathan Eric Halperin, LAW OFFICES OF PATRICK M. REGAN, Washington, D.C., for Appellant.

Fred Joseph Fresard, BOWMAN & BROOKE, Detroit, Michigan; William Kearns Davis, BELL, DAVIS & PITT, P.A., Winston-Salem, North Carolina, for Appellees.

ON BRIEF: Patrick M. Regan, LAW OFFICES OF PATRICK M. REGAN, Washington, D.C.; Jerome P. Trehy, Jr., TWIGGS, ABRAMS, STRICKLAND & TREHY, P.A., Raleigh, North Carolina, for Appellant. Frank Nizio, BOWMAN & BROOKE, Detroit, Michigan; J. Donald Cowan, Jr., SMITH, HELMS, MULLISS & MOORE, L.L.P., Greensboro, North Carolina, for Appellee General Motors. Alan M. Ruley, BELL, DAVIS & PITT, P.A., Winston-Salem, North Carolina, for Appellee Coach Crafters.

Before RUSSELL and WILLIAMS, Circuit Judges, and MICHAEL, Senior United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

PER CURIAM:

*1 This litigation arises out of the tragic death of Amy Geissinger, a Duke University student who was killed after she fell from the rear door of a university bus while the bus was turning a corner. In 1977, defendant-appellee General Motors Corp. ("GMC") manufactured the RTS-II bus, which it sold to the Rhode Island Transit Authority in 1978. In 1991, defendant-appellee Coach Crafters, Inc. purchased the bus, which it refurbished and sold to Duke University according to an agreed-upon set of specifications.

Plaintiff-appellant Mills filed suit against GMC on behalf of the estate of Ms. Geissinger, alleging (1) negligent design, manufacture, and distribution of the bus, the defect specifically being the design of the rear doors; (2) failure to warn and breach of a post-sale duty to warn; (3) failure to retrofit or recall; (4) breach of an implied warranty of merchantability; and (5) a claim for punitive damages. Mills filed identical claims against Coach Crafters, except that plaintiff alleged that Coach Crafters was negligent in the re-manufacture and distribution of the refurbished bus. Finally, Mills also sued defendant Midland Ross, the manufacturer of the bus's rear door motors and linkages. Prior to adjudication of defendants' motions for summary judgment, Mills settled with Midland Ross. Thus, only GMC and Coach Crafters remain

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parties to this suit.

The district court granted defendants' separate motions for summary judgment. Although the court noted the emotional appeal of the case, it found that Mills's suit against GMC was barred by North Carolina's six year Statute of Repose, N.C. Gen.Stat. § 1-50(6). The court granted Coach Crafters's motion for summary judgment because it found that defendant (1) had neither actual nor constructive knowledge of any alleged defect in the Midland Ross doors; and (2) the contract between Duke University and Coach Crafters explicitly excluded an implied warranty of merchantability. Mills appeals from the lower court's decision. We will review the district court's grant of summary judgment *de novo. See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 928 (4th Cir.1995).

I. *GMC'S MOTION FOR SUMMARY JUDGMENT*

The district court granted GMC's motion for summary judgment because it found that Mills's suit was barred by North Carolina's Statute of Repose. Under N.C. Gen.Stat. § 1-50(6),

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any defect or in any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

Because Ms. Geissinger was injured more than six years after GMC had sold the RTS-II bus, the court concluded that any claim for personal injuries was barred as against GMC.

On appeal, Mills first argues that summary judgment should not have been granted because discovery was ongoing and might have resulted in the production of materials that would have had a direct bearing on the factual issues related to the motion. Mills next argues that § 1-50(6) does not apply to his failure to warn claim. Mills also argues that GMC's negligence continued beyond the sale of the bus through its production and distribution of service manuals and bulletins, thus bringing plaintiff's claims within the period permitted by the Statute of Repose. Finally, Mills makes the related argument that GMC's service manuals and bulletins are separately defective products that were sold within six years of Geissinger's death, thus avoiding § 1-50(6)'s bar. None of these arguments has merit.

A. *Ongoing Discovery*

*2 The district court did not address plaintiff's first argument regarding discovery except to note that "[w]hether a statute of repose has expired is strictly a legal issue." Memorandum Opinion at 6, *Mills v. General Motors Corp.* (M.D.N.C. July 12, 1996) (No. 94CV00733) (J.A. at 1287) (citing *Lamb v. Wedgewood South Corp.*, 448 S.E.2d 832, 836 (N.C.Ct.App.1983)). Mills has failed to identify what evidence he believes that discovery would have produced, but regardless, the parties do not dispute the dates on which the bus was manufactured and the injury occurred. These facts alone are sufficient to make a determination as to the application of § 1-50(6); accordingly, a reversal on the basis of potential discovery is unwarranted.

B. *Section § 1-50(6)'s Statutory Bar*

"A statute of repose 'serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue,' and functions to give a defendant a vested right not to be sued if the plaintiff fails to file within the prescribed period." *Lamb*, 448 S.E.2d at 835 (citations omitted). GMC manufactured the RTS-II bus in 1977, and delivered the bus to its initial purchaser by 1978. Ms. Geissinger was killed in 1992. As a result, Ms. Geissinger's claim accrued "more than six years after the date of initial purchase," thus raising the statutory bar as to appellant's claims against GMC. Mills, however, makes several efforts to avoid application of the bar to his claims.

Mills first argues that a manufacturer's duty to warn of hidden defects continues beyond the six year period specified in North Carolina's Statute of Repose. Although North Carolina recognizes that a manufacturer has a continuing post-sale duty to warn consumers of dangerous defects that it later discovers, *see Smith v. Selco Prods., Inc.*, 385 S.E.2d 173, 176-77 (N.C.Ct.App.1989), this duty to warn of hidden defects does not extend beyond the six-year limit imposed by the Statute of Repose, *see Davidson v. Volkswagenwerk, A.G.*, 336 S.E.2d 714, 716 (N.C.Ct.App.1985). As stated in § 1-50(6), no claim

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for injuries "arising out of ... *any* failure in relation to a product" may be brought where the injury occurred more than six years after the product's manufacture. Mills's failure to warn claim relates to the sale and manufacture of the RTS-II bus. As a result, the claim is barred by § 1-50(6).

Mills also argues that GMC's production of allegedly insufficient service manuals and bulletins constituted a continuing pattern of negligence such that the statute of repose should not operate to bar appellant's claims. In support of this argument, Mills cites several cases from North Carolina and other jurisdictions. The North Carolina cases clearly are distinguishable from the instant case, inasmuch as the case at bar does not raise the equitable concerns that were present in *Bryant v. Adams*, 448 S.E.2d 832, 838 (N.C.Ct.App.1994) (misrepresentations in discovery bars defendant from raising statute of repose), and *One North McDowell Association of Unit Owners, Inc. v. McDowell Development Co.*, 389 S.E.2d 834 (N.C.Ct.App.1990) (tolling agreement between parties estopped defendant from raising statutory bar). We are unpersuaded that the Minnesota cases relied on by appellant can be reconciled with *Davidson*.[FN1]

FN1. In addition, with regard to appellant's citation of *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn.1988), we note, as did the court below, that the statute at issue in *Hodder* was " 'not a typical statute of repose.' " *Id.* at 830. Instead, the statute at issue in *Hodder* was a "useful life" statute where the period of repose was defined by the useful life of the product, as determined by the trier of fact. Unlike the statute of repose in the case at bar, the statute in *Hodder* did not "specify a presumptive number of years after which an action cannot be brought." *Id.*

*3 Finally, appellant argues that GMC's post-sale production of safety manuals and bulletins started the running of the statute of repose anew because the service manuals and bulletins themselves constituted separately defective products so as to support a claim of negligence. *See Driver v. Burlington Aviation, Inc.*, 430 S.E.2d 476 (N.C.Ct.App.1993). This court has no quarrel with *Driver*, but the complaint in the instant case is premised merely on the defective design of the bus's rear doors. Nowhere does Mills's complaint allege that the service manuals or bulletins provided by GMC were a separately defective product. Accordingly, *Driver* is inapposite to the case at bar, and North Carolina's six year Statute of Repose applies.

For these reasons, the district court's grant of summary judgment to GMC will be affirmed.

II. *COACH CRAFTERS' MOTION FOR SUMMARY JUDGMENT*

A. *Actual or Constructive Knowledge*

Coach Crafters remanufactured the RTS-II bus according to a set of specifications that were agreed upon by Duke University and Coach Crafters. *See* Purchase Agreement, Ex. A (J.A. at 253-58). These specifications corresponded to GMC's original design, but incorporated certain additional modifications, none of which relate to the instant case, that GMC had recommended subsequent to the bus's original manufacture. Appellant contends that Coach Crafters was negligent because it failed to modify the rear doors to include a positive locking mechanism. The district court granted Coach Crafters's motion for summary judgment in part because it found that Coach Crafters had neither actual nor constructive knowledge that the rear doors of the RTS-II buses posed a danger so as to impose a duty on defendant, either as a manufacturer or a remanufacturer. Mills argues that the district court erred because Coach Crafters reasonably should have known of the dangers posed by the doors in light of numerous accidents that took place involving the rear doors of RTS-II buses, and in light of service bulletins issued by GMC regarding the rear doors of their buses.

Initially, it is important to distinguish between those RTS-II buses that were equipped with rear doors manufactured by Midland Ross, as was the bus in the instant case, and those buses that were equipped with doors manufactured by Vapor Corp. The vast majority of buses manufactured by GMC were equipped with Vapor doors. Only a relatively small number of buses-330 out of 8300 buses-were equipped with Midland Ross doors. Although Mills alleges that numerous injuries and fatalities occurred in accidents involving the rear doors of RTS-II buses, all of the incidents cited involved buses equipped with Vapor doors. The case at bar is the first and, as far as this

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court knows, the only incident involving Midland Ross doors-there has never been an incident of the type seen in the instant case related to Midland Ross doors. As a result, Coach Crafters could not have discovered, even through reasonable investigation, prior incidents involving Midland Ross doors such that it would have been put on notice of the attendant dangers. Moreover, none of the GMC bulletins addressed any problems with the Midland Ross doors that relate to the accident in the instant case.[FN2]

FN2. Although one bulletin was applicable to Midland Ross doors, it addressed the problem of "wind buffeting," whereby at speeds over 15 miles per hour, the rear door would open slightly, causing the bus to slow down until the doors closed. *See* J.A. at 1228-34. The bulletin did not address any problem of bus doors bursting open when pressure was applied by passengers.

*4 Mills contends, however, that the absence of incidents involving buses equipped with Midland Ross doors is indicative of the small number of Midland Ross-equipped buses as compared to those equipped with Vapor doors, rather than any difference in the doors' safety. Mills argues that whether Vapor doors or Midland Ross doors are to be considered is irrelevant; the defect is the absence of any positive locking mechanism, such mechanism not being present in both models of doors. Accordingly, Mills contends that Coach Crafters had constructive knowledge of the dangers posed by Midland Ross doors by virtue of the incidents involving Vapor doors.

First, it is important to note that Coach Crafters denies having any knowledge of problems associated with Vapor doors. Nevertheless, even assuming that Coach Crafters should have known about the problems attendant with Vapor-equipped RTS-II doors, this knowledge would not have put Coach Crafters on notice of any dangers associated with Midland Ross doors. Although certain types of products may pose a generic threat to consumers, *see* Morgan v. Cavalier Acquisition Corp., 432 S.E.2d 915 (N.C.Ct.App.1993) (drink vending machines), a post-accident engineering analysis of the accident conducted by the National Highway Traffic and Safety Administration ("NHTSA") explained that Vapor doors and Midland Ross doors are very different from each other. *See* J.A. at 245. Specifically, the report noted that "[t]he Vapor system uses pneumatic motors of a different size, the mechanical linkage (and the mechanical advantage generated by the linkage) is different, and the air pressure required by the system is also different." *Id.* Appellant characterizes the distinction between the two types of doors as "irrelevant," *see* Reply Brief of Appellant at 3, *Mills v. General Motors Corp.* (No. 96-2359) (4th Cir. Jan. 13, 1997), but the NHTSA report is clear that this accident was different from those involving Vapor-equipped buses. In fact the NHTSA report explained:

> The single accident that occurred was the result of a combination of unfortunate circumstances. The doors on the subject bus were properly adjusted and the air pressure was correctly set. The woman that fell into the stairwell appears to have tried to stop her fall with her foot. Her foot landed at the area where the two doors meet at the outer edge of the lower step. Her foot deflected the doors just enough for her leg to be forced through. *The doors remained closed and the air motor did not activate.* Unfortunately her foot struck the pavement and was caught and run over by the rear wheel of the bus. This caused her body to be pulled through the doors. The doors, which are 7 feet tall and are held closed at the top, deflected just enough to allow her body to be pulled through. The doors still remained closed during this incident and the air motor did not cycle the doors. *This event was unique, when contrasted with accidents involving RTS-II buses fitted with Vapor door operating systems. In the accidents involving Vapor-equipped buses, the doors actually opened, or were pushed open, and passengers fell out through the open doors.*
>
> ***5** ....
>
> *No safety-defect trend has been identified.*

Id. at 247-48 (emphasis added). Although the NHTSA's report is a post hoc analysis of the accident, it persuasively distinguishes between Vapor doors and Midland-Ross doors, clearly illustrating why incidents involving Vapor-equipped buses would not be sufficient to put Coach Crafters on notice that there were defects in buses equipped with Midland Ross doors.

Ultimately, it is evident that the Midland Ross doors functioned as they were designed to function. Unlike

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those instances involving Vapor-equipped buses where the doors actually opened so as to permit passengers to fall out, the door in the instant case remained closed. Whatever defect, if any, that may have been present in the Midland Ross doors cannot be charged to Coach Crafters, the remanufacturer having no notice or knowledge, actual or constructive, that the rear doors posed a danger to passengers. Accordingly, Coach Crafters is entitled to summary judgment on Mills's negligence claims.

B. *Breach of Implied Warranty of Merchantability*

The district court found that there was no privity of contract between Ms. Geissinger and Coach Crafters such that appellant could assert a claim for breach of an implied warranty of merchantability. The court came to this conclusion because it characterized the agreement between Coach Crafters and Duke University as a contract for services. Appellant counters that the privity requirement has been relaxed in product liability actions for personal injury suits relating to the sale of goods, and that the sale of the bus by Coach Crafters to Duke was the sale of goods. Brief of Appellant at 28, *Mills* (No. 96-2359) (Nov. 19, 1996). After considering the contract at issue, we find without addressing the issue of privity that Coach Crafters is entitled to summary judgment on appellant's breach of warranty claim.

Appellant contends that the general warranty on the bus incorporates an implied warranty of merchantability. In support of this argument Mills quotes Exhibit B of the sales agreement, which states:

> Coach Crafters, Inc. warrants and guarantees the bus to be free from basic defects and related defects for twelve (12) months or 50,000 miles, whichever comes first. In addition to the basic warranty, CoachCrafters, Inc. warrants and guarantees the structure of the bus to be free of basic defects and related defects for a period of two (2) years, unlimited mileage.

J.A. at 259.

If a contract is unambiguous on its face, a court may interpret the contract as a matter of law. *World-Wide Rights Ltd. Partnership v. Combe, Inc.*, 955 F.2d 242, 245 (4th Cir.1992). "Where the terms of a ... contract are clear and unambiguous, its terms 'are to be taken and understood in their plain, ordinary and popular sense.' " *Faber Indus., Ltd. v. Witek*, 483 S.E.2d 443, 444 (N.C.Ct.App.1997) (quoting *Taylor v. Gibbs*, 150 S.E.2d 506, 506 (N.C.1966)). In the instant case, the contract is unambiguous on its face.

*6 In addition to the language that appellant cites, the contract between Coach Crafters and Duke clearly states:

> THE EXPRESS WARRANTY SET FORTH IN THE LIMITED WARRANTY POLICY IS EXPRESSLY IN LIEU OF ANY OTHER EXPRESS OR IMPLIED WARRANTIES OR GUARANTEES WITH RESPECT TO BUSES OR ANY PART THEREOF, INCLUDING ANY IMPLIED WARRANTY OR [sic] MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

J.A. at 250. Because the express language of the agreement clearly rules out any implied warranties, we find as a matter of law that Coach Crafters is entitled to summary judgment on plaintiff's breach of warranty claim.

III. *CONCLUSION*

For the reasons stated, the district court's grant of summary judgment to GMC and Coach Crafters is

AFFIRMED.

C.A.4 (N.C.),1997.
Mills v. G.M.C.
120 F.3d 262, 1997 WL 414338 (C.A.4 (N.C.))

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H

Circuit Court of Virginia,
Fairfax County.
WINCHESTER HOMES, INC.
v.
HOOVER UNIVERSAL, INC., et al.
No. 100865.

Jan. 06, 1992.
April 21, 1992.

WILLIAM G. PLUMMER, Judge.

*1 This matter has come before the Court on a Joint Demurrer to the Second Amended Motion for Judgment and Bill of Particulars of Plaintiff Winchester Homes, Inc. ("Winchester"), a Joint Special Plea in Bar, and a Joint Motion for Sanctions filed by Defendants Chesapeake Corporation, Hoover Universal, Inc., Johnson Controls, Inc., Hoover Treated Wood Products, Inc., Mid-Atlantic Wood Preservers, Inc., Ply-Gem Industries, Inc., Timber Products Inspection, Inc., Osmose Wood Preserving, Inc., Applied Research Group, Inc., Reliance Wood Preservers, Inc,. and Allied Plywood Corporation.

Fraud

Based upon arguments of counsel and having reviewed counsels' briefs, the Court sustained in open court the Defendants' demurrer as to Count IV, based on fraud, of Winchester's Second Amended Motion for Judgment. The Court hereby restates its opinion that Winchester has failed to allege fraud with the required specificity. *See* Tuscarora, Inc. v. B.V.A. Credit Corp., 218 Va. 849, 241 S.E.2d 778 (1978).

Additionally, Winchester has made no allegation whatsoever of any active misrepresentation by Defendants Johnson Controls, Inc., Reliance Wood Preserving, Inc., Mid-Atlantic Wood Preservers, Inc., Timber Products Inspections, Inc., or Allied Plywood Corporation.

Moreover, Winchester failed to allege that any Defendant actively misrepresented any material fact to any homeowner or that Winchester communicated the alleged misrepresentations to the homeowners. Although Winchester alleged that all of the Defendants fraudulently concealed material information from the homeowners, the Court finds that Winchester failed to allege any duty by the Defendants to disclose such information to the homeowners. Winchester has not alleged a relationship between the Defendants and the homeowners sufficient to impose such a duty.

Finally, the Court finds that an allegation of fraud is a personal cause of action which the homeowners could not assign to Winchester. Winchester's reference to Virginia Code § 8.01-26 is inapposite, as an assignment of anticipated proceeds of a court award under that provision is simply to assign a monetary expectancy; the statute does not permit assignment of the underlying cause of action.

Virginia Consumer Protection Act

The Court also sustained the Defendants' demurrer to Count V of the Second Amended Motion for Judgment based on alleged violations of the Virginia Consumer Protection Act. *See* Va.Code Ann. §§ 59.1-196 to 59.1-207 (1987 & Supp.1991). The Court found that the sales of FRTP between the Defendants and Winchester were not consumer transactions as contemplated by the Act. The Defendants' commercial transactions with Winchester do not fall within the ambit of the Act's restrictions on consumer transactions. Specifically, as sold by the Defendants, the FRTP was to be used as component parts in the construction of homes and not "primarily for personal, family or household purposes" as envisioned by the Act. *See* Va.Code Ann. § 59.1-198(A)(i) (1987 & Supp.1991).

*2 Further, a violation of the Virginia Consumer Protection Act, based on misrepresentation, provides a

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personal cause of action which the homeowners could not assign to Winchester. Attempted assignments from the homeowners could not provide Winchester with standing to bring this action in their place.

Special Plea in Bar-Breach of Warranty

The Defendants have filed a Joint Special Plea in Bar contending that claims concerning certain townhomes under Counts I, II, and III of the Second Amended Motion for Judgment are barred by the four-year statute of limitations for breach of warranty claims.

(a) *Breach of Implied Warranties*

Having heard oral arguments and upon reading the briefs of counsel, the Court sustains the Defendants' plea of the statute of limitations to Counts II and III of the Second Amended Motion for Judgment concerning alleged breaches of implied warranties. The Court finds that a four-year statute of limitations governs such claims grounded upon implied warranties, Va.Code Ann. § 8.2-725 (1991), and that the causes of action at bar accrued upon tender of delivery, which occurred, at latest, upon completion of the town-homes.

The Court further finds that Winchester had no assignments or subrogation rights at the time it filed its original Motion for Judgment. Winchester could not become subrogated to the rights of the homeowners until it fully discharged any obligation owing to the homeowners by having replaced or repaired the roof on any particular unit. The Court believes to be unfounded Winchester's argument that its mere inspection of any particular roof caused Winchester to become subrogated to the potential rights of the homeowners against the Defendants.

The original Motion for Judgment, therefore, did not toll the four-year statute of limitations; the first Amended Motion for Judgment, which Winchester filed on June 24, 1991, did not relate back to the original filing. *See Irvine v. Barrett*, 119 Va. 587, 592, 89 S.E. 904, 906 (1916). Consequently, the statute of limitations bars any implied warranty claim for townhome roofs completed more than four years prior to June 24, 1991, i.e., before June 24, 1987.

Moreover, the first Amended Motion for Judgment did not toll the statute of limitations for those townhomes for which Winchester had not yet obtained an assignment or repaired the roof as of June 24, 1991. The Court concludes that claims for which Winchester obtained assignments or had repaired roofs between June 24, 1991, and September 16, 1991, were not deemed to be filed until September 16, 1991, the date Winchester filed its Second Amended Motion for Judgment. Consequently, the statute of limitations bars a claim on any such townhome which Winchester completed more than four years prior to September 16, 1991, i.e., before September 16, 1987.

The Court similarly concludes that Winchester has not properly alleged standing to bring suit concerning any townhome for which it had not yet acquired an assignment or subrogation rights as of September 16, 1991.

(b) *Breach of Express Warranties*

*3 Concerning Count I, breach of express warranties, the Court sustains the Defendants' Special Plea in Bar as to Defendants Hoover Universal, Inc., Johnson Controls, Inc., Hoover Treated Wood Products, Inc., Mid-Atlantic Wood Preservers, Inc., Ply-Gem Industries, Inc., Timber Products Inspection, Inc., Reliance Wood Preservers, Inc., and Allied Plywood Corporation. The Court, however, overrules the Special Plea in Bar to Count I as to Defendants Osmose Wood Preserving, Inc., Chesapeake Corporation, and Applied Research Group, Inc., and finds that the alleged express warranties provided by these defendants must remain for factual inquiry.

Winchester contends that the causes of action for the alleged breaches of express warranties did not accrue upon delivery (at latest, upon completion of the townhome), but rather, upon discovery of the alleged breach of warranty. Winchester relies upon Virginia Code Section § 8.2-725, which provides that a cause of action for a breach of an express warranty of future performance of goods accrues upon discovery of the breach. Va.Code Ann. § 8.2-725(2) (1991).

The Court finds that as a matter of law, the alleged express warranties of Defendants Hoover Universal, Inc., Johnson Controls, Inc., Hoover Treated Wood Products, Inc., Mid-Atlantic Wood Preservers, Inc., Ply-Gem Industries, Inc., Timber Products Inspec-

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tion, Inc., Reliance Wood Preservers, Inc., and Allied Plywood Corporation did not constitute express warranties of future performance. The Court has determined that these Defendants did not explicitly extend their alleged warranties to future performance. The Court stresses the absence of any specific guarantee or reference to a future time in the representations upon which Winchester relies. Accordingly, with regard to these eight defendants, the Special Plea in Bar to Count I falls under the same analysis as Counts II and III, and the Courts sustains the Special Plea in Bar to Count I for the reasons and to the same extent as discussed above with regard to Counts II and III.

Concerning Osmose Wood Preserving, Inc., the Court cannot conclude as a matter of law that its alleged express warranty that "Flame Proof is impervious to attacks from rot and decay" and "will maintain its fire retardant properties *for the life of the structure* ..." (emphasis added) does not constitute a warranty of future performance. Similarly, the Court finds that the alleged warranties by Chesapeake Corporation and Applied Research Group, Inc., that "*Lifetime* lumber withstands structural damage ..." (emphasis added) require further factual inquiry. Consequently, the Court overrules the Special Plea in Bar to Count I as to these three defendants.

The Court notes that by their very name, the alleged *implied* warranties of Counts II and III cannot be *express* warranties of future performance.

Standing

*4 For the following reasons, the Court overrules the Defendants' demurrer in which they claimed that Winchester lacks standing. The Defendants demurred to the Second Amended Motion for Judgment in its entirety on the grounds that Winchester lacked standing through assignments and subrogation at the time it filed its original Motion for Judgment. Defendants contend that Winchester could not cure such defects by amending its pleadings to substitute the homeowners, through assignments and subrogation, as parties to this litigation.

Although the Court is convinced that Winchester did not have standing through assignments and subrogation when it filed the original Motion for Judgment, as Winchester had yet to receive an assignment from any homeowner and had not yet fully discharged any alleged obligation to any homeowner to repair and replace a roof, the Court granted Winchester leave to amend the pleading to add claims of assignment and subrogation. At that time, the Defendants made no objection to such leave to amend on the grounds that Winchester lacked standing by virtue of assignments or subrogation.

Moreover, the Court finds that the rationale underlying *Dillow v. Stafford*, 181 Va. 483, 25 S.E.2d 330 (1943), supports this Court's opinion that Winchester may assert standing in its Second Amended Motion for Judgment. Allowing a substitution of plaintiffs, the *Dillow* Court stated:

> If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement, or allegations, however great may be the difference in the form of liability as contained in the amended, from that stated in the original declaration, it will not be regarded as for a new cause of action.

Id. at 488, 25 S.E.2d 330. Although doing so by virtue of assignments and subrogation, Winchester has attempted to enforce similar claims arising out of the same circumstances and allegations, i.e., the premature degradation and deterioration of the Defendants' FRTP.

The Defendants correctly note that *Dillow* involved an original plaintiff who had standing, while the case at bar does not. Relying on *The Chesapeake House on the Bay, Inc. v. Virginia Nat'l Bank*, 231 Va. 440, 344 S.E.2d 913 (1986), the Defendants conclude that to substitute a party with standing for a party lacking standing introduces a new cause of action, which the plaintiff cannot accomplish simply by amended pleadings.

Neither *Dillow* nor *Chesapeake House* are controlling, however, as both involve a substitution of parties. In the case at bar, however, Winchester has remained the same plaintiff throughout the pleadings and only the theory of recovery has changed. The claims confronting the Defendants have not changed and the Defendants face no element of surprise. Accordingly, the Court finds that Winchester has standing to assert claims by virtue of its allegations of assignments and subrogation.

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Sanctions

*5 As expressed in open court, the Court postpones a determination concerning any and all motions for sanctions in this case until all other matters have been resolved.

This matter came before the Court for hearing on February 3, 1992. The Court took under advisement Plaintiff Winchester Home Inc.'s Motion for Reconsideration, Defendants' Joint Motion for Reconsideration Winchester's Motion for Leave to Amend Second Amended Motion for Judgment, and Defendants' Motion to Compel Discovery Responses. In addition, the Court has since received Winchester's Motion to Compel Discovery and will address that motion in this letter.

Motions for Reconsideration

On January 6, 1992, the Court issued an opinion letter addressing, among other things, Defendants' Joint Demurrer to the Second Amended Motion for Judgment and Bill of Particulars and Defendants' Joint Special Plea in Bar. In response, Winchester and the Defendants moved for a reconsideration of the Court's rulings contained in that letter. Having heard arguments of counsel on February 3, 1992, and having reviewed their memoranda of law, the Court denies both Winchester's Motion for Reconsideration and Defendants' Joint Motion for Reconsideration and abides by its rulings issued in the January 6, 1992, opinion letter. The Court relies upon the reasoning set forth in that letter and upon its remarks from the bench at the February 3, 1992, hearing.

Winchester's Motion for Leave to Amend

Winchester has filed a Motion for Leave to Amend Second Amended Motion for Judgment to add claims against all of the Defendants for indemnification and for an alleged violation of the Magnuson-Moss Warranty Act. As a court shall, upon sustaining a demurrer, liberally grant a plaintiff leave to amend in furtherance of the ends of justice, *see* Rule 1:8, the Court grants Winchester leave to file a Third Amended Motion for Judgment to include claims for indemnification and a violation of the Magnuson-Moss Warranty Act.

While these new claims may raise questions or issues similar to those already addressed in previous motions, and while this case has already been pending for a substantial period of time, the Defendants are not unduly prejudiced by Winchester's amendments. While similar to or related to previous claims, Winchester's new claims appear to state new or independent theories of recovery. In addition, the trial for this matter is set for more than six months away, providing sufficient time within which the Defendants may prepare a defense against Winchester's amended pleading. Moreover, similarities in issues raised by the new claims with those raised in earlier pleadings may facilitate the Defendants' ability to respond to such claims.

Leave to amend the Second Amended Motion for Judgment, however, does not otherwise affect the rulings issued by the Court in its January 6, 1992, opinion letter regarding claims set forth in the Second Amended Motion for Judgment. In particular, the Court abides by its opinion concerning Defendants' Joint Special Plea in Bar. Nevertheless, by granting leave to amend, the Court is not ruling on any potential statute of limitations defect concerning claims for indemnification. The Court notes that if Winchester did not discharge an obligation to a homeowner prior to when a statute of limitations may have run on an underlying claim that the homeowner may have had against the Defendants, Winchester would have no cause of action for indemnification for discharging an obligation. In that situation, Winchester could not benefit from the limitations period for a claim for indemnification as it would have no underlying right to indemnification.

Va.Cir.Ct.,1992.
Winchester Homes, Inc. v. Hoover Univ., Inc.
Not Reported in S.E.2d, 27 Va. Cir. 62, 1992 WL 884416 (Va.Cir.Ct.)

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