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.

APPELLANTS' REPLY TO BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS

Robert Taylor Ross (VSB No. 29614)
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)
rross@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

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I. THIS COURT SHOULD FOLLOW THE MODERN TREND AND RECOGNIZE A POST-SALE DUTY TO WARN, A SEPARATE AND DISTINCT DUTY FROM THE CONTINUING POINT-OF-SALE DUTY

The post-sale, negligence-based duty to warn that Royal Indemnity Company and American Empire Surplus Lines Insurance Company, (collectively hereafter, "Royal) advocates does not focus on an unreasonably dangerous product, *i.e.*, one unaccompanied by adequate warnings about its hazardous properties. Rather, Royal's theory involves imposing a duty to disclose and warn about dangerous defects in products of which a manufacturer learns after sale.

The VADA's argument overlooks and fails to understand the critical distinction between a post-sale duty to warn sounding in negligence, on the one hand, and a point-of-sale continuing duty to warn based on a defect in the product, on the other. Because the breach of any post-sale duty examines the manufacturer's conduct, it does not relate to the time of sale. The continuing pre-sale duty is premised on whether a manufacturer knew or should have known of dangers in the product at the time it was sold. See, M. Stuart Madden, The Duty to Warn in Products Liability: Contours and Criticisms, 89 W. Va. L. Rev. 221, 235 (1987). The post-sale duty, however, can exist even when the product "is not defective at the time of sale because no reasonable seller would have known of the risk…" See

Tom Stilwell, Warning: You May Possess Continuing Duties After the Sale of Your Product! (An Evaluation of the Restatement (Third) of Torts: Products Liability's Treatment of Post-Sale Duties, 26 Rev. Litig. 1035, at 1046 (2007) (quoting Restatement (Third) § 10 cmt. b). As such, a post-sale duty to warn is a separate and independent claim, which can also be paired with a breach of a continuing point-of-sale failure to warn claim. See Kenneth Ross, Post-Sale Duty to Warn: A Critical Cause of Action, 26 N. Ky. L. Rev. 573, 578 (1999). This cause of action sounds in negligence because of the focus on the manufacturer's post-sale conduct. See id. at 579. In light of these distinct duties, focusing on different conduct, this Court should find that there is a separate cause of action, sounding in negligence, when a manufacturer fails to warn consumers of newly discovered faults with its products.

The VADA's reliance on Logan v. Montgomery Ward & Co., 216 Va. 425, 219 S.E.2d 685 (1975) and Morgen Industries, Inc. v. Vaughan, 252 Va. 60, 471 S.E.2d 489 (1996), is misplaced. Those cases involved negligence theories based on the continuing point-of-sale duties to warn because the plaintiffs claimed that the products were defective at the time they left the control of the defendants. The VADA's assertion that Logan and Morgen cannot be squared with plaintiffs' argument fails to recognize

and understand the distinction between a continuing point-of-sale duty to warn sounding in product liability or warranty, and a separate post-sale duty to warn sounding in negligence. The Court should instead focus on the post-sale duty sounding in the manufacturer's negligent conduct.

Based on the number of courts requiring manufacturers to issue post-sale warnings of hazards to product users, the American Law Institute incorporated post-sale duty to warn section in the Third Restatement of Torts. The pertinent section states, "One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning." Restatement (Third) of Torts: Products Liability § 10(a). This duty is without regard to whether the product was defective at the time of sale. See Madden & Owen on Product Liability, § 11:2 (3d ed.). Under a negligence theory, "the duty to warn is continuous and is not interrupted by manufacture or sale of the product." See Moyers v. Corometrics Med. Sys., Inc., No. 98-2797, 2000 U.S. App. LEXIS 6177, at *15 n. 6 (4th Cir. April 4, 2000) (citing Bly v. Otis Elevator Co., 713 F.2d 1040, 1045-46 (4th Cir. 1983)). This is the precise negligent breach of a post-sale duty to warn that Royal alleges.

In its attempt to counter Royal's assertion that federal courts in Virginia have predicted that this Court would recognize a manufacturer's post-sale duty to warn, the VADA cites to Ambrose v. Southworth Products Corp., 953 F. Supp. 728, 732 (W.D. Va. 1997), and Estate of Kimmel v. Clark Equip. Co., 773 F. Supp. 828, 831 (W.D. Va. 1991). Royal's brief, however, demonstrates a trend in other jurisdictions, which is recognized by the Western District of Virginia in its most recent decision, Rash v. Stryker Corp., 589 F. Supp.2d 733, 735-36 (W.D. Va. 2008), as well as by other cases in the Fourth Circuit.[1]

The facts here are compelling. Fire sprinklers have a safety purpose, *viz.,* to suppress fire, protect life, and protect against serious property damage. Sprinklers are generally recognized to be highly effective in

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[1] See, e.g., A.J. Buck & Son, Inc. v. Crown Equip. Corp., No. 92-2533, 1994 U.S. App. LEXIS 25527, at *5-6 (4th Cir. Sept. 15, 1994) (allowing plaintiff to plead separate cause of action based on negligent breach of post-sale duty to warn); Island Creek Coal Company v. Lake Shore, Inc., 832 F.2d 274, 280 (4th Cir. 1987) (holding that the "ends of justice" require that "if the defendant discovered that the machine it had sold to the plaintiffs was not safe, it had a duty to notify the plaintiffs and a failure to do so would be actionable negligence.") (citations omitted); McAlpin v. Leeds & Northrup, Co., 912 F. Supp. 207, 210 (W.D. Va. 1996) (finding existence of post-sale duty to warn sounding in negligence). In analyzing Bly and Island Creek, the court in McAlpin concluded that the Fourth Circuit does recognize a manufacturer's duty to warn in Virginia, and nothing indicates that "a manufacturer should be relieved of liability for failure to warn under a theory of negligence if it learns of a potential danger to a buyer only after the product has left the manufacturer's hands." McAlpin, 912 F. Supp. at 210.

suppressing fires. The defects in the sprinklers were latent – they could not be discovered by the user until the sprinklers were exposed to fire. The corrosive products were internal to the sprinkler itself, not evident to the naked eye. The manufacturer concedes that the sprinklers are a one-time performer: they cannot be tested or functioned until the time of a fire. There was no way for the user to learn of such latent defects without the assistance of the manufacturer in providing a warning, so that the defective heads could be replaced by safe ones.

McAlpin recognized the ruling in Bly that a manufacturer did not have a continuing duty to warn post-sale in an implied breach of warranty case when the focus is on the product itself. See id. at 209-10. The McAlpin court concluded, however, that the Bly analysis did not lead to the result that a manufacturer does not have a post-sale duty to warn of defects discovered after the initial sale in a negligence claim, because in that situation the focus is on the manufacturer's conduct and not the product itself: "under a theory of negligence, the focus is on whether the manufacturer's failure to warn was unreasonable." Id. at 209. The Court's concern was that:

> 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.

912 F. Supp. at 211.

McAlpin also found Island Creek persuasive because of its holding that the defendant had a duty to warn plaintiff of a defect discovered after sale, noting that the manufacturer had a post-sale duty to warn of a defect in its product "at any time after it is manufactured and sold." See id. at 210 (citing Smith v. FMC Corp., 754 F.2d 873 (10th Cir. 1985)).

Most recently, Rash v. Stryker Corp. predicted that this Court would allow a cause of action based on a negligent breach of a post-sale duty to warn. 589 F. Supp. 2d 733, 736 (W.D. Va. 2008). The court found that Bly, like McAlpin, "hinged on the distinction between [a negligence theory and a strict liability theory.] Id. (citing McAlpin, 912 F. Supp. at 210). The court also cited to the Restatement, quoted *supra*, and the reasonable person standard it applies to manufacturers regarding a post-sale duty to warn. Id.

The VADA attacks Royal's reliance on Rash and McAlpin by arguing that Bly is not a post-sale duty to warn case. While the factual background in Bly differs from the facts and theories here, nevertheless, the theories and principles of law laid out in Bly were accurate then and are still

accurate today, i.e., there exists a separate, distinguishable post-sale duty to warn premised on a theory of negligence.[2]

Judging post-sale conduct by negligence principles is consistent with existing caselaw. See Ross, *supra.*, at 579. Knowledge, either actual or constructive, is a requisite before imposing any post-sale duty. See id. (citing Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1314 (Kan. 1993)). Once there is knowledge, negligence principles and a reasonable person standard are applied because the court is examining the manufacturer's conduct post-sale. See id. (citing Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994)). Thus, a manufacturer cannot be held strictly liable for post-sale conduct, a point the VADA continually confuses in asserting that there is no substantive difference in the standards governing breach of warranty and negligent failure to warn claims. Those standards are based on pre-sale and point-of-sale conduct, while appellants' arguments are based on post-sale conduct. Adopting a post-sale duty to warn would be consistent with other

[2] The VADA also relies upon Estate of Kimmel v. Clark Equip. Co., a 1991 decision from the Western District of Virginia whose holding is contrary to and in stark contrast to the more recent 2008 decision Rash, which was handed down by the same court. Further, the VADA attacks Bly by arguing that it is not an accurate statement of Virginia law. This position, however, is based on the mischaracterization of plaintiffs' theory and the VADA's difficulty in recognizing the separate duties to warn: one at the point-of-sale and continuing onward and the post-sale duty for later discovered defects.

state courts which have adopted such a duty by applying negligence principles. There are sound reasons and compelling facts which justify the Court's following this approach in this case.

II. THE TREND IS TOWARDS THE RECOGNITION AND CREATION OF A POST-SALE DUTY TO WARN

This Court should adopt a post-sale duty to warn. The Restatement (Third) of Torts: Products Liability recognizes that "a growing body of decision and statutory law imposes such a duty." See Restatement (Third) of Torts: Products Liabilty § 10 cmt. a; see also Madden & Owen on Products Liability, § 11:2 (3d ed.) (recognizing growth and trend); Frank E. Kulbaski III, Statutes of Repose and the Post-Sale Duty to Warn: Time for a New Interpretation, 32 Conn. L. Rev. 1027, 1036 (2000) (doing same and noting the duty "may not arise until long after the product has been marketed."). Jurisdictions that have examined the issue have found that the policies supporting a post-sale duty to warn outweigh any policies against such a duty because of the importance of consumer safety. See id. at 1039.

The leading case containing a clear statement of the post-sale duty warn was the Michigan's Supreme Court's decision in Comstock v. General Motors Corp., 99 N.W.2d 627 (Mich. 1959). There, General Motors ("GM") learned after the sale of its 1953 Buicks that some of the cars were subject

to brake failure. GM instructed its dealers to replace the brake systems on any Buicks brought into the dealers' shops, but failed to warn all purchasers of the cars of the danger. Id. at 632-33. The court stated that similar to the duty to warn at the point of sale, "we believe that a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market. This, GM did not do." Id. at 634. The court emphasized the magnitude of the danger in finding the existence of the duty. Id. See, also, Cover v. Cohen, 461 N.E.2d 864, 871 (N.Y. 1984) (holding that duty arises to risks manufacturers learn of that it did not know about at time of sale).

Since the mid-1960s, the majority of jurisdictions that have considered the issue of a post-sale duty to warn have found a duty when a manufacturer's post-sale knowledge of the product's performance provides it with sufficient knowledge to warn of specific hazards or defects not known at the time of sale. See Stilwell, *supra*, at 1040.[3] Some states'

[3] The Georgia Court of Appeals in 2006 held, "A negligent failure to warn claim may arise from a manufacturer's post-sale knowledge acquired months, years, or even decades after the date of the first sale of the product." Johnson v. Ford Motor Co., 637 S.E.2d 202, 207 (Ga. Ct. App. 2006); see also Esparaza v. Skyreach Equip. Inc., 15 P.3d 188, 198-99 (Wash. Ct. App. 2000) (explaining how duty arises after sufficient notice to manufacturer); Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401,

legislatures have even passed statutes that clearly establish that a manufacturer must provide warnings of dangers discovered after its product leaves its control.[4]

At least 30 states have approved, or indicated an inclination to approve, some form of the post-sale duty to warn, and this Court should not ignore this developing law. See Kenneth Ross, Introduction, in 2004 A.B.A. Sec. Lit. Rep., Post-Sale Duty to Warn 1 (Kenneth Ross ed., 2004).

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407 (N.D. 1994) (discussing duty to provide post-sale warnings for deficiencies a manufacturer learns exists in product); Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1310 (Kan. 1993) (applying post-sale duty sounding in negligence); Smith v. Selco Prod. Inc., 385 S.E.2d 173, 176-77 (N.C. Ct. App. 1989) (doing same); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988) (doing same); Kozlowski v. John E. Smith's Sons Co., 272 N.W.2d 915 (Wis. 1979) (doing same). The bordering state of Maryland adheres to the same view. In Rekab, Inc. v. Frank Hrubetz & Co., the Maryland Court of Appeals wrote, "Even if there is no duty to warn at the time of the sale, facts may thereafter come to the attention of the manufacturer which make it imperative that a warning be given." 272 A.2d 107, 110 (Md. 1971). Maryland even goes so far as to say that the duty continues even after the product has been discontinued from manufacture and sale. See Ragin v. Porter Hayden Co., 754 A.2d 503, 518 (Md. Ct. Spec. App. 2000) (citing Owens-Illinois, Inc. v. Zerbonia, 601 A.2d 633, 646 (Md. 1992)); See also, Lewis v. Ariens, 751 N.E.2d 862, 867 (Mass. 2001) (adopting section ten of Third Restatement).

[4] See, e.g., N.J. Stat. Ann. § 2A:58C-4. Georgia's statute imposes a duty that may not arise until many years later. See, Watkins v. Ford Motor Co., 190 F.3d 1213, 1218 (11th Cir. 1999) (discussing how duty invoked by Code Ann. § 51-1-11(c) many not arise until much time later). The same is true of the bordering state of North Carolina, see N.C. Gen. Stat. § 99B-5(a)(2); and Louisiana, La. R.S. § 9:2800.57(C); see also Lovick v. Wil-Rich, 588 N.W.2d 688, 692 (Iowa 1999) (noting Iowa adoption of doctrine by statute).

III. PUBLIC POLICY DICTATES THAT MANUFACTURERS BE REQUIRED TO PROVIDE POST-SALE WARNINGS

There are a number of policy reasons why requiring a post-sale warning is beneficial to the public. Giving manufacturers a post-sale duty to warn makes it more likely that users will possess important and necessary information. See Kulbaski, *supra.*, at 1037. This dissemination of information will further enable the consumer to determine whether to use the product at all, or to disregard it for another. See id. Manufacturers have a special ability to obtain post-sale information concerning their products that consumers do not have. See id. They are in the best position to convey any newly discovered information. See id. In the interests of public safety, manufacturers and suppliers of products should be incentivized to advise of any defects in their products which are discovered after the sale of the product. Placing a post-sale duty to warn on a manufacturer would create that incentive.

The VADA argues that recognizing a post-sale duty to warn would impose undue burdens and significant unfairness on manufacturers, but this is simply not true. This argument fails to account for basic product liability law which requires a balancing of costs and benefits. Any burden imposed on the manufacturers of defective products is clearly outweighed by the public policy to protect life and property from harm, when a

manufacturer can prevent the harm because of superior knowledge of a product defect, and especially when it is reasonable and feasible to do so. The costs involved in a post-sale duty to warn pale in comparison to the damages that could result if warnings are not given. Manufacturers and suppliers of products with defects which are known to them should not escape liability merely because it might be costly or burdensome to provide a warning. If customers are not warned of newly-learned product hazards, there is a risk of serious, and even lethal, injury, as well as substantial property damage, as in this case involving more than $10 million in damage due to the faulty sprinkler heads.

The Restatement provides four factors to consider in determining whether a post-sale duty to warn exists. See Restatement (Third) § 10(b). It states a duty will exist if: (1) the seller knows or reasonably should know that a product poses a substantial risk of harm to persons or property; (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning. Id.; see also M. Stuart Madden, The Quiet Revolution in Post-Sale Duties, in 2004 A.B.A. Sec. Lit. Rep.,

Post-Sale Duty to Warn 9 (Kenneth Ross ed., 2004) (discussing factors); see Dixon v. Jacobsen Mfg. Co., 637 A.2d 915, 923-24 (N.J. Super. Ct. App. Div. 1994) (having "no hesitation" in placing duty on manufacturer where it clearly knew identity of owner of product); Alexander v. Morning Pride Mfg., 913 F. Supp. 362 (E.D. Pa. 1995) (doing same). "This flexible standard allows a jury to balance the need to protect consumers from dangerous products with the burdens imposed on manufacturers from a post-sale warning requirement." Rash v. Stryker Corp., 589 F. Supp. 2d 733, 737 (W.D. Va. 2008). It also accommodates society's competing desires to provide product users with complete product information while avoiding unfair or unjustifiable burdens on manufacturers. The Third Restatement would clearly impose a duty on the defendants in this case, as every factor in section 10(b) is substantially met.

The VADA's wholesale argument that this duty to warn is burdensome, unfair or too costly, in the absence of a factual analysis, is not a viable approach. The facts in this case compel this Court to impose a post-sale duty to warn on the defendants. The defendants knew of the defects in these sprinkler heads. They designed and supplied them, and performed the installation, maintenance, and inspection of the entire sprinkler system at River Run. SimplexGrinnell is the successor in interest

to Grinnell Fire Protection Systems Company, a division of Grinnell Corporation which actually designed and manufactured the F960 sprinkler heads. The defendants knew River Run's identity, and knew of its use of the defective sprinkler heads.

A negligence based duty to warn will not create a substantial change in products liability law, as the theory does not relate to the product itself but rather to the conduct of the manufacturer in ignoring post-sale knowledge of known dangers. There is no unfairness in asking a manufacturer to warn the users of dangerous known defects in its product.

Given the regular contact between the two parties here, at a minimum it is a factual question as to whether a reasonable person under the circumstances would have warned River Run of the known problems with the sprinkler heads. Tyco and SimplexGrinnell were in perfect positions to advise River Run of these problems; however, they chose not to do so and instead remained silent. With a proper warning, River Run would have replaced its sprinklers to protect against serious harm. Without a warning, River Run could not have done so.

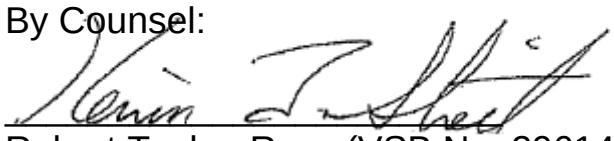
CONCLUSION

The law regarding the duty of care for dangerous and defective products continues to evolve and, increasingly, courts are recognizing that

the post-sale duty of care should be fairly and reasonably interpreted to meet the ends of justice and fulfill the goals of public policy. For these reasons, this Court should adopt a post-sale duty to warn sounding in negligence.

Respectfully submitted, this 26th day of October, 2010.

By Counsel:



Robert Tayloe Ross (VSB No. 29614)
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)
rross@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, Pennsylvania 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 three copies of of Appellants' Reply To Brief *Amicus Curiae* Of The Virginia Association Of Defense Attorneys and one electronic copy on CD were hereby served this 26th day of October, 2010, via UPS Ground Transportation, upon counsel as follows:

Mark D. Loftis
Frank K. Firedman
Woods Rogers PLC
Wachovia Tower, Suite 1400
10 South Jefferson Street
Post Office Box 14125
Roanoke, Virginia 24038-4125

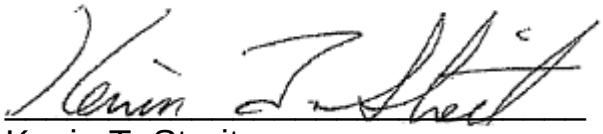
Counsel for Amicus Curiae
The Virginia Association of Defense Attorneys

Dawn E. Boyce
Trichilo, Bancroft, McGavin,
Horvath & Judkins, P.C.
3920 University Drive
Fairfax, Virginia 22030

Counsel for Appellee

J. Michael Roberts
Shook, Hardy & Bacon, LLP
2555 Grand Boulevard
Kansas City, MO 64108

Pro Hac Vice
Counsel for Appellee



Kevin T. Streit