IN THE

Supreme Court of Virginia

RECORD NO. 092567

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.

SIMPLEXGRINNELL, LP,

Appellee.

BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS IN SUPPORT OF APPELLEE SIMPLEXGRINNELL, LP

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IN THE SUPREME COURT OF VIRGINIA

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,	)	Record No. 092567
Appellants	)	
v.	)	
SIMPLEXGRINNELL, LP,	)	
Appellee.	)	

BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS IN SUPPORT OF APPELLEE SIMPLEXGRINNELL, LP

STATEMENT OF INTEREST

This Brief *Amicus Curiae* is submitted in support of the Appellee, SimplexGrinnell, LP, by the Virginia Association of Defense Attorneys ("VADA"), pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia.

VADA is a non-profit, Statewide bar organization of more than 800 members whose practice is devoted primarily to the defense of civil actions. Among other things, VADA occasionally submits *amicus curiae* briefs in cases involving significant legal issues which, in VADA's view, have the

potential to impact the fairness and integrity of the civil litigation and trial processes. VADA believes that the appellants' efforts to convince this Court to adopt a "post-sale" duty to warn as a part of the products liability law of Virginia make this such a case.

VADA argues that recognition of such a "post-sale" duty to warn would work a substantial change in the existing products liability law of the Commonwealth, and would create substantial unfairness for product manufacturers and sellers. Permitting evidence of, and appeals to, information learned only after distribution of the product at issue would be fraught with difficulties, and would permit the assessment of liability based on hindsight. VADA has a substantial interest in opposing such an expansion of Virginia law.

Accordingly, VADA files this brief *amicus curiae* to urge the Court to reject appellant's attempts to create a post-sale duty to warn on the part of product manufacturers and sellers.

STATEMENT OF THE CASE

This case involves alleged defects in sidewall sprinkler heads sold and installed by the appellee, SimplexGrinnell, LP ("SimplexGrinnell"), under a contract with Apartment Contract Corporation, the agent for appellee Centrum-Prince William, LP. (JA 50-51.) The sprinkler heads

were installed on the exterior balconies of the apartment complex at some time prior to June 16, 1997. (JA 4, 51.) On February 8, 2003, the apartment complex was damaged by a fire that occurred on an exterior balcony. (JA 50-52.) The sprinkler heads failed to open and allow the flow of water to extinguish the fire. (JA 52.) Appellants insured the apartment complex, paid claims for the fire loss, and then brought subrogation claims seeking to recover from SimplexGrinnell and others, alleging they were responsible for the loss. (JA 7.)

As pertinent to this brief *amicus curiae*, the appellants below sought to advance, among other things, claims based on an alleged "post-sale" duty to warn. They alleged that "*subsequent to the sale and installation of the F960 sidewall sprinklers*...SimplexGrinnell knew or had reason to know" of a corrosion problem that would cause the sprinkler heads to fail to operate, but failed to issue warnings or instructions about this condition. (JA 7, emphasis added.) Count IV of the Amended Motion for Judgment below made plain that the failure to warn claim was premised on a duty purportedly arising after the delivery of the sprinkler heads, and based on information that was not known, or reasonably ascertainable, by SimplexGrinnell at the time of delivery:

> 53. After the installation of the dry horizontal sidewall sprinklers in Centrum's premises the defendant SimplexGrinnell, through research, testing, and from knowledge and experiences in the sprinkler industry, obtained information, data and knowledge that the dry horizontal sidewall sprinklers model F960 with their component parts were susceptible to corrosion and failure because of their design.
>
> 54. The spread of the fire and resulting damages to Centrum were caused by the negligence, gross negligence, and negligent acts or omissions of defendant SimplexGrinnell in failing to warn Centrum that the dry horizontal sidewall sprinklers would be adversely affected by corrosion and that they would fail to operate as intended.....

(JA 12.)[1]

The Circuit Court, after considering all of the evidence presented by the parties on the Pleas in Bar filed by SimplexGrinnell and appellee Tyco Fire Products, LP, issued a memorandum opinion finding that the sprinkler heads were ordinary building materials that were subject to Virginia's statute of repose (Va. Code § 8.01-250). (JA 857-865.) Finding that the suit was brought more than five years after SimplexGrinnell completed its installation work, the Circuit Court held the appellants' tort claims –

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[1] Appellants repeatedly concede in their brief that the alleged defects in the sprinkler heads were discovered only after the items had been delivered. *E.g.*, Appellants' Brief at 4 ("the defect causing [the sprinkler heads] not to open was known to the manufacturer as early as 1998") & 38 (deficiencies discovered "[s]hortly after the F960 sprinklers were sold").

including the purported "post-sale" duty to warn claim – were barred by the statute of repose, and entered an Order granting the Pleas in Bar. (JA 866-88.)

In this appeal, appellants argue that Virginia law recognizes a cause of action for breach of a "post-sale" duty to warn, and that this claim somehow is not subject to the statute of repose. (Appellants' Brief at 34.)

ISSUES PRESENTED

I. Whether established Virginia products liability law – which requires that any unreasonably dangerous condition in a product must have existed when the goods left the defendant's hands – precludes a cause of action for a "post-sale" duty to warn based on the development of information that was not known or reasonably ascertainable at the time the product was delivered?

STATEMENT OF FACTS

The *amicus curiae* will rely on appellee SimplexGrinnell's Statement of Facts.

STANDARD OF REVIEW

The question of whether Virginia law recognizes a cause of action premised on a "post-sale" duty to warn is a pure question of law which this Court reviews *de novo*. *Sheets v. Castle*, 263 Va. 407, 410, 59 S.E.2d 616, 618 (2002).

ARGUMENT AND AUTHORITIES

The circuit court held that all of appellant's tort claims – including the claim for breach of the purported post-sale duty to warn – were barred by Va. Code § 8.01-250. VADA does not address the issue of the applicability of the statute of repose based on the facts developed below, but rather addresses only the question of whether Virginia law recognizes a post-sale duty to warn (Appellants' Assignment of Error No. II).[2]

I. THIS COURT HAS REPEATEDLY HELD THAT A PRODUCT IS TO BE JUDGED AS OF THE DATE IT LEFT THE DEFENDANT'S HANDS.

This Court has repeatedly held that in order to impose liability upon a product manufacturer or seller under Virginia law, whether for a design defect, a manufacturing defect, or a defect in warnings and instructions, the

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[2] Given this Court's two decades of precedent construing the statute of repose to protect manufacturers and suppliers of "ordinary building materials," and the General Assembly's endorsement of that construction, VADA believes the trial court's fact finding that the sprinkler heads were "ordinary building materials" is soundly reasoned and should be affirmed. And given that appellant pled the post-sale duty to warn claim as a negligence claim (JA 12), and argues that the claim sounds in negligence (Appellant's Brief at 34-35), the "post-sale" duty to warn claim is unquestionably an "action to recover for...injury to property" falling within the ambit of Code § 8.01-250. *See School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 37, 360 S.E.2d 325, 328 (1987) ("[T]he lapse of the statutory period [specified in Code § 8.01-250] was meant to extinguish all the rights of a plaintiff, including those which might arise from an injury sustained later").

defect must have been present when the product left the defendant's control. As the Court explained in *Logan v. Montgomery Ward & Co.*:

> The standard of safety of goods imposed on the seller or manufacturer of a product is essentially the same whether the theory of liability is labeled warranty or negligence....Under either the warranty theory or the negligence theory the plaintiff must show, (1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose; and (2) *that the unreasonably dangerous condition existed when the goods left the defendant's hands.*

216 Va. 425, 428, 219 S.E.2d 685, 687 (1975) (emphasis added). In *Morgen Industries, Inc. v. Vaughan*, this Court restated the applicable standard:

> In order to recover under either a negligence or a breach of implied warranty theory for the manufacture of an unreasonably dangerous product, a plaintiff must show (1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) *that the unreasonably dangerous condition existed when the goods left the manufacturer's hands.*

252 Va. 60, 65, 471 S.E.2d 489, 492 (1996) (emphasis added). The Court further made clear that this standard applies to *all* categories of product defect – including alleged failures to warn – by explaining that, "A product is unreasonably dangerous if it is defective in assembly or manufacture,

unreasonably dangerous in design, or unaccompanied by adequate warnings concerning its hazardous properties." *Id.*

This standard cannot be squared with appellant's argument that Virginia products liability law applies a different standard for negligence liability than for warranty liability, and the requirement that the unreasonably dangerous condition must have existed "when the goods left the defendant's hands" rules out any appeal to post-distribution evidence (*i.e.*, evidence relating to matters which the defendant did not know, and had no reason to know, at the time the product was delivered). Thus, a product which was not unreasonably dangerous at the time of delivery does not become defective later because the manufacturer obtains additional information; because industry standards, government regulations or consumer expectations change; or because post-sale events have revealed information which was not known, or reasonably ascertainable, by the manufacturer or seller at the time of delivery.

II. THE FEDERAL COURTS THAT HAVE IMPROPERLY HELD VIRGINIA WOULD RECOGNIZE A POST-SALE DUTY TO WARN HAVE FAILED TO DISTINGUISH BETWEEN A "CONTINUING" DUTY TO WARN (A DUTY TO WARN EXISTING AT THE TIME OF DELIVERY AND CONTINUING THEREAFTER) AND A "POST-SALE" DUTY TO WARN (A DUTY TRIGGERED ONLY BY EVENTS OCCURRING AFTER THE DATE OF DELIVERY).

Federal Courts applying Virginia law have reached conflicting conclusions on whether Virginia would recognize a post-sale duty to warn.[3] The Federal Courts that have concluded Virginia would recognize such a duty have uniformly relied on *dicta* in a Fourth Circuit decision, *Bly v. Otis Elevator Co.*, 713 F.2d 1040 (4th Cir. 1983), which incorrectly characterized Virginia law. By confusing the concept of a "continuing" duty to warn with the creation of a "post-sale" duty to warn, these federal cases have improperly recognized a "duty" which does not exist under Virginia law.

A. The Fourth Circuit's Decision in *Bly* Incorrectly Characterized Virginia Law, and Does Not Support the Creation of a Post-Sale Duty to Warn.

The alleged "post-sale" duty to warn can be traced to the Fourth Circuit's statement in *Bly* that, "[U]nder a negligence theory the duty to warn is continuous and is not interrupted by manufacture or sale of the product." *Bly v. Otis Elevator Co.*, 713 F.2d at 1045-1046. It is uniformly

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[3] The Appellants assert that, "A long line of Federal decisions have [sic] 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." (Appellants' Brief at 34-35.) Appellants, however, ignore that other – and better-reasoned – decisions have held that Virginia ***does not*** recognize such a duty. *Ambrose v. Southworth Products Corp.*, 953 F. Supp. 728, 732 (W.D. Va. 1997) ("Virginia does not recognize a duty on the part of a manufacturer to warn its consumers of dangerous defects discovered by the manufacturer after the sale of its product."); *Estate of Kimmel v. Clark Equip. Co.*, 773 F. Supp. 828, 831 (W.D. Va. 1991) (no post-sale duty to warn under Virginia law).

acknowledged, even by those courts that have held Virginia would recognize a post-sale duty to warn, that this statement is *dicta*. *Rash v. Stryker Corp.*, 589 F. Supp. 2d 733, 736 (W.D. Va. 2008); *McAlpin v. Leeds & Northrup Co.*, 912 F. Supp. 207, 209-210 (W.D. Va. 1996) (characterizing statement as "arguably dicta"); *Hart v. Savage*, 72 Va. Cir. 41, 45 (Cir. Ct. for the City of Norfolk, 2006).

In *Bly*, the plaintiff's decedent was operating a lift truck and, without looking, backed it into a canister which was raised on the front of another lift truck. 713 F.2d at 1042. The guard on the decedent's lift truck slipped beneath the raised canister, and the decedent was crushed between the canister and the lift truck's controls. *Id.* The decedent's estate brought suit against the lift truck manufacturer, alleging that the lift truck was defective. The suit contained claims for negligence and breach of warranty, but was submitted to the jury solely on the theory that the manufacturer had breached the implied warranty of merchantability. *Id.*

The plaintiff in *Bly* established that at the time the lift truck was manufactured and sold, industry and governmental organizations had recognized the need for waist-high guards on lift trucks. *Id.* at 1043. The lift truck operated by the decedent had only shin-high guards, and the lower

height of the guards was what permitted them to slip underneath the raised canister. *Id.* As the court explained,

> In light of this evidence suggesting that waist-high guards reflected prevailing industry views on the appropriate level of operator protection at the time this lift truck was manufactured and sold, coupled with expert testimony opining that the truck was, in this sense, defective in design, a jury could certainly conclude that a lesser standard of protection was "unreasonable" and a breach of the implied warranty of merchantability that proximately caused Bly's death.

Id.

In addition to the defective design claim, however, the plaintiff sought to prove a breach of warranty based on the manufacturer's failure to warn of the hazards of operating the lift truck without waist-high guards. Plaintiff claimed that warnings were required when the lift truck was sold in 1944, and when it was refitted in 1948. *Id.* at 1044. Plaintiff also introduced evidence that the manufacturer had been notified of a similar accident involving the same lift truck in 1977, in an effort to show the manufacturer had "a further obligation at that later date" to warn about the lift truck's hazards. *Id.* The district court instructed the jury that it could find that the manufacturer had a duty to warn in 1944 and 1948, and that it could find a "renewal of that obligation" after notice of the 1977 accident. *Id.* The *Bly* court held this instruction was improper because it injected the

reasonableness of the manufacturer's conduct – a negligence principle – into a claim for breach of implied warranty, which focuses only on the condition of the product. *Id.* at 1045-46.[4]

On the facts, *Bly* is not a "post-sale" duty to warn case at all. As commonly understood, a "post-sale" duty to warn refers to a duty that arises at some time after (in many cases long after) the product has been delivered, based on information that discloses a hazard that was not known or reasonably ascertainable based on the facts known and the information available at the time the product was delivered. *See* Restatement (Third) of Torts: Products Liability § 10 cmt. a. By contrast, in *Bly* there was evidence suggesting the product manufacturer failed to give an adequate warning of the known or reasonably ascertainable hazards *at the time of manufacture and sale*. This failure would have rendered the lift truck unreasonably dangerous and defective even had the manufacturer not received notice of a similar claim more than thirty years later.

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[4] The *Bly* court distinguished between failure to warn claims sounding in negligence and those sounding in breach of implied warranty by equating breach of implied warranty with strict liability. 713 F.2d at 1045 n.6 ("[I]t is well established that warranty liability under Virginia law for personal injuries caused by defective products is the functional equivalent of strict tort under the Restatement formulation."). As discussed *infra* at pp. 14-16, Virginia has rejected the doctrine of strict liability under § 402A of the Restatement (Second) of Torts, and has in fact treated failure to warn claims sounding in breach of implied warranty as the functional equivalent of negligent failure to warn claims.

Bly, therefore, is a "***continuing***" duty to warn case, in that if the manufacturer knew or had reason to know of a dangerous condition at the time of manufacture and sale, and failed to give an adequate warning, then the manufacturer had a *continuing* duty to provide the warning that the law required at the time of manufacture and sale.

The failure to distinguish a "post-sale" duty to warn from a "continuing" duty to warn has caused much of the confusion in the case law cited by appellants to support their argument for a post-sale duty to warn. The United States District Court for the Western District of Virginia, in *Estate of Kimmel v. Clark Equip. Co.*, 773 F. Supp. 828 (W.D. Va. 1991), properly distinguished these differing duties. Characterizing much of the *Bly* court's discussion of the duty to warn under a negligence theory as "gratuitous," the *Kimmel* court held that *Bly* did not impose an independent, post-sale duty to warn:

> To put it another way, the *Bly* court provided no basis for a claim under Virginia law that the duty to warn is separate and independent from any duty to warn the manufacturer had at the time the product left its hands.
>
> Though the duty to warn clearly is continuous from the date of manufacture/sale, it requires the manufacturer to warn only about dangerous conditions it knew about, or in the exercise of reasonable care should have known about, at that time. The duty does not require a manufacturer to

> warn about a dangerous condition that became reasonably recognizable or apparent only at some later period of time, after industry standards and other data caused the matter to be revisited in a new light.

Id. at 831 (citation omitted).[5]

B. *Bly*'s Suggestion That There is a Distinction Between Negligence and Warranty for Purposes of Determining Whether a Product is Unreasonably Dangerous Has Not Been Followed By This Court.

As noted above, this Court has held that the standard of proof for determining whether a product is unreasonably dangerous is the same whether the plaintiff proceeds in negligence or in implied warranty. *Morgen Industries*, 252 Va. at 65, 471 S.E.2d at 492; *Logan*, 216 Va. at 428, 219 S.E.2d at 687. Moreover, this Court has not articulated any different standard for determining the adequacy of a warning when a plaintiff proceeds in negligence than when a plaintiff sues for breach of implied warranty. Rather, the Court has looked to the Restatement (Second) of Torts §388 to define the scope of the duty to warn regardless of whether the claim sounds in negligence or in warranty. For example, in *Owens-Corning Fiberglas Corp. v. Watson*, the plaintiff brought both negligence

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[5] After *Kimmel* was decided, this Court decided *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 136, 413 S.E.2d 630, 635 (1992), in which it clarified that "the appropriate standard in Virginia is whether a manufacturer has a reason to know, not whether the manufacturer should know."

and breach of warranty claims against ten asbestos manufacturers. 243 Va. 128, 131, 413 S.E.2d 630, 632 (1992). This Court analyzed the failure to warn claims by referring to the test set out in the Restatement (Second) of Torts § 388 – without distinguishing between the negligence claim and the warranty claim. *Id.* at 135, 413 S.E.2d at 634; *see Slone v. General Motors Corp.*, 249 Va. 520, 526-527, 457 S.E.2d 51, 54 (1995) (same).

Even though the terminology used to describe the considerations for determining whether a product is "unreasonably dangerous" for purposes of an implied warranty claim may be slightly different from the terminology used in a negligence claim, there is no substantive difference between the elements. *See* G. Spahn, R. Draim, D. Carr, S. Otero & M. Tannery, VIRGINIA PRACTICE: PRODUCTS LIABILITY § 5:1(d) (2010 Ed.). Under either theory, the product manufacturer or seller has a duty to give a reasonably adequate warning if it knows, or has reason to know, of hidden product hazards which create an unreasonable risk of harm in intended uses (or reasonably foreseeable uses) of the product. *Pfizer, Inc. v. Jones*, 221 Va. 681, 684, 272 S.E.2d 43, 45 (1980) (negligent failure to warn claim; manufacturer must give a reasonable warning, not the best possible one); *see Ellis v. International Playtex, Inc.*, 745 F.2d 292, 306-307 (4th Cir. 1984) (listing elements to be considered in claim for breach of implied

warranty for failing to warn of product hazards, and citing to *Featherall v. Firestone Tire and Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979)).

The *Bly* court manufactured a distinction between the standards for warranty liability and negligence liability by citing its own decisions for the proposition that "warranty liability under Virginia law for personal injuries caused by defective products is the functional equivalent of strict tort under the Restatement formulation." *Bly*, 713 F.2d at 1045 n.6. This Court, however, subsequently held (and has repeatedly held) that the doctrine of strict liability in tort is not a part of the products liability law of Virginia. *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 424 n.4, 374 S.E.2d 55, 57-58 n.4 (1988) ("Virginia law has not adopted § 402A of the Restatement (Second) of Torts and does not permit tort recovery on a strict-liability theory in products-liability cases"); *Harris v. T. I., Inc.*, 243 Va. 63, 413 S.E.2d 605 (1992)(rejecting the "product line" theory of successor liability because it is "based upon the doctrine of strict liability – a doctrine that is not recognized in Virginia").[6] *Bly*, therefore, was never an accurate statement of Virginia law.

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[6] Virginia law does recognize a limited application of strict liability in tort in the case of certain ultrahazardous products and activities. *E.g., Warley Constr. Co. v. Hungerford, Inc.*, 215 Va. 377, 380, 210 S.E.2d 161, 164 (1974) (because blasting is "an intrinsically dangerous and ultrahazardous activity" the law recognizes a strict liability standard for

C. Appellants Misconstrue This Court's Decision in *Harris v. T. I., Inc.*, 243 Va. 63, 413 S.E.2d 605 (1992). That Decision Provides No Support for Recognition of a Post-Sale Duty to Warn Under Virginia Law.

Appellants appear to construe this Court's decision in *Harris v. T. I., Inc.*, 243 Va. 63, 413 S.E.2d 605 (1992), as offering tacit recognition of a cause of action for post-sale duty to warn, arguing that this Court's decision "was factually driven rather than determined by the lack of any recognized cause of action." (Appellants' Brief at 36.)

Harris presented a classic post-sale duty to warn claim based on information acquired after the date of manufacture and sale of the product. *Id.* at 66, 413 S.E.2d at 606-07.[7] This Court, however, declined to reach

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resulting damage); *see American Oil Co. v. Nicholas*, 156 Va. 1, 10, 157 S.E. 754, 757 (1931) (gasoline is a "highly inflammable substance" requiring a high degree of care).

[7] The case involved a trash truck manufactured and sold in 1981. *Harris*, 243 Va. at 66, 413 S.E.2d at 606-07. At the time of manufacture and sale, industry standards "strongly recommended, but did not require, the installation of an audible backup warning device." *Id.* at 66, 413 S.E.2d at 607. In 1984, however, the governing industry standard was amended to make such devices mandatory. *Id.* The plaintiff's decedent, who was blind, had been killed in 1988, when the truck (lacking any audible backup alarm) backed over her. *Id.* at 65-66, 413 S.E.2d at 606. The plaintiff claimed that the successor corporation, which had purchased substantially all of the assets of the manufacturer in 1985, had an independent duty to warn the purchaser who had bought the truck in 1981 "of the dangers in not having the backup warning device installed on the truck, which device had been mandated by industry standards subsequent to the time [the customer] purchased the truck." *Id.* at 71, 413 S.E.2d at 610.

the issue of whether Virginia recognizes a post-sale duty to warn. Instead, it held that, "assuming, without deciding, that in a proper case we would recognize a successor corporation's post-sale duty to warn, no such duty could arise under the facts alleged" because the plaintiff failed to establish that there was a "special relationship" between the customer and the successor corporation. *Id.* at 72, 413 S.E.2d at 610.

This Court has often assumed, without deciding, that it might recognize a cause of action on a different set of facts – but the fact that the Court engages in such an assumption is no indication that it will ultimately recognize the cause of action. For example, in a number of decisions this Court assumed, without deciding, that Virginia would recognize the doctrine of promissory estoppel. *E.g.*, *Stone Printing and Mfg. Co. v. Dogan*, 234 Va. 163, 165, 360 S.E.2d 210 (1987) ("[W]e assume without deciding that the doctrine of promissory estoppel applies in Virginia."). The Court expressly recognized that its assumption was not a holding that the cause of action in fact existed. *W.J. Schafer Associates v. Cordant, Inc.*, 254 Va. 514, 521, 493 S.E.2d 512, 516 (1997) ("Although we have addressed the doctrine of promissory estoppel and even assumed, without deciding, the existence of such a cause of action, we never have held that such a cause of action exists or should be created."). When it ultimately decided the

issue, this Court concluded that promissory estoppel "is not a cognizable cause of action in the Commonwealth, and we decline to create such a cause of action." *Id.*

Thus, the fact that this Court in *Harris* assumed, without deciding, that Virginia would recognize a post-sale duty to warn on the part of a successor corporation is no indication whatsoever that such a cause of action in fact exists, and does not require this Court to recognize such a cause of action.[8]

III. RECOGNIZING A POST-SALE DUTY TO WARN ON THE PART OF PRODUCT MANUFACTURERS AND SELLERS WOULD IMPOSE UNDUE BURDENS ON, AND RESULT IN SIGNIFICANT UNFAIRNESS TO, PRODUCT MANUFACTURERS AND SELLERS.

Recognition of a post-sale duty to warn would open the door to introduction of post-distribution evidence (evidence of data and information that was not known or reasonably ascertainable at the time the product was manufactured and sold), a development that would be fraught with peril.

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[8] Appellants also place substantial reliance on the Western District of Virginia's decision in *Rash v. Stryker Corp.*, 589 F. Supp.2d 733 (W.D. Va. 2008). (Appellants' Brief at 35.) Yet in predicting Virginia would recognize a post-sale duty to warn this decision engaged in little analysis, and cited not a single decision from this Court. Rather, the court erroneously relied on the *dicta* from the Fourth Circuit's *Bly* decision, and cited to the Restatement (Third) of Torts: Products Liability § 10(b). *Id.* at 735-36. But this Court has never adopted, or even cited to, the Restatement (Third) of Torts: Products Liability. In short, the *Rash* decision is not grounded in Virginia law at all.

Product manufacturers and sellers should be encouraged to continue testing and improving their products, and to accumulate and assimilate knowledge about the uses of and experiences with their products in order to improve the safety of those products, whether through improvements in design or through different or additional warnings. This process should not be encumbered by the prospect of these efforts being used against the company later in a lawsuit.

Additionally, product manufacturers and sellers should not be subjected years (or decades) later to liability for older model products lacking the safety features of more recent models. A product can only be "unreasonably dangerous" if it is measured against some objective standard. Virginia has consistently determined that this standard is established at the time of delivery (*i.e.*, when the product leaves the defendant's hands). *Logan v. Montgomery Ward & Co.,* 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975). This is a predictable, sensible rule, as other courts have recognized.[9]

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[9] *E.g., Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991) ("A defect can therefore be identified by measuring the product against a standard articulated expressly by government or industry or established by society in its expectations held about the product at the time of its sale."), *cert. denied*, 502 U.S. 820 (1991); *Chase v. General Motors Corp.*, 856 F.2d 17, 20 (4th Cir. 1988) ("There is no doubt that almost every product which is marketed can be manufactured to be more safe than it is. The

All of the arguments advanced by the appellants in support of their alleged post-sale duty to warn would be equally applicable to a post-sale duty to retrofit. Yet every court that has addressed the issue had held that Virginia would reject imposition of a post-sale duty to retrofit and its potentially ruinous results for product manufacturers and sellers attempting to respond to such an expansive and unlimited duty. *See Buettner v. Super Laundry Mach.*, 857 F. Supp. 471, 478 (E.D. Va. 1994), *aff'd*, 47 F.3d 116 (4th Cir. 1995) (denying claim that installer of old machine was negligent for failure to retrofit with safety features); *Butler v. Navistar Intern. Transp. Corp.*, 809 F. Supp. 1202, 1209-10 (W.D. Va. 1991) (no duty under Virginia law to retrofit tractor with anti-rollover device); *Estate of Kimmel v. Clark Equipment Co.*, 773 F. Supp. 828, 829-30 (W.D. Va. 1991) ("there is no duty to retrofit under Virginia law"); *see also*, *Austin v. Clark Equipment Co.*, 48 F.3d 833, 837 (4th Cir. 1995) (neither designer nor manufacturer has a legal duty to produce a product incorporating the ultimate in safety); *Pontifex v. Sears, Roebuck & Co.*, 226 F.2d 909, 910 (4th Cir. 1955) (commercial seller of old model lawnmower was not negligent in selling "an

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question is: did the manufacturer use reasonable care in designing and manufacturing the product at the time it was marketed, not whether it could possibly have been made better or more safe, or later has been made better or more safe.").

old model machine not equipped with a safety device of later models," even though the seller gave no warning of the hazard); *Besser Co. v. Hansen*, 243 Va. 267, 276, 415 S.E.2d 138, 144 (1992) (there is no duty to provide an accident proof product).

Recognizing a post-sale duty to warn would also result in substantial unfairness to defendants in the trial of products liability cases. The unfairness would be magnified in the case of older products (such as many industrial products, which may be expected to last for decades), as plaintiffs point to years of technological advancement and research, evidence of other accidents occurring after the date of distribution of the product, and other post-distribution evidence to argue that the defendant was obligated – years after delivery of the product – to provide additional or different warnings tailored to the precise accident suffered by the plaintiff. Juries in such cases will be irreparably infected by hindsight bias. Defendants should not be put to the burden of defending an older (perhaps decades older) product using the standards of today's engineering and technology.

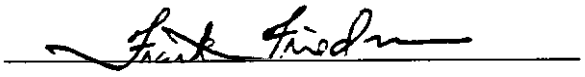
CONCLUSION

This Court should reject the appellants' invitation to expand the products liability law of the Commonwealth by creating a "post-sale" duty to

warn. Virginia's product liability law is well-defined and well-equipped to respond to claims for injury or damage alleged to be caused by unreasonably dangerous products in a manner that is fair to both plaintiffs and defendants. Creation of the expansive duty urged by appellants would only impose undue burdens, and create unpredictability and unfairness, for product manufacturers and sellers. Accordingly, the decision below should be affirmed.

Respectfully submitted,

VIRGINIA ASSOCIATION OF
DEFENSE ATTORNEYS

By: 

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CERTIFICATE

I hereby certify that in compliance with Virginia Supreme Court Rule 5:26(d) fifteen copies of this Brief *Amicus Curiae* of the Virginia Association of Defense Attorneys have been filed in the office of the clerk of this Court and that three copies have been mailed, postage prepaid this 5th day of October, 2010, to the following counsel of record:

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