In The

Supreme Court of Virginia

RECORD NO. 091993

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

***Appellants*,**

v.

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

Appellees.

BRIEF OF APPELLANTS

C. Jay Robbins, IV (VSB No. 22847)
Kevin T. Streit (VSB No. 45024)
MIDKIFF, MUNCIE & ROSS, P.C.
300 Arboretum Place, Suite 420
Richmond, Virginia 23236
(804) 560-9600 (Telephone)
(804) 560-5997 (Facsimile)
crobbins@midkifflaw.com
kstreit@midkifflaw.com

Counsel for Appellants

Michael J. Izzo, Jr. (*Pro Hac Vice*)
Paul R. Bartolacci (*Pro Hac Vice*)
Lawrence F. Walker (*Pro Hac Vice*)
COZEN O'CONNOR
1900 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-2000 (Telephone)
(215) 665-2013 (Facsimile)
mizzo@cozen.com
pbartolacci@cozen.com
lwalker@cozen.com

Counsel for Appellants

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND
MATERIAL PROCEEDINGS BELOW.....1

STATEMENT OF FACTS 3

ASSIGNMENTS OF ERROR..... 11

ARGUMENT 12

I. Standard of Review 12

A. The trial court erred in sustaining the defendants' plea in bar on the grounds that the F960 Q46 sprinkler head was an "ordinary building material" rather than "equipment" and granting its manufacturer, Tyco, protection under the Virginia statute of repose.....13

B. The trial court erred in dismissing Count VIII of Plaintiffs' Amended Motion for Judgment without determining whether a post-sale duty to warn based on negligence principles existed in Virginia law 34

C. The trial court erred in dismissing the plaintiffs' warranty cause of action on the grounds that the manufacturer's statements concerning the F960 Q46's intended future performance under the Virginia Uniform Commercial Code did not constitute a warranty of future performance. The court further erred in holding that the statute of limitations, therefore, began to run on the date of delivery, rather than on the date of the injury.....43

CONCLUSION AND RELIEF REQUESTED 50

CERTIFICATE OF SERVICE 51

TABLE OF AUTHORITIES

Page(s)

CASES

A.J. Buck & Son, Inc. v. Crown Equipment Corp.,
34 F.3d 1066 (4th Cir. 1994) 35

Alney v. Grisham,
273 Va. 68, 639 S.E.2d 182 (2007) 13

Baker v. Pool Service Co.,
272 Va. 677, 636 S.E.2d 360 (2006) 30

Bayliner Marine Corp. v. Crow,
257 Va. 121, 509 S.E.2d 499 (1999) 47

Cape Henry Towers Inc. v. National Gypsum Co.,
229 Va. 596, 331 S.E.2d 476 (1985) ..... passim

Chestnut Forks Tennis Club v. TJ International Inc.,
56 F.3d 60 (4th Cir. 1995) 48

Comstock v. General Motors Corp.,
99 N.W.2d 627 (Mich. 1959) 39

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

Crowston v. Goodyear Tire & Rubber Co.,
521 N.W.2d 401 (N.D. 1994) 41

Daughtrey v. Ashe,
243 Va. 73, 413 S.E.2d 336 (1992) 46

Eagles Court Condo. Unit Owners Assoc. v. Heatilator Inc.,
239 Va. 325, 389 S.E.2d 304 (1990) 19

Fred Hilton, Administrator of the Estate of Courtney Leighann Hilton Rhoton, Deceased v. Joshua Philip Martin,
275 Va. 176, 654 S.E.2d 572 (2008)..... 12

Grice v. Hungerford Mechanical Corp.,
236 Va. 305, 374 S.E.2d 17 (1988).....passim

Harris v. T.I. Inc.,
243 Va. 63, 413 S.E.2d 605 (1992)..... 36

Hart v. Savage,
2006 WL 3021110 (Va. Cir. Ct. Oct. 19, 2006)..... 35

Island Creek Coal Company v. Lake Shore, Inc.,
832 F.2d 274 (4th Cir. 1987)..... 35

Janvier v. Arminio,
272 Va. 353, 634 S.E.2d 754 (2006)..... 12

Jones v. Town of Marion,
28 Va. App. 791, 508 S.E.2d 921 (1999), aff'd,
259 Va. 7, 524 S.E.2d 866 (2000)..... 12, 13

Kraft foods North America Inc. v. Banner Engineering and Sales Inc.,
446 F. Supp. 2d 551 (E.D. Va. 2006).....46-47

Lee County v. Town of St. Charles,
264 Va. 344, 568 S.E.2d 680 (2002)..... 12

Lostrangio v. Laingford,
261 Va. 495, 544 S.E.2d 357 (2001)..... 12

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

Martin v. American Medical Systems Inc.,
116 F.3d 102 (4th Cir. 1997)..... 47

McAlpin v. Leeds & Northrup, Co.,
912 F. Supp. 207 (W.D. Va. 1996) 35, 41

Niese v. City of Alexandria,
264 Va. 230, 564 S.E.2d 127 (2002) 12

Rash v. Stryker Corp.,
589 F. Supp. 2d 733 (W.D. Va. 2008) 35

Smith v. Allen Bradley Co.,
371 F. Supp. 698 (W.D. Va. 1974) 17

Taylor v. Wal-Mart Stores, Inc.,
2001 WL 420363 (W.D. Va. 2001) 30

Thompson v. Skate America, Inc.,
261 Va. 121, 540 S.E.2d 123 (2001) 13

Torres v. Xomox Corp,
49 Cal. App. 4th 1, 56 Cal. Rptr. 2d 455 (1996) 41

Washington v. Square D Company,
71 Va. Cir. 34, 2006 WL 637033 (Va. Cir. Ct. 2006) 27, 29, 30

Weichert Co. of Virginia v. First Commercial Bank,
246 Va. 108, 431 S.E.2d 308 (1993) 13

Wiggins v. Proctor & Schwartz, Inc.,
330 F. Supp. 350 (E.D. Va. 1971), aff'd,
No. 71-1952 (4th Cir. March 8, 1972) 17

STATUES

Va. Code Ann. § 8.01-243 16

Va. Code Ann. § 8.01-246 16

Va. Code Ann. § 8.01-250 ..... 16, 18, 20

Va. Code Ann. § 8.2-318 47

Va. Code Ann. § 8.2-725(2) 44

Va. U.C.C. § 2-313 ..... 44, 45

Va. U.C.C. § 2-313(a) 44, 45

OTHER AUTHORITIES

Restatement (Third) of Torts (Products Liability, § 10 (1998)) 35, 42

Thomas W. Coffee, Creating Expressed Warranties Under the UCC: Basis of The Bargain – Don't Rely On It, 20 UCC L.J. 115 (1987) 46

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On February 8, 2003 a fire originated on the outside balcony of apartment 310 of the River Run Apartments, located at 13911 Hedgewood Drive, Woodbridge, Virginia. The apartment complex was owned by First Centrum LLC. The fire spread beyond the balcony of apartment 310 to the balcony of unit 410 and then to the roof of the building causing in excess of $10,000,000 of damage to the apartment complex. Plaintiffs, Royal Indemnity Company and American Empire Surplus Lines Insurance Company, as the property insurers for the complex, paid for the damage and are subrogated to the rights of the owners. (JA 611-613)

The apartment balconies were equipped with special sidewall sprinkler heads designed for exterior use and possible exposure to freezing temperatures. These sprinklers were F960/Q46 ½" orifice sidewall sprinkler heads (F960) which were designed and manufactured by the defendant Tyco. Although the sprinkler heads were exposed to the design temperature to allow them to open, they failed to open when the fire reached them and, therefore, no water was put on the fire. The sprinkler heads on units 310 and 410 both failed to open. (JA 613) Testing of the sprinkler heads after the fire in conjunction with Tyco at their laboratory disclosed that the sprinklers were “O”-ring technology sprinklers which

utilized a synthetic rubber “O”-ring and brass plug assembly which failed to open because the “O”-ring material adhered to the inside surface of the orifice and the brass plug had severe corrosion at this interface. (JA 166-67)

Plaintiffs filed an Amended Motion for Judgment for property damage against Tyco which alleged negligence in the selection of the materials, design and manufacture of the F960 sprinkler heads, negligent failure to warn of known defects in said sprinkler heads and for breach of an express warranty relating to the future performance of the sprinklers. (JA 1-21)

Tyco and Co-Defendant Simplex Grinnell, L.P. (“Simplex”) filed Motions for a Plea in Bar on the grounds that the Plaintiff’s actions were barred (1) by the 5 year Virginia Statute of Repose, (2) by the 4 year Uniform Code Commercial Code Statute of Limitations; and (3) that Tyco 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. (JA 42)

The Prince William County Circuit Court conducted hearings and heard oral argument on December 17, 2008, February 13, 2009 and June 30, 2009. On February 20, 2009, the Court issued an opinion (Hon. Rossie D. Alston, Jr.) which sustained the plea in bar and held that the F960 sprinkler heads were “ordinary building materials” under the Virginia Statute

of Repose. (JA 705) The Court's Order dated February 27, 2009 dismissed all tort based causes of action including the negligent failure to warn count. (JA 713)

On June 30, 2009, the Circuit Court (Hon. Craig D. Johnson) dismissed Plaintiffs' remaining cause of action against Tyco based on express warranty of future performance in literature provided by the manufacturer, concluding that language was not one of future performance. This became a final judgment as to Tyco. (JA 1312) Plaintiffs appeal all three (3) rulings of the trial court and its Orders entered on February 27, 2009 and June 30, 2009. This Court, upon plaintiffs' petition for rehearing, granted a full appeal in this matter.

STATEMENT OF FACTS

This suit arises out of a February, 2003 fire which started on the balcony of Unit 301 at the River Run Apartments. The balconies were equipped with Tyco F960 sidewall sprinklers which were specifically designed to extinguish balcony fires. The incipient fire on the balcony of unit 310 was not extinguished because the Tyco F960 sprinkler head failed to open. The fire spread to the balcony of Apartment 410 where another Tyco F960 sprinkler head failed to open. The fire progressed and spread under the roof and caused extensive damage to the apartment complex.

The sprinklers should have opened when the temperature in the area reached 165° F.

The F960 sprinkler heads were manufactured in 1996 and were installed at the River Run Apartments in 1997. (JA 55) They were considered extra fire protection for the balconies which would not otherwise be protected by sprinklers. The fire occurred more than five years after the installation; however, the defect causing them not to open was known to the manufacturer as early as 1998 when an Underwriter's Laboratory (UL) task force (of which Tyco was a member) determined that the sprinklers were likely not to open because of two specific defects in the materials selected by the manufacturer. (JA 924-978) These same two defects combined to cause the sprinklers to stick in the closed position during this fire.

In 1998 and 1999, Tyco and UL conducted tests and learned that the "O"-ring technology sprinklers were deficient for two (2) reasons. First, the brass alloy used in the plug assembly leached zinc from the brass when it was exposed to water. This "dezincification" of the brass alloy formed a crust of corrosion at the interface of the plug which prevented it from withdrawing from the opening to allow water to be sprayed on a fire. Second, Tyco and UL also determined that the synthetic "O"-ring material

softened in water and stuck to the inside of the opening further sticking the plug in place and preventing it from opening. Essentially, the sprinkler head could give no fire protection at all. In 2001, Tyco, which owned three (3) other sprinkler manufacturers (in addition to Grinnell) which used the same technology, recalled and replaced more than 35,000,000 sprinkler heads which used this technology. (JA 971) Tyco did not recall or replace the F960, but instead, discontinued its manufacture and said nothing to purchasers, leaving their safety in peril. (JA 840)

A warning would have prompted action on the part of the River Run Apartments, however, because nothing was said, River Run had the expectation that their balconies were protected by functional fire protection equipment. (JA 921) This expectation was unfulfilled. The extreme damage to the River Run Apartments could have been prevented.

The parties have entered into a stipulation of uncontested facts, many of which are contained in descriptive literature authored by the manufacturer which accompanied the sale of the sprinkler heads themselves. Additional facts were developed during discovery of Tyco's Rule 30(b)(6) corporate designee witness, Donald Pounder and at hearings at which Mr. Pounder testified.

It is significant at the outset for the court to understand an important distinction between the F960 sprinkler head and a sprinkler system. The sprinkler head, itself, is an individually manufactured product which has specific design criteria, mechanical properties, performance parameters and specific applications. A “system” includes the head which discharges the water but consists of various water pipes, fittings, hangers and other plumbing articles.

Tyco, the manufacturer is solely in the business of manufacturing fire protection equipment. Tyco manufactures many kinds of sprinkler heads. The F960 sprinkler head is a specific type of side wall sprinkler which was completely designed and assembled by Tyco at their manufacturing plant in Lubbock, Texas. (JA 55) Architects, engineers and contractors working at the River Run complex played no part in its design, assembly or sale. (JA 58, 64) Each F960 head was stamped with a 1996 date code identifying it as a Grinnell sprinkler and also bore the “UL” symbol of Underwriters Laboratory indicating that it was a product approved by Underwriters Laboratory. (JA 55)

Each F960 head was equipped with a frangible bulb designed to expand and break at a predetermined temperature set by the manufacturer. The internal mechanical assembly including a nipple, a seal inlet, a brass

plug and o-ring fitted into a machined groove, a yoke assembly, spring, bulb seat and compression screw are contained within a metal guide tube. The F960 head was patented and had a “G” inside a triangle, representing a registered trademark of the Grinnell Corporation. (JA 57)

The non-discharge end of the F960 head contained a threaded fitting which must be screwed into a pre-determined threaded pipe fitting to place it in service. Each head was individually packaged in a cardboard box (JA 58) which contained a manufacturer supplied technical data sheet which, inter alia, described the intended operation[1] of the sprinkler head. The technical data sheet stated the following:

> “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.” (JA 57)

The specifications for materials, dimensions and testing requirements needed to meet performance standards for sidewall automatic fire sprinklers were established by the manufacturer. No testing authority selected or mandated the materials or the dimensions used by the

[1] (JA 811) (JA 57)

manufacturer. The F960 head was designed for sidewall application and, in this case, for use on balconies which might be subject to freezing temperatures. It was offered with different temperature ratings thereby giving it a different triggering temperature which made each temperature rated head a different product used for a different application.

F960 sidewall sprinklers are not interchangeable with other types of sprinklers, for example, they cannot be used in ceilings where pendant sprinkler heads are used. No components of the F960 head are assembled in the field by construction personnel. It is sold as a completely assembled product. (JA 58) Where larger numbers were purchased, 20 to 30 individually boxed sprinklers were placed in a larger shipping box. All sales, whether in larger numbers, or singly in a box, were accompanied by a technical data sheet prepared by the manufacturer. (JA 58)

The technical data sheet contains discharge curves and a horizontal distance chart which shows the manufacturer's designed water discharge in gallons per minute and the designed coverage area. The technical data sheet indicates that the F960's <u>must</u> be installed in accordance with the manufacturer's instructions and certain National Fire Protection Standards otherwise the integrity of the product could be compromised. These

instructions were not suggestions or guidelines, but were required by the manufacturer. (JA 73; JA 247-250)

The F960 heads could not be installed in any threaded pipe fitting; because the manufacturer required precise clearances between the F960 inlet and the inside of a pipe fitting only certain fittings were approved. Using a pipe fitting not specified by the manufacturer could result in binding of the plug and failure of the sprinkler to operate. (JA 60) The installation instructions also prescribed distances of water deflectors from the ceilings and certain water pressures to be utilized. (JA 60-61) The F960 heads were rated for use at a maximum service pressure of 175 psi and could be ordered in specially manufactured lengths. The manufacturer also required the use of a specific groove lock socket and 1' NPT side outlet fittings supplied by the manufacturer to provide adequate clearance. The materials for all the internal working parts of each sprinkler head were selected by the manufacturer.

The installation instructions recommended minimum lengths for certain temperatures, the use of manufacturer specified fittings, the use of specially manufactured escutcheon plates, and even the use of specified types of pipe thread sealant a special type of wrench. (JA 73) Each sprinkler head had a basic warranty against defects in material and

workmanship in addition to other statements made by the manufacturer concerning the expected performance of the sprinkler head in a fire. Each head was subjected to quality control and testing by the manufacturer. (JA 165) If damaged, the F960 sprinkler heads could be removed by unscrewing the sprinkler head from its mating fitting in accordance with manufacturer's instructions after turning off the water supply.

Finally, the F960 heads could not be functioned, cycled or tested to see if they were operational. They were intended to operate only one time, at the time of a fire when it is exposed to the required temperature to expand and break the frangible bulb. Once a sprinkler is operated, whether as intended, or accidentally, it cannot be re-used but must be replaced.[2]

The trial court, after reviewing these facts, erroneously concluded that the F960 sprinkler heads were "ordinary building materials" which were "more similar" to swimming pool liners and steel plates purchased in bulk. The court viewed the F960 heads as "fungible goods" over which Tyco exercised no control over the installation methods and found that the manufacturer was protected by the Virginia statute of repose. The court also dismissed plaintiffs' negligent failure to warn cause of action as a tort theory as also barred by the Virginia statute of repose.

---

[2] (JA 799-800)

Subsequently, the court dismissed plaintiffs' warranty of future performance cause of action, holding that Tyco's statements about the intended future performance of the head in a fire did not constitute a warranty of future performance.

ASSIGNMENTS OF ERROR

A. The trial court erred in sustaining the defendants' plea in bar on the grounds that the F960 Q46 sprinkler head was an "ordinary building material" rather than "equipment" and granting its manufacturer, Tyco, protection under the Virginia statute of repose.

B. The trial court erred in dismissing Count VIII of Plaintiffs' Amended Motion for Judgment without determining whether a post-sale duty to warn based on negligence principles existed in Virginia law.

C. The trial court erred in dismissing the plaintiffs' warranty cause of action on the grounds that the manufacturer's statements concerning the F960 Q46's intended future performance under the Virginia Uniform Commercial Code did not constitute a warranty of future performance. The court further erred in holding that the statute of limitations, therefore, began to run on the date of delivery, rather than on the date of the injury.

ARGUMENT

I. Standard of Review

This appeal involves purely questions of law concerning the trial court's application of the law to essentially undisputed facts. In such circumstances, the standard of review is *de novo*. Fred Hilton, Administrator of the Estate of Courtney Leighann Hilton Rhoton, Deceased v. Joshua Philip Martin, 275 Va. 176, 654 S.E.2d 572 (2008); Janvier v. Arminio, 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006); Jones v. Town of Marion, 28 Va. App. 791, 508 S.E.2d 921 (1999), aff'd, 259 Va. 7, 524 S.E.2d 866 (2000). A trial court's legal conclusions are not binding and the reviewing court is accorded the same opportunity as the trial court to consider the issues of law presented for review. Lee County v. Town of St. Charles, 264 Va. 344, 568 S.E.2d 680 (2002). The same standard is to be applied where the court dismisses a cause of action where no evidence is taken in support of a plea in bar. In such circumstances, the court, upon review must consider solely the pleadings and facts stated in the pleadings, taken as true for the purpose of resolving the question of law. Niese v. City of Alexandria, 264 Va. 230, 564 S.E.2d 127 (2002); Lostrangio v. Laingford, 261 Va. 495, 544 S.E.2d 357 (2001).

Dismissal of Count VIII, alleging post sale negligent failure to warn required acceptance as true of all facts alleged in the Motion for Judgment, the facts impliedly alleged and the reasonable inferences of fact that can be drawn from the facts alleged. Alney v. Grisham, 273 Va. 68, 639 S.E.2d 182 (2007). Accordingly, the sole question is whether the facts, as alleged, state a cause of action against the defendant. Thompson v. Skate America, Inc., 261 Va. 121, 540 S.E.2d 123 (2001). Where factual matters are presented in a plea in bar hearing, and the court makes no reference to them, the question of law raised by the initial pleadings still remains for *de novo* review. Jones, supra., See also, Weichert Co. of Virginia v. First Commercial Bank, 246 Va. 108, 431 S.E.2d 308 (1993).

A. The trial court erred in sustaining the defendants' plea in bar on the grounds that the F960 Q46 sprinkler head was an "ordinary building material" rather than "equipment" and granting its manufacturer, Tyco, protection under the Virginia statute of repose.

The trial court summarized the relevant case law which has interpreted the Virginia statute of repose. The court, however, misapplied the Supreme Court's factors and criteria in erroneously concluding that the F960 sprinkler heads were ordinary building materials. The facts of record were essentially undisputed. Only legal inferences and legal conclusions were to be drawn from those facts.

The facts clearly show that F960 sprinkler heads were individually packaged when singly sold and, when larger numbers were sold, 20 to 30 individual boxes were placed in a carton for shipping. From these facts, the trial court erroneously concluded that the sprinklers were sold "in bulk" similar to rolls of swimming pool liner or sheets of plate steel used in swimming pool construction. See, e.g., Luebbers v. Ft. Wayne Plastics, Inc., 255 Va. 368, 498 S.E.2d 911 (1998). The court also focused on the fact that other manufacturers' sprinklers could have been chosen for installation at the River Run Apartments. From this the court erroneously concluded that the sprinklers were "interchangeable" like rolls of swimming pool liner or metal sheets. The trial court also focused on whether there was oversight or control in the installation process. The evidence indicated that the manufacturer's Technical Data Sheet provided mandatory requirements for installation. This was clear not only by the language used in the Technical Data Sheet itself but also in the cross-examination testimony of Donald Pounder, Tyco's representative. The court, however, erroneously concluded that the installation instructions were merely guidelines or suggestions rather than mandatory requirements. This led to the erroneous conclusion that the manufacturer exercised no control over the installation process.

The trial court also erroneously concluded that the sprinklers were "essential to the building" unlike the electric switch gear considered by the Supreme Court in Cooper Industries, Inc. v. Melendez, 260 Va. 578, 537 S.E.2d 580). Many buildings are built without sprinklers. Certainly they are not essential to the construction of any building nor could they legally be considered fungible goods like grain, potatoes or stock certificates. Essentially, the trial court focused on criteria which may have been relevant in some cases but, in the instant case, were minimally relevant to the seminal issue of whether the F960 sprinkler heads are ordinary building materials or equipment.

Whether Tyco's F960 sprinkler head is an "ordinary building material" depends on an analysis of the nature of the sprinkler head itself, its use, and on the analysis provided by a series of Virginia Supreme Court opinions which have dealt with this issue.

The Virginia Statute of Repose provides protection to persons performing or furnishing design, planning, surveying or supervision of construction of an improvement to real property more than five (5) years after the performance or furnishing the services. Manufacturers of equipment are expressly excepted from that protection by the statutory language:

> "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 ….rather each such action shall be brought within the time next after such injury as occurs as provided in §§ 8.01-243 and 8.01-246 (Va. Code Ann. § 8.01-250 (2002)." (emphasis added)

It is undisputed that Tyco is not in the business of design, planning or supervision of construction. It is exclusively a fire protection equipment supplier. Although the statute does not provide a definition of equipment or machinery, the legislative history and case law clearly indicate that the statutory intent was to exclude manufacturers like Tyco from Statute of Repose protection.

The seminal Virginia Supreme Court case is Cape Henry Towers Inc. v. National Gypsum Co., 229 Va. 596, 331 S.E.2d 476 (1985) which involved the question whether pre-engineered wallboard was an ordinary building material. The Court reviewed the legislative history of the statute of repose. The original statute, adopted in 1964, just referred to improvements to real property. In 1968 an amendment added surveying and in 1973 a second paragraph was added stating that the statute shall not apply to the manufacturer or supplier of any equipment or machinery or other articles which are installed in or become part of the real property. In 1977 the language was revised again to state that "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."

The court extensively reviewed the prior case law[3] and legislative history and concluded that the statutory amendments were a codification of the legislative intent that the statute was never intended to apply to manufacturers and suppliers of machinery and equipment.

The Cape Henry Court noted that two conclusions could be drawn from the legislative history in 1973. First, that the statute needed a change from its original form, which inferentially included manufacturers of machinery later affixed to realty because the legislature considered that result undesirable. Second, amending language was selected which would accomplish the precise end sought. The Court, accordingly, concluded that the original statute was sufficiently broad to include parties who furnish building materials incorporated into the construction of improvements. However, it also concluded that the General Assembly decided that it was inadvisable to continue to extend protection to manufacturers and suppliers of machinery and equipment. However, the Court reasoned that the intent

---

[3] See Wiggins v. Proctor & Schwartz, Inc., 330 F. Supp. 350 (E.D. Va. 1971, aff'd in an unpublished opinion 71-1952 (4th Cir. March 8, 1972) and Smith v. Allen Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974)

to exclude those manufacturers was not an intent to exclude those who supplied "ordinary building materials" (material men).

The Cape Henry Court concluded as follows:

> "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 manufacturers' warranties voidable if the equipment is not installed and used in strict compliance with the manufacturer's instructions. Material men 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." (Emphasis added)

The Court articulated the basic nature of the difference between equipment and ordinary building materials and also noted that decisions from other jurisdictions having similar statutes of repose are of little assistance. The Court went on to reason that the trial court correctly applied the code to the National Gypsum textured wallboard and it affirmed dismissal of the case.

The Court next decided Grice v. Hungerford Mechanical Corp., 236 Va. 305, 374 S.E.2d 17 (1988) which involved an electrical panel box which was assembled in the field by electricians. The electrician bought the box

(manufactured by Federal Pacific) and at separate times also bought various components from the manufacturer and assembled them at the construction site and installed them as part of the electrical system. Based on expert testimony of a licensed master electrician proffered by the box manufacturer the Court concluded that the electrical panel box including all of its component materials were ordinary building materials:

> "According to the agreed statement of facts, the quality and quantity of the component parts of an electric 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 'no instructions are received from the manufacturer.'"

The implication from the agreed facts is clear that the electric panel was not a product in and of itself; rather, it appears that a box and components, wire, grounding devices etc. were sold separately and assembled by the electrician.

Grice was followed by Eagles Court Condo. Unit Owners Assoc. v. Heatilator Inc., 239 Va. 325, 389 S.E.2d 304 (1990), which involved a Heatilator fireplace. The court held that the installer was entitled to the benefit of the statute and affirmed a judgment in its favor. However, a judgment in favor of the manufacturer and supplier was reversed because application of the statute depended on whether the fireplace was

machinery or equipment within the meaning of § 8.01-250. The Court remanded the case for further factual hearing on this issue. There is no further case history on this case.

The Court next decided Cooper Industries, Inc. v. Melendez, 260 Va. 578, 537 S.E.2d 580 (2000) in which the Supreme Court affirmed a trial court finding and held that a switchgear and circuit breakers were equipment within the meaning of the Statute of Repose and therefore, the protection of the statute was not available to the manufacturer of the switchgear.

The switchgear was an eight foot six inch high, eight foot nine inch wide and five foot two inch deep metal cabinet which held ten circuit breakers, each of which were 25.5 inches in height, 26.5 inches deep and four inches wide. The court reviewed the owner's manual and instructions regarding installation and use of the circuit breaker as well as a shop drawing prepared by the manufacturer and the Navy's contract specifications for the equipment. The court noted that the detailed instructions included in the owner's manual probably would not have been provided for "ordinary building materials".

The court looked at the Navy specifications, one of which was to provide equipment that was 'established standard tested products of the

manufacturer, thoroughly coordinated and integrated by the manufacturer [with] the ratings of all equipment and components…guaranteed and published by the manufacturer.' (Emphasis added). The specifications required the manufacturer to factory test and to certify the primary and secondary switchgear sections. The trial court noted that such specifications tended to remove the items in question from the category of "ordinary building materials".

On appeal, the Supreme Court reviewed the testimony of Cooper's expert on the purpose of the switchgear and found that the pier would function without the switchgear. Cooper's expert testified that the K-Don circuit breaker served the same basic function as the circuit breaker used in a residence (analogizing to the Grice decision) except that it was significantly larger. The Court noted, however, that the circuit breaker at issue was a finished product, tested at the factory before it left the manufacturer. It had only to be plugged in to compatible switchgear at the building site. The expert also testified that the manufacturer of the K-Don circuit breaker provided an instruction bulletin which was placed in the carton with each breaker that was sold.

The Supreme Court reviewed its previous decisions, noting that in Cape Henry Towers, supra the Court recognized that the Statute of

Repose perpetuated a distinction between suppliers of 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 those who furnish machinery or equipment. The Court emphasized the critical test criteria that "machinery and equipment unlike ordinary building materials 'are subject to close quality control at the factory and may be made subject to independent manufacturers warranties, voidable if the equipment is not installed and used in strict compliance with the manufacturers' instructions'.

The court distinguished the Grice Opinion noting that in Grice the quality and quantity of the component parts as well as the instructions for assembling and installing the electrical panel box as a unit in a building were provided by an architect or other design professional not the manufacturer. Hence, the Grice court concluded that the panel box and components were ordinary building materials.

The Cooper Court also reviewed Luebbers v. Ft. Wayne Plastics, Inc., 255 Va. 368, 498 S.E.2d 911 (1998) where the items at issue were structural component materials for in ground swimming pools such as steel panels, braces and vinyl liners. There a distributor purchased the component parts in bulk from the manufacturer and held them for resale to

swimming pool contractors as parts of swimming pool kits. The Court concluded that the steel panels, braces, and vinyl liners were ordinary building materials rather than equipment within the meaning of the Code. The Court considered the following factors:

(1) The component parts at issue were interchangeable with other component materials in the swimming pool construction;
(2) Distributors purchased the materials in bulk from the manufacturer;
(3) The manufacturer of the materials did not oversee construction of the swimming pools, but merely warranted the steel panels from defects of workmanship and the vinyl liners from defective welding; and
(4) Although the manufacturer sold specifications, guides, and installation manuals as general guides, the manuals did not address the construction of the specific swimming pool involved in the case.

The Court concluded that such materials were "fungible components" of the pool and that they "[i]ndividually…served no function other than as generic materials to be included in the larger whole and [were] indistinguishable from the wall panels…addressed in Cape Henry Towers." (Emphasis added).

This analysis is significant because the Court, in essence, was really describing generic building materials such as wallboard and lumber. Steel panels used in the sides of the swimming pools are not machinery or equipment. They are truly building materials under any criteria.

In Cooper Industries, the manufacturer argued that the switchgear and circuit breaker were generic items similar to the exterior wall panels in Cape Henry Towers and the electric parts and panel box in Grice. It also argued that the switchgear and circuit breakers were "fungible" items because the Navy authorized use of several different brands of switchgears and circuit breakers and because this equipment was "interchangeable" with other equipment. Cooper also argued that it supplied the switchgears without any special warranties and was not present at the piers during construction. The Court rejected these arguments because they were "premised on a mischaracterization of the switchgear and circuit breakers as essential to the existence of the piers". The Court found the following facts to be controlling:

First, the switchgear and circuit breakers were not part of the electrical system of the pier (i.e. not essential to the pier itself). Instead, they were part of the electric charging system for submarines.

Second, the switchgear was a "self contained and fully assembled" product by the manufacturer as distinguished from a collection of unassembled parts like Grice.

Third, the circuit breakers were tested at the factory and needed only to be placed in a switchgear that contained a compatible cradle.

Fourth, the manufacturer supplied an instruction manual with each circuit breaker and the Navy required that the switchgear and circuit breaker bear the manufacturer's nameplate and information on it.

Fifth, per Navy requirements, the equipment was to be "established standard tested products of the manufacturer thoroughly coordinated and integrated by the manufacturer".

Sixth, the switchgear and circuit breakers were "not fungible or generic materials". While the Navy specifications would have allowed other manufacturers' equipment to be used, once this one was selected, it was a mated component with the other components. The Court found it significant that Cooper's expert admitted that Cooper assembled the switchgear and selected the component parts including the circuit breakers. The Court was not persuaded by cases from other jurisdictions, significantly, cases in the Second Circuit, Georgia and Illinois because in those cases the courts were focused on whether an item was an improvement to real estate not whether it was ordinary building materials or equipment.

The Court's analysis in Cooper Industries is relevant and controlling in this case. The parallels are inescapable. Tyco designed and manufactured the F960 sprinkler head for a specific purpose (i.e. to be

used on balconies of apartment buildings.) They were not like wallboard or lumber which could be interchanged with any other piece of lumber or wallboard. The F960 head was a self-contained preassembled product when it came from the manufacturing plant and all the component parts were selected and assembled by the manufacturer. The F960 sprinkler heads were not an essential part of the building. They were screwed to a water supply pipe and could be replaced by merely unscrewing them and replacing them with another sprinkler head. The building could be constructed without sprinklers. The heads were tested at the factory and needed only to be screwed into the appropriate connection. The heads were not “fungible” or generic goods even though other heads could have been used. “Fungible goods” is a term used to apply to indistinguishable commodities such as grain, soil and stock certificates. As applied to construction materials the parallel would be lumber, bricks, mortar and the like. Each of the F960 sprinkler heads were tested and put through quality control procedures by the manufacturer. They were certified by the manufacturer to meet UL standards for side wall sprinkler application. Each sprinkler head came with its own warranty and instruction manual for installation. It could not be placed anywhere or put up in any configuration at the discretion of a builder. The manufacturers’ installation instruction

sheets contained mandatory installation requirements. The sprinkler heads would not function if not installed per manufacturer's requirements.

Cooper's analysis is compelling. The purpose of the Statue of Repose would not be served by insulating manufacturers of such equipment from liability when their products fail.

The Cooper analysis was followed by the Virginia Circuit Court in Washington v. Square D Company, 71 Va. Cir. 34, 2006 WL 637033 (Va. Cir. Ct. 2006), which was another circuit breaker case. The Court held that a circuit breaker panel manufactured by Square D was not ordinary building materials and therefore Square D was not protected by the Statute of Repose. The Court reviewed the Supreme Court Opinions on the issue and noted the similarities of this equipment to the electrical components in Grice and further noted that these items were installed by contractors and subcontractors chosen by the building owner. There was no evidence that Square D provided any on site supervision and the electrical system was designed by and manufactured in conformity with specifications and drawings supplied by the owners. The Court also noted that the instruction and installation manual was a general document and not tailored to the installation of components in a particular building. After recognizing these facts the Court analyzed and rejected Square D's contentions.

Unlike Cape Henry, Grice and Luebbers, where the materials were manufactured in bulk, the components here were manufactured for the office building where they were installed in accordance with detailed drawings of Square D. The components were not "fungible" or "interchangeable" like the swimming pool components in Luebbers. Significantly, the Court made reference to the critical factor that the quality and quantity of the component parts of the system were determined by Square D and not by the owners as was the case in Grice. The assembly instructions were not prepared by the owners, architect or other design professional. The units were assembled in one of Square D's manufacturing plants. They merely had to be connected to each other and to the building on site. The Court's analysis is instructive:

> "The court also finds that the quality control and testing exhibited by Square D are more consistent with the finding that the five year limitation does not apply than with the 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 bus ways…the switchboards…and the ground fault relays…. Rush also testified about the extensive tests and inspections performed by Square D before the components left their respective plants…. Detailed instruction manuals showing how to properly connect the components were also sent to the site by Square D as previously noted. As previously noted the components were already assembled when the arrived at the site. They just needed to be connected.
>
> 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 switchgear and circuit breakers in Cooper "were each self-contained and fully assembled by their respective manufacturers" (citation omitted) the bus ways, switchboards and ground fault relays were each self contained and fully assembled by Square D."

The Court also noted that Square D placed an underwriter's laboratory listing label and other safety labels and a label that has a date code and a serial number on its product so that Square D would know when the product was manufactured. The court reasoned that Cape Henry's criteria of close factory quality control, warranties and mandatory installation instructions were controlling in weighing the differences and similarities of products.

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" (i.e. giving the installation instructions on specifically how they should be installed). Square D prepared the final drawings of the electrical systems 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 in the building.[4]

The most recent Virginia Supreme Court case to analyze the Statute of Repose is Baker v. Pool Service Co., 272 Va. 677, 636 S.E.2d 360 (2006) (Opinion by Justice G. Steven Agee.) where this court held that a flat drain cover for a pool drain was an ordinary building material.

The trial court concluded that under the Supreme Court opinions, that the drain cover was fungible and interchangeable with other similar products with no particular manufacturer's instructions.

On appeal, the plaintiff made a number of arguments which did not address application of the rule but questioned its propriety. The Court refused to overturn the building materials doctrine, stating that the doctrine of stare decisis plays a significant role in the orderly administration of the courts and in ensuring consistency in the opinions. The Court also indicated it saw no flagrant error or mistake in the ordinary building

---

[4] One Federal District Court case, Taylor v. Wal-Mart Stores, Inc., discussed this issue an unreported opinion, 2001 WL 420363 (W.D. Va.). There the trial court found that a sink installed in a Wal-Mart store was ordinary building materials. The court analyzed that the sink was a piece of generic equipment that was installed by a plumber. The means and methods of installation were left up to the plumber. The court likened the sink to the pool components in Luebbers. Respectfully, this case lacks the full analysis of Cooper or Washington but is consistent with the overall analysis of building materials.

materials doctrine and held that the drain cover was indistinguishable from materials found to be ordinary building materials in the prior cases, e.g., exterior wall panels (Cape Henry Towers), components of the electric panel (Grice) and the steel panels, braces and vinyl liners (Luebbers.) The Court reasoned that the manufacturer mass produced the drain covers for installation into swimming pools and spas and felt that the drain cover in the case was indistinguishable from the fungible component parts of a swimming pool found to be ordinary building materials in Luebbers. It was a fungible component in that, individually, the drain cover served no function other than as generic material to be included into the larger whole.

It is clear, under the Virginia Supreme Court authority that the Tyco F960 sprinkler head is not an ordinary building material and its manufacturer is excluded from the protection of the Virginia Statute of Repose. The Supreme Court opinions make it clear that ordinary building materials are generic in nature and are not separate and distinct mechanical operating products. Cape Henry Towers shows the legislative intention was to exclude manufacturers who supply fully assembled, factory tested products which have mandatory installation instructions, and their own warranties. The Tyco F960 is a fully assembled product whose component parts are assembled and selected by the manufacturer and

which are not assembled on site or dictated by architects, contractors or engineers. The F960 heads are independent mechanical devices which have specific functions, different ratings, different applications and complete mechanical independence. They are not bulk products or fungible goods like sand or bricks. They are sold both individually and in packaged lots. Contrary to Tyco's argument, adopted by the trial court, the F960 heads are not "interchangeable" with other sprinklers throughout the building. They are designed for a specific sidewall application. They may not be used on the interior of a building in a similar manner as pendent sprinklers. Each sprinkler has its own discharge curve and temperature rating. It isn't like a pool drain cover.

The F960 heads are not essential for the functioning of a building; rather, they are added protective devices which are connected to water pipes, much the way other equipment may be hooked up to an electric source. Each sprinkler head comes with printed literature describing its mechanical function, intended use, required installation instructions and patent information. <u>The sprinkler head is distinguished from a "sprinkler system" which consists of a series of pipes, fittings and valves</u>. Whereas pipes and elbows are generic materials which are truly interchangeable and fungible, the sprinkler head is not. The critical factors which distinguish

equipment from ordinary building materials were set forth in Cooper Industries, namely that the sprinkler head is a self contained and fully assembled product by the manufacturer as distinguished from a series of unassembled parts; it is tested at the factory and the manufacturer retains control over the manner in which it is installed and can function. The manufacturer supplies a detailed manual of required installation instructions and the product bears the manufacturer's nameplate, product identification and date stamp. This sprinkler head also is tested and is subjected to quality control by the manufacturer. One doesn't build a building from sprinkler heads. It simply isn't a building material. Utilizing all of these factors, it is clear that the sprinkler head is equipment and not an "ordinary building material," within the meaning of the Supreme Court's opinions and the statute.

This particular sprinkler head failed to operate because of manufacturing defects in design and selection of materials. The sprinkler head, as a product, was discontinued by the manufacturer and like products have been recalled from the market. This is clearly the subject of products liability law and the manufacturer of this defective product is not deserving of protection under the Statute of Repose in Virginia. The trial court's analysis was wrong as a matter of law.

DUTY TO WARN

B. The trial court erred in dismissing Count VIII of Plaintiffs' Amended Motion for Judgment without determining whether a post-sale duty to warn based on negligence principles existed in Virginia law.

The trial court improperly dismissed Count VIII of Plaintiffs' Amended Motion for Judgment based on defendant Tyco Fire Products failure to provide a post-sale warning to First Centrum that the sprinklers installed at the River Run Apartment Complex would fail to operate in the event of a fire.

The Court's Memorandum Letter Opinion of February 20, 2009 focused only on the statute of repose defense in Tyco's Plea In Bar. The Court heard no argument on Count VIII of Plaintiffs' Amended Motion for Judgment and yet entered an Order on February 17, 2009, dismissing all of the plaintiffs' tort claims against Tyco based upon the statute of repose, including Count VIII. This, by itself, was error since the statute of repose defense does not bar the negligent post-sale duty to warn claim. In essence, the Court dismissed that cause of action as if there were a demurrer.

The Virginia Supreme Court has not yet directly addressed the question of whether a post-sale duty to warn cause of action grounded in negligence exists under Virginia law. A long line of Federal decisions have

predicted that the Virginia Supreme Court, in a proper case, would recognize a manufacturer's post-sale duty to warn based upon a negligence theory. See, A.J. Buck & Son, Inc. v. Crown Equipment Corp., 34 F.3d 1066 (4th Cir. 1994); Island Creek Coal Company v. Lake Shore, Inc., 832 F.2d 274 (4th Cir. 1987); and McAlpin v. Leeds & Northrup, Co., 912 F. Supp. 207 (W.D. Va. 1996).

The most recent Federal case to address this issue is Rash v. Stryker Corp., 589 F. Supp. 2d 733 (W.D. Va. 2008). There, the Court observed that the Supreme Court of Virginia has not yet considered the issue of whether a manufacturer's post-sale duty to warn exists under Virginia law and thus predicted how the Supreme Court of Virginia would answer that question. The Court considered prior Federal decisions as well as a Virginia Circuit Court case, Hart v. Savage, 2006 WL 3021110 (Va. Cir. Ct.) and concluded that the Supreme Court of Virginia would allow a cause of action based upon a manufacturer's negligent breach of a post-sale duty to warn. The Court suggested that the Restatement (Third) of Torts (Products Liability, § 10 (1998)) provided the necessary elements to establish the cause of action.

The evidence in support of the pleadings in this case satisfied the plaintiffs' *prima facie* burden to establish those elements necessary to

prove that Tyco Fire Products was negligent in failing to satisfy a post-sale duty to warn based on negligence utilizing those factors set forth by the majority of Courts and the Restatement of Torts.

Paragraph 29 of Plaintiffs' Amended Motion for Judgment specifically alleged that Tyco and Simplex knew of the corrosion and "O"-ring defects after sale but failed to warn. This paragraph, along with the evidence in this case, is the basis for Count VIII of Plaintiffs' Amended Motion for Judgment. This cause of action is based on negligence, not warranty or strict products liability.

The only Virginia Supreme Court case addressing a post-sale duty to warn is Harris v. T.I. Inc., 243 Va. 63, 413 S.E.2d 605 (Va. 1992), which arose in the context of a successor corporation in a products liability action arising out of a defect in a truck. The Virginia Supreme Court assumed, without deciding, that in a proper case a successor corporation's post-sale duty to warn would be recognized if the successor corporation had a direct and continuing relationship with its predecessor's customers. The Court found that there was merely a "casual" relationship between the successor corporation and the original buyer. Its decision was factually driven rather than determined by the lack of any recognized cause of action. The Court

did not address a post-sale duty to warn on the part of the original manufacturer, the precise issue before the Court in this matter.

The present case involves some aspects of “successor liability”, however, there are sufficient facts in the record showing that there was direct contact between Tyco Fire Products and the customers of the original manufacturer of the sprinkler head. In fact, a division of the manufacturer performed the installation, maintenance and inspection of the entire sprinkler system installed at the River Run Apartments. The record establishes a clear and continuing relationship between the current defendants and their predecessor companies:

Defendant, Tyco Fire Products, LP (“Tyco”) is in the business of designing, manufacturing, assembling and selling sprinkler heads. (JA 53) Tyco owned Grinnell Corporation at the time it manufactured, designed, assembled and distributed the F960 sprinkler heads at issue in this case. Co-Defendant, Simplex Grinnell LP is in the business of designing, installing and servicing automatic sprinkler systems. It is the successor in interest to Grinnell Fire Protection Systems Company and has continually serviced and maintained the River Run sprinklers since installation.

At the time of the River Run Apartment Project, Grinnell Fire Protection Systems was a Division of Grinnell Corporation. The name

Grinnell Fire Protection Systems Company also appears on 1993 design schematics for the O-Ring in the F960 sprinkler at issue in this case indicating that the same company that installed the sprinklers in the River Run Apartments also played a part in their design. (JA 825-826).

Although Tyco and SimplexGrinnell contend they are *currently* separate legal entities, at the time the sprinklers were designed Tyco's predecessor and SimplexGrinnell's predecessor were actually one company performing all the work necessary to design, manufacture, distribute and install the F960 sprinkler head.

The facts in this case cry out for this Court to impose a post-sale duty to warn on Tyco. Shortly after the F960 sprinklers were sold, investigations conducted by UL and the Consumer Product Safety Commission, in cooperation with Tyco, found that the "O"-Ring Technology was deficient. Because the brass alloy in the plug leached zinc and because the synthetic o-ring softened in water, it was known that the "O"-Ring Technology sprinklers were likely to stick closed in a fire. These facts were known to Tyco as early as 1998 and 1999, well before the River Run fire. Clearly, Tyco knew these defects were dangerous because they authorized the recall and replacement of 35 million sprinklers using the same technology sold by other sprinkler manufacturers owned by Tyco. Grinnell's Chief of

Engineering was a member of an ad hoc o-ring task force which tested field samples of these sprinklers and learned that many of the F960 sprinklers failed to open during testing. The related companies owned by Tyco were Central Sprinkler, Starr, and GEM (Grinnell Equipment Manufacturing). Tyco did not replace or warn purchasers of the F960 heads. It stopped making them and left the deficient heads in place without notifying the purchasers. These defective heads, in the instant case, remained at the River Run Apartments and, as expected, failed to operate and were responsible for the fire's spread and which caused $10,000,000 in what otherwise would be avoidable property damage.

The facts of the present case parallel the seminal post-sale duty to warn case, Comstock v. General Motors Corp., 99 N.W.2d 627 (Mich. 1959). In Comstock, GM learned of brake problems in 1953 Buicks shortly after putting them on the market. A mechanic sued GM after being struck by a car with faulty brakes. The Michigan Supreme Court held that a manufacturer's duty to warn extended to latent defects that were hazardous to life and which were discovered shortly after the product was put into the market. Certainly, on the facts of Comstock, a warning was necessary and appropriate because of the risk to life. A similar circumstance exists in this case. Fire sprinklers are well known to be highly effective in suppressing

fires and they are deemed desirable and, in some circumstances, even required in certain buildings. The purchasing public has an expectation that they will be protected from the effects of fire by functional sprinklers. There is no question that, in the instant case, this defect posed a serious risk to life and property. The sprinklers' failure to open allowed this fire to extend beyond the balcony of apartment 310 and destroy the entire building. The defects here were latent, and unable to be discovered until the sprinklers failed. Tyco concedes that the sprinklers cannot be tested or functioned until the time of a fire. Additionally, the defects here were internal to the sprinkler and unable to be detected by the user. (JA 65; 799-804) The corrosion and softened synthetic o-rings were located at the interface of the sprinkler's discharge port internal to the sprinkler. There was no way for the user to learn of these latent defects without a warning from the manufacturer, who knew of them. The manufacturer knew of these defects well in advance of the fire. The Consumer Products Safety Commission commentary disclosing that these defects could cause the sprinkler heads not to activate in the fire were known prior to 2001. Tyco, as a participant in the testing, knew of these deficiencies as well but, for some reason, known only to itself, omitted the F960 sprinkler from warnings and from the voluntary replacement program. A warning in this

case to First Centrum would have been effective. The sprinklers would have been replaced. (JA 922-923)

It may be argued that manufacturers should not be required to give a post-sale warning because doing so might be costly or burdensome. However, manufacturers of products with dangerous defects which are known to them should not escape liability merely because it might be costly or burdensome to provide a warning. See, McAlpin v. Leeds and Northrop Co., supra, wherein the court noted:

> "Absent a post-sale duty to warn, a manufacturer could learn of defects in its product that only manifest themselves in unusual circumstances and take no affirmative action whatsoever, with the hope that such a latent defect will not lead to litigation."

See also, Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401 (N.D. 1994) (indicating that to allow manufacturers to ignore post-sale knowledge about dangers in their products is contrary to prevailing negligence principles).

In Torres v. Xomox Corp, 49 Cal. App. 4th 1, 56 Cal. Rptr. 2d 455 (1996) the court addressed some of the concerns about imposing a duty to warn about latent defects on manufacturers. The court noted that some courts were reluctant to impose a duty because to do so might impose too high a duty on manufacturers. They should not be charged with knowing more than the prevailing scientific or medical knowledge. This rationale not

to impose a post-sale duty to warn would serve no purpose in the present case. Here, the manufacturer itself, in conjunction with testing authorities, participated in and developed the testing and data which disclosed the defect in the F960 sprinklers. Under these facts, there would be no high duty or burden for Tyco to discover and warn purchasers of the F960, particularly when three other companies owned by Tyco recalled millions of sprinklers having the same technology and defect. Now the concern would be the cost of warning. In the present case, the cost would be small in relation to the risk to life and significant property damage. Sprinklers are safety devices. They are designed to protect life and property. The purchasers and users of these sprinklers are known to the manufacturer since related companies provide service to these customers. In the instant case, also, the fact that the defect is latent is an important factor. The owners cannot detect the defect. This provides more justification for the manufacturer to disclose its knowledge to protect the consuming public.

In the instant case, there is no issue concerning the feasibility of warning customers. They can be easily notified as is evidenced by the recall of the sprinklers of other related companies. It was quite clear that Tyco could track down the owners of the other sprinklers. Section 10 of the Restatement (Third) of Torts embodies these principles and rationale. It

provides a sound guideline for this Court. The negligence standard is whether a reasonable person in the seller's position would provide a warning when the seller becomes aware of the defects after sale. The court can measure the nature of the defect and whether it poses a substantial risk of harm to persons or property, whether the persons to be warned can be identified and can be expected to be unaware of the risk, whether the warning can be effectively communicated and whether the risk of harm is sufficiently great to justify the burden of providing a warning. All of these factors should be the subject of a jury charge and jury resolution in the instant case. This court should reverse the District Court's dismissal and allow the plaintiff to fully develop the record and submit the manufacturer's failure to provide a warning to a jury on a negligence theory.

C. The trial court erred in dismissing the plaintiffs' warranty cause of action on the grounds that the manufacturer's statements concerning the F960 Q46's intended future performance under the Virginia Uniform Commercial Code did not constitute a warranty of future performance. The court further erred in holding that the statute of limitations, therefore, began to run on the date of delivery, rather than on the date of the injury.

In the trial court Tyco argued that breach of warranty claims against Tyco concerning the F960 were barred by the four (4) year Virginia UCC Statute of Limitations because the product was tendered for delivery more than four (4) years before the filing of this action. The Trial Court agreed

and rejected plaintiff's position that a warranty of future performance was created. This was error.

An exception to the four year delivery statute of limitations is carved out by the UCC for warranties of future performance. Specifically, Va. Code Ann. § 8.2-725(2) notes that a breach of warranty occurs upon tender of delivery "except that where a warranty explicitly 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."

It is clear, from the stipulated facts and from the testimony of Tyco's corporate designee witness Donald Pounder that the performance of the F960 sprinkler head cannot be determined until it is called upon to perform during a fire. It is undisputed that the F960 cannot be cycled, tested or otherwise judged for performance until that time. The F960 is intended to operate one time only and it cannot be recycled, reprogrammed or reused. There is no way to determine whether it is defective until there is a fire. In the language of the statute, "discovery of the breach must await the term of such performance."

Virginia law is clear that an express warranty may be created without specific language calling it a warranty. Virginia's Uniform Commercial

Code § 2-313 and 313(a) clearly state that a warranty may be created by any affirmation of fact or promise made by the seller which relates to the goods and which becomes a part of the basis of the bargain. Warranties can be created by literature which accompanies the goods where the seller makes an express affirmation of fact or a promise. The Code provides that it is not necessary to the creation of a warranty obligation that the seller use formal words such as warrant or guarantee (Va. U.C.C. §§ 2-313 at 2-313(a) or that the seller have a specific intention to undertake an obligation, as long as the affirmation of fact does not purport to be merely the seller's opinion or statement about the value of the goods.

The accompanying literature to the F960 sprinkler contains an affirmation of fact about the sprinkler head's performance. Specifically, the technical data sheet accompanying the sprinkler head provides:

> "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."

This is the manufacturer's statement concerning the intended operation of the sprinkler head. (JA 811) Pounder confirmed that the sprinkler could not be tested, that it is a one time operation, and that there

is no test that the user could perform to determine whether the sprinkler head is functional. The statement of the manufacturer indicates clearly a time period for this warranty, i.e. the warranty is in effect until such time as the head is exposed to a temperature sufficient to operate the bulb. Thereafter, the mechanical functioning of the sprinkler head is to take place as described in the technical data sheet thereby allowing water to be discharged onto a fire. Nothing can be more characterized as a warranty of future performance than this affirmation of fact by the manufacturer.

Legally, this statement is made by one who has superior knowledge concerning the goods in question and it is not an opinion but, rather, is a statement of fact. See Daughtrey v. Ashe, 243 Va. 73, 413 S.E.2d 336 (1992). The language in the Uniform Commercial Code referring to "part of the basis of the bargain" does not establish a buyer's reliance requirement, "instead, this language makes a seller's description of the goods that is not his mere opinion a representation that defines his obligation." Daughtrey at p. 74. See also Thomas W. Coffee, Creating Expressed Warranties Under the UCC: Basis of The Bargain – Don't Rely On It, 20 UCC L.J. 115, 126 (1987). The question of whether a particular affirmation of fact made by the seller constitutes an express warranty is generally a question of fact. See Kraft foods North America Inc. v. Banner Engineering and Sales

Inc., 446 F. Supp. 2d 551 (E.D. Va. 2006); Bayliner Marine Corp. v. Crow, 257 Va. 121, 509 S.E.2d 499, 502 (1999).

Under Virginia law, it is also clear that lack of privity between the plaintiff and defendant is no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, expressed or implied or for negligence. Va. Code Ann. 8.2-318. Any description of the goods or the product constitutes a basis of the bargain and is an express warranty. Reliance is unnecessary because the express warranty inquiry focuses on what it is that the seller has agreed to sell and absent clear proof that the parties did not intend their bargain to include the seller's description of the goods, that description is an express warranty. See, Martin v. American Medical Systems Inc., 116 F.3d 102 (4th Cir. 1997).

In the present case, the sprinkler head's intended operation is described by the manufacturer in specific terms. The literature contains affirmations of fact concerning the goods and the performance of the product which, under Virginia law, constitute express warranties.

The manufacturer's statement in essence warrants that water in the system will be held back until the frangible bulb is broken by exposure to the prescribed temperature and when that occurs, the mechanism internal

to the sprinkler head will operate to remove the plug and allow water flow. One clearly must await the future performance of the sprinkler head in order to determine whether the warranty has been breached. Application of such a warranty is an exception to the ordinary UCC statute of limitations. Certainly, this expected performance is the essence of the bargain.

The language describing the intended performance of the sprinkler head relates to the future and, certainly, because of the nature of the sprinkler head, discovery of the breach must await such performance. The time for performance is the defined period of time i.e. when a fire occurs.

The issue of a warranty of future performance was addressed by the Fourth Circuit in Chestnut Forks Tennis Club v. TJ International Inc., 56 F.3d 60 (4th Cir. 1995). There the court found that oral statements made by the seller that a wood truss roof would last as long as a metal one, would last a life time and would last 80-100 years were warranties that related to future performance of the trusses. In Chestnut Forks, even post-sale statements were found to be warranties of future performance (that the roof would last 80-100 years). The court noted that such questions were not to be decided behind locked courthouse doors, but rather, were to be decided by juries.

Finally, the precise issue regarding warranties of future performance and a fire suppression system was directly addressed in a Michigan Trial Court opinion, St. Paul Fire & Marine Insurance Co., subrogee of Boone Enterprises t/a Boone's Long Lake Inn v. Northern Fire & Safety Inc., (Docket Number 90-8468-NZ, Circuit Court for the County of Grand Traverse, Rodgers, J.) (10/30/92) (See Exhibit "E" to Plaintiffs' Opposition to Tyco's Plea in Bar). (JA 924-926) Specifically, literature accompanying a kitchen fire suppression fire system was at issue. The statements concerned how the suppression system would operate to suppress a fire before it traveled into duct work in a restaurant. Judge Rodgers analyzed the issue as follows:

> "Unlike a product used regularly in a course of business, a fire suppression system only operates in the fortuitous and unpredictable event of a fire. … the UCC does contemplate and makes a provision for claims based upon the breach of warranty of future performance …. The performance of the fire suppression system could only be judged by the fortuitous event of a fire. No fire occurred until April 17, 1989, the date the cause of action accrued. St. Paul's Complaint was timely filed."

In the instant case, we respectfully submit that a warranty of future performance was created by the accompanying literature. The description relates to the future performance in the event of a fire. The only way performance could be judged or a breach determined is by performance at

the time of a fire. Accordingly, the cause of action did not accrue until the date of the fire and therefore, the appellants' action was timely filed.

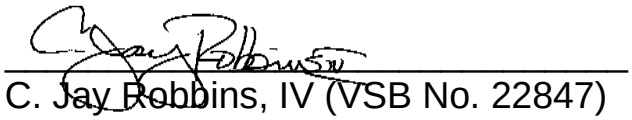
It is respectfully submitted that the Trial Court erred in not finding a warranty of future performance on the undisputed facts. Dismissal of this cause of action should be reserved.

CONCLUSION AND RELIEF REQUESTED

The Orders of the Trial Court should be reversed and the case remanded for trial on the merits.

Respectfully submitted, this 2nd day of August, 2010.

By Counsel:



C. Jay Robbins, IV (VSB No. 22847)
Kevin T. Streit (VSB No. 45024)
Midkiff, Muncie & Ross, P.C.
300 Arboretum Place, Suite 420
Richmond, VA 23236
(804) 560-9600 (Telephone)
(804) 560-5997 (Facsimile)
crobbins@midkifflaw.com
kstreit@midkifflaw.com
Counsel for Petitioners – Appellants

OF COUNSEL:
Michael J. Izzo, Jr., Esquire
Paul R. Bartolacci, Esquire
Lawrence F. Walker, Esquire
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000 (Telephone)
(215) 665-2013 (Facsimile)
mizzo@cozen.com
pbartolacci@cozen.com
lwalker@cozen.com
Co-Counsel for
Petitioners – Appellants
(Pro Hac Vice)

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 5:26(h) on this 2nd day of August, 2010, fifteen bound copies of this Opening Brief of Appellant and Joint Appendix have been hand-filed with the Clerk's Office of the Supreme Court of Virginia, and three bound copies of the Opening Brief of Appellant and two bound copies of the Joint Appendix have been served via UPS Ground Transportation to opposing counsel at the following address:

Dawn E. Boyce (VSB No. 32923)
Trichilo, Bancroft, McGavin,
Horvath & Judkins, P.C.
3920 University Drive
Fairfax, Virginia 22030
(703) 385-1000 (Telephone)
(703) 385-1555 (Facsimile)
dboyce@tbmhjlaw.com

Paul A. Williams (*Pro Hac Vice*)
Shook, Hardy & Bacon, LLP
2555 Grand Boulevard
Kansas City, Missouri 64108
(816) 559-2263 (Telephone)
(816) 421-5547 (Facsimile)
pwilliams@shb.com

A digital copy (via CD) of this Brief along with a digital copy of the Joint Appendix was also hand-filed with the Clerk's Office of the Supreme Court of Virginia this same date.

Date: August 2, 2010

C. Jay Robbins, IV