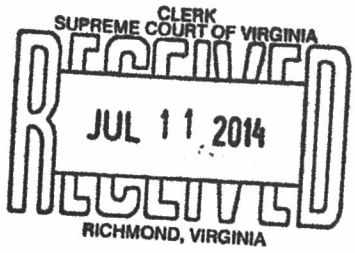
IN THE
SUPREME COURT OF VIRGINIA



No. 14-0216

HYUNDAI MOTOR COMPANY, LTD., and
HYUNDAI MOTOR AMERICA, INC.

Appellants/Defendants,

v.

KEITH ALLEN DUNCAN and VANESSA DUNCAN,
Guardians and Conservators for ZACHARY GAGE DUNCAN,
incapacitated, and KEITH ALLEN DUNCAN and VANESSA DUNCAN,
individually,

Appellees/Plaintiffs.

From the Circuit Court of Pulaski County
No. CL10-503

BRIEF OF THE VIRGINIA CHAMBER OF COMMERCE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Curiae the Virginia Chamber of Commerce is an association of over 16,000 businesses throughout the Commonwealth of Virginia. It advocates the interests of the business community with a principal focus on Virginia employers.

Amicus Curiae the Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing approximately 300,000 members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the U.S., including a substantial number of members headquartered in Virginia, and many other members doing business in Virginia. An important function of the Chamber is representing its members' interests in matters before Congress, the Executive Branch, and federal and state courts, including this Court. *See, e.g.*, http://www.chamberlitigation.com/ford-motor-co-and-honeywell-international-co-v-boomer.

Amici have a substantial interest in ensuring that Virginia's products liability law is fair and reflects sound public policy and that manufacturers and merchants are subject to clear and concrete rules for commercial transactions. In particular, many of *Amici*'s members in Virginia in a wide

range of industries are subject to, and compliant with, stringent federal safety standards. The trial court's interpretation of the implied warranty of merchantability would expose merchants and manufacturers that are fully compliant with federal safety standards to uncertain liability based on nebulous and retroactive standards. *Amici*'s members would be adversely affected if the judgment of the trial court is allowed to stand.

STATEMENT OF THE CASE

Amici adopt and incorporate the Statement of the Case set forth in the Appellants' Opening Brief to the extent relevant to this *amicus* brief.

STATEMENT OF FACTS

Amici adopt and incorporate the Statement of Facts set forth in the Appellants' Opening Brief to the extent relevant to this *amicus* brief.

STATEMENT REGARDING ASSIGNMENTS OF ERROR AND STANDARD OF REVIEW

Amici submit this brief in support of Appellants' Assignments of Error 1, 2 and 5(b). *Amici* adopt and incorporate the Standard of Review set forth in the Appellants' Opening Brief to the extent relevant to this *amicus* brief.

INTRODUCTION

The decision below represents a radical departure from established "merchantability" law in Virginia. If upheld, it not only will discourage innovation in safety technology, but also could convert Virginia into a magnet for a new wave of lawsuits against manufacturers whose products are fully compliant with federal safety standards.

The 2008 Tiburon model vehicle sold by Appellants/Defendants Hyundai Motor Company and Hyundai Motor America ("Defendants") fully complied with the Federal Motor Vehicle Safety Standards (FMVSS). Those standards did not require Defendants to equip the 2008 Tiburon with a side airbag system. The company did so anyway—it went above and beyond the FVMSS requirements—and thus, Defendants argue, made the Tiburon even safer.

The jury in this case nonetheless concluded that the 2008 Tiburon was *not even fit to be sold to consumers*—it was not "merchantable." Plaintiffs/Appellees' ("Plaintiffs") theory, which the jury apparently accepted, was that Defendants did not position the sensor for the voluntarily-added side airbag system in a place that *might have* allowed the airbag to deploy in the single-car crash at issue in this case; and if the side airbag system had deployed, it *might have* prevented the driver's injuries.

Under this theory, to be merchantable, any vehicle sold in 2008 must not only have come equipped with a side airbag, but also one that would deploy in precisely the circumstances presented here. That is not the standard of merchantability for motor vehicles, much less the proper application of the implied warranty of merchantability.

Here, Plaintiffs conflate two distinct inquiries: whether a product could have been made safer (an inquiry more apt for a negligence claim) versus whether a product has met minimum and reasonably-expected safety standards so as to be fit for the stream of commerce (the inquiry of a claim for implied warranty of merchantability). By merging these two inquiries, Plaintiffs have effectively dressed up a negligence claim in the garb of a claim for implied warranty of merchantability—no doubt to bypass procedural and legal hurdles that would have arisen had they asserted a negligence claim. One consequence is that Plaintiffs failed to prove a standard of merchantability in the industry that Defendants breached. The trial court should have struck the Plaintiffs' evidence for this reason alone.

Two additional errors by the trial court contributed to the jury's troubling verdict. First, the jury was allowed to consider speculative and unsupported expert testimony. The linchpin of the Plaintiffs' theory was the testimony of an expert who concluded that, had the sensor been placed in

a different, untested location, the airbag might have deployed. The testimony was pure *ipse dixit*. The expert conducted no independent analysis of the effect of changing the position of the sensor. So he could not say whether this change would have prevented the injuries in question. Nor could he say that the change would have resulted in fewer injuries across the full range of side-impact collisions the Tiburon might experience. He never should have been allowed to testify.

Second, the trial court did not instruct the jury properly on the concept of merchantability. Hyundai offered three instructions that would have helped clarify this difficult concept. The trial court refused to give them. Unsurprisingly, the jury asked during deliberation, "[w]hat is the definition of implied warranty of merchantability?" Tr. 2910:23-24. This presented a chance for the trial court to correct its error in refusing to provide that definition in its instructions. The trial court refused.

If allowed to stand, the decision below will serve as a precedent that will undermine the predictability and stability the Uniform Commercial Code (UCC) was meant to provide. The result will have significant ramifications, not only in the motor vehicle industry, but for merchants of goods throughout Virginia. *Amici* thus submit this brief in support of Defendants and ask the Court to correct the trial court's errors and provide guidance on

a plaintiff's burden to demonstrate the standard of merchantability in the trade, on the necessary foundation for expert opinion, and the importance of full and complete jury instructions.

ARGUMENT

I. The Trial Court Erred in Failing to Require the Plaintiffs to Establish the Standard of Merchantability in the Trade.

(Appellants' Assignment of Error No. 1)

Every contract for the sale of goods by a merchant contains an implied warranty that "the goods shall be merchantable." Va. Code § 8.2-314(1). Specifically, the goods must "pass without objection in the trade under the contract description" and be "fit for the ordinary purposes for which such goods are used." Va. Code § 8.2-314(2)(a), (c). Accordingly, to be "merchantable," a product must be "reasonably safe for its intended use." *Logan v. Montgomery Ward & Co., Inc.*, 219 Va. 425, 428, 219 S.E.2d 685, 687 (1975).

The plaintiff bears the burden of "establish[ing] the standard of merchantability in the trade." *Bayliner Marine Corp. v. Crow*, 257 Va. 121, 128, 509 S.E.2d 499, 503 (1999). That is the standard against which the merchant's product is judged. In determining whether a product complies with the standard of merchantability, it is appropriate to consider, among other evidence, "safety standards promulgated by the government or the

relevant industry . . . ." *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir. 1993) (applying Virginia law). Where "safety standards [for the product at issue] had never been promulgated" and there is no "established norm in the industry," it becomes "a matter of opinion of trained experts what design was safe for its intended use." *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430, 297 S.E.2d 675, 680 (1982). But "a product's compliance with industry custom 'may be conclusive where there is no evidence to show that it was not reasonably safe.'" *Alevromagiros*, 993 F.2d at 421 n.6 (quoting *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975)).

While the implied warranty of merchantability requires that the product be "reasonably safe," "a manufacturer is not required to supply an accident-proof product," *Slone v. General Motors Corp.*, 249 Va. 520, 526, 457 S.E.2d 51, 54 (1995), and "the product need not incorporate the best or most highly-advanced safety devices." *Alevromagiros*, 993 F.2d at 420. And always, the relevant standard of merchantability was that standard in place "when the goods left the defendant's hands." *Logan*, 216 Va. at 428, 219 S.E.2d at 687.

The implied warranty of merchantability thus harmonizes two important objectives—it instills consumers with confidence that products

will perform consistent with a concrete set of standards, while giving merchants freedom to innovate and compete so long as their products comply with the minimum acceptable standards in the trade. The implied warranty of merchantability is distinct from the duty of care that animates tort actions for design defects. Under Virginia law, an action for breach of implied warranty of merchantability is derived from *contract*. If warranty and tort-based product liability claims are to remain meaningfully distinct, then breach-of-warranty plaintiffs must be rigidly held to their burden of demonstrating the concept of the standard of merchantability.

Here, the Plaintiffs did not prove any broadly-applicable standard of merchantability that Hyundai breached. At most, they demonstrated that, had Hyundai installed the impact sensor for its side airbag on the "B-pillar" instead of on the "cross member," the side airbag *might have* deployed in the crash, and the injuries in question *might have* been prevented. The expert testimony supporting these contentions should have been excluded, *see infra* Section II, but regardless, it suggests a standard of merchantability wholly at odds with reality and undisputed record evidence.

The FMVSS in place in 2008 did not require a side airbag system at all, much less one with a sensor placed in the Plaintiffs' expert's preferred location. Plaintiffs did not dispute this point. Nor could they dispute that,

on the whole, the inclusion of the side airbag system improved the safety of the vehicle. When, then, did the 2008 Tiburon become "unreasonably dangerous" and not fit "for the use to which [it] would ordinarily be put"? *Logan*, 216 Va. at 428, 219 S.E.2d at 687. The Plaintiffs failed to provide an answer.

The trial court's refusal to set aside the jury's verdict distorts and undermines the implied warranty of merchantability for at least four reasons: (1) it undermines the predictability and stability the UCC was intended to foster; (2) it fails to give weight to concrete federal standards actually in place; (3) it discourages beneficial innovation; and (4) it obliterates important distinctions between contract and tort law.

A. Public Policy Demands a Uniform Standard of "Merchantability."

Minimum standards for "merchantability" must be objective and uniform throughout an industry. After all, the purpose of a "standard of merchantability in the trade" is to give consumers confidence that products will perform consistent with certain minimum standards, while simultaneously giving merchants fair notice that their products must comply with broadly acceptable concrete norms.

An action for breach of the implied warranty of merchantability thus presents different considerations than other products liability actions.

Contrasting the "breach of implied warranty" and "strict products liability" causes of actions, the New York Court of Appeals explained, "[t]he former class of actions originates in contract law, which directs its attention to the purchaser's disappointed expectations; the latter originates in tort law, which traditionally has concerned itself with social policy and risk allocation by means other than those dictated by the marketplace." *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 (N.Y. 1995).

The Supreme Court of Kansas has provided similar guidance. Interpreting a statute similar to Va. Code § 8.2-314, it explained:

> The statutory language is that "[g]oods to be merchantable must be at least such as." Thus more may be required by the parties' agreement, course of dealing, or usage of trade, but the minimum standards assure a buyer that if the goods received do not conform at least to normal commercial expectations, the buyer will have a cause of action by which he or she can secure compensation for losses suffered. Even though the seller may be careful not to make a single assertion of fact or promise about the goods, the ordinary buyer in a normal commercial transaction has a right to expect that the goods which are purchased will not turn out to be completely worthless. The purchaser cannot be expected to purchase goods offered by a merchant for sale and use and then find the goods are suitable only for the junk pile. On the other hand, a buyer who has purchased goods without obtaining an express warranty as to their quality and condition cannot reasonably expect that those goods will be the finest of all possible goods of that kind. Protection of the buyer under the uniform commercial code lies between these two extremes.

Int'l Petroleum Serv., Inc. v. S & N Well Serv., Inc., 230 Kan. 452, 454, 639 P.2d 29, 32 (1982).

Significantly, the "implied warranty of merchantability" applies only to sales of goods by "merchants." Va. Code § 8.2-314 ("[A] warranty that the goods shall be merchantable is implied in a contract for their sale *if the seller is a merchant* with respect to goods of that kind.") (emphasis added). The purpose of the so-called "merchant rules," as suggested by their drafter, was to provide "simpler, clearer, and better adjusted rules, built to make sense and to protect good faith, make for more foreseeable and more satisfactory results both in court and out." Karl Llewellyn, *Modern Approach to Counselling and Advocacy – Especially in Commercial Transactions*, 46 Colum. L. Rev. 167, 178 (1946). Indeed, the division between rules for merchants and rules for nonmerchants reflected a belief that "[r]ules fashioned specifically for a commercial setting, and insulated from nonmercantile considerations, would thus protect the rules' predictability for businessmen." Ingrid Hillinger, *Article 2 Merchant Rules*, 73 Geo. L. J. 1141, 1148 (1985). These rules, in turn, benefited the consumer because they tell merchants "that, by law, they assume responsibility for the quality of goods they sell." *Id.* at 1173; *see also* Ingrid Hillinger, *The Merchant of Section 2-314*, 34 Hastings L.J. 747, 756 (1983)

(explaining that the implied warranty protects "the buyer's reasonably entertained quality expectations").

Courts nationwide have thus emphasized the importance of predictability. *See, e.g., Putnam Rolling Ladder Co. v. Manufacturers Hanover Trust Co.*, 546 N.E.2d 904, 908 (N.Y. 1989) ("[T]he UCC has the objective of promoting certainty and predictability in commercial transactions."); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 83 (Tex. 1977) ("The [UCC] provisions provide a predictable definition of a manufacturer's potential liability."); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 286 (Alaska 1976) (noting that "manufacturers . . . look to the Uniform Commercial Code provisions to provide a predictable definition of potential liability."); *cf. Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 104, 546 S.E.2d 696, 704 (2001) (recognizing, in the context of Title 8.4 of the Virginia Code, that the UCC "was enacted to promote uniformity, predictability, and finality in certain types of commercial transactions").

Here, by failing to require the Plaintiffs to establish a clear standard of merchantability in the industry, the trial court allowed the Plaintiffs to ask how the product might have been designed better rather than whether the 2008 Tiburon met the minimum, reasonably-expected standards "for the performance of the product when used in the customary, usual and

reasonably foreseeable manners." *Denny*, 662 N.E.2d at 736. And by failing to hold Plaintiffs to the essential burden of proving a concrete and broadly-applicable minimum standard that Hyundai breached, the trial court fundamentally undermined the UCC's goals of certainty and predictability. Consider the implications. If the 2008 Tiburon was unmerchantable because it lacked a side airbag system equipped with a sensor on the "B-pillar," then *every* vehicle manufactured in 2008 or later that lacks a side airbag sensor on the B-pillar is unmerchantable. This creates a category of thousands of vehicles that are not fit for ordinary use, but only in Virginia, and without any way for the manufacturers (or the consumers) to have known this at the time the product left their hands.

Courts have consistently rejected such an absurd result. *See, e.g., Mears v. General Motors Corp.*, 896 F. Supp. 548 (E.D. Va. 1995). In *Mears*, the plaintiff was badly injured when her car was struck by a pickup truck. *Id.* at 549. The pickup truck had been equipped with a "single hydraulic brake system," not a "split hydraulic brake system" that might have "offer[ed] a safety advantage in some circumstances." *Id.* The "split" system had been used in Europe and in some American vehicles, but when the defendant manufactured the pickup truck "no medium duty trucks sold by domestic manufacturers used anything other than the single brake

system." *Id.* at 549-50. The plaintiff argued that the pickup truck was not merchantable because it used the "single brake system" instead of a "safer alternative." *Id.* at 550-51.

The court rejected plaintiff's argument and concluded that the truck was not so "unreasonably dangerous" as to be unmerchantable. The court noted that "sound policy" counseled in favor of using government standards and industry recommendations to establish minimum standard for merchantability. *Id.* at 552. The court then noted that "no federal or state regulation mandated the use of the split braking system," and that the leading industry group neither "required or suggested" the use of the split system on a pickup truck. *Id.* at 552. Moreover, the court explained, if the plaintiff was correct,

> tens of thousands of medium duty trucks that are legally on the roads today with single braking systems are unreasonably dangerous. It means that hundreds of thousands of motor vehicles that are sold annually without unquestioned safety improvements such as air bags or antilock braking systems are unreasonably dangerous.

Id. at 553 (internal ellipses and quotations omitted). Recognizing the problems created by this theory, the court explained: "The requirements set forth by the courts ensure that only when the product in question is measured against concrete standards and expectations, and falls short of these criteria, can it be found to be unreasonably dangerous." *Id.*

Failure to measure a product against "concrete standards and expectations" that existed at the time of manufacture opens manufacturers to unlimited, and unforeseeable, liability for products that were perfectly merchantable at the time of manufacture. It creates the substantial risk that "a member of industry will be held liable for 'failing to do what no one in his position has ever done before.'" *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 336 (4th Cir. 1991) (applying Kentucky law) (quoting W. Prosser, *Handbook of the Law of Torts* § 33 (4th ed. 1971)).

That is exactly what has happened here. *Amici* urge this Court to vacate the judgment in this case and correct the trial court's error in refusing to require the Plaintiffs to prove a uniform standard of merchantability.

B. The Federal Motor Vehicle Safety Standards Provide Appropriate "Concrete Standards" of Merchantability.

The result in this case is all the more troubling because "concrete standards" actually exist. Under federal law, the Secretary of Transportation must "prescribe motor vehicle safety standards" that "consider relevant available motor vehicle safety information" and meet the need for motor vehicle safety. 49 U.S.C. § 30111(a), (b)(1); *see Vehicle Equip. Safety Comm'n v. Nat'l Highway Traffic Safety Admin.*, 611 F.2d 53, 54 (4th Cir. 1979). And the FMVSS are particularly well-suited to serve as

the standard of merchantability because, like the merchantability standard, they must be concrete and objective.

The "objectivity" requirement for the FMVSS "insure[s] that the question of whether there is compliance with the standard can be answered by objective measurements and without recourse to any subjective determination." *Chrysler Corp. v. Dep't of Trans.*, 472 F.2d 659, 675 (6th Cir. 1972). "The importance of objectivity in safety standards cannot be overemphasized" because the standards "put[] the burden upon the manufacturer to assure that his vehicles comply under pain of substantial penalties." *Id.* "In the absence of objectively defined performance requirements and test procedures, a manufacturer has no assurance that his own test results will be duplicated in tests conducted by the Agency." *Id.*

The same is true here. Concrete and objective standards of merchantability are essential. The consequences for merchants and manufacturers of anything less would be severe. They include the prospect of substantial liability, not just in the context of any one particular product, but with respect to the hundreds of thousands of similar products the merchant has sold.

Of course, the standard of "merchantability" can, in some cases, be informed by whether "a significant segment of the buying public would

object to buying the goods" in question. *See Bayliner Marine Corp.*, 257 Va. at 128, 509 S.E.2d at 503 (internal quotations omitted). But that is a high bar—one that cannot be cleared with anecdotal, speculative or subjective evidence. *See id.* Any lesser standard would subvert the goal of concrete and predictable standards of merchantability.

But these considerations never entered the equation in this case, because the Plaintiffs presented no evidence regarding the expectations of "a significant segment of the buying public." The only evidence regarding the standard of merchantability was the uniform FMVSS. And those regulations have never required the installation of side-impact airbags, much less side impact airbags positioned on the "B-pillar." *See Durham v. County of Maui*, 696 F. Supp. 2d 1150, 1154 (D. Haw. 2010) ("For no types of vehicles, however, does FMVSS 208 provide either a requirement or an explicit option that manufacturers install side-impact airbags.").

C. The Trial Court's Ruling Discourages Beneficial Innovation.

The result in the trial court is problematic for yet another reason—it discourages the types of innovations that have made cars and trucks safer.

The Plaintiffs avoided suggesting that a car without a side airbag is unmerchantable. How could they? Tens of thousands of cars sold in 2008 lacked side airbags. Instead, they effectively took the position that, if a

manufacturer is to include a side airbag, it is only merchantable if the sensor is placed on the "B-pillar" rather than on the "cross-member." Thus, by including the side airbag system in the 2008 Tiburon—by making the vehicle safer in the vast majority of side-impact collisions—Hyundai actually made the Tiburon unmerchantable.

This is a deeply troubling result. Under the Plaintiffs' theory, a manufacturer would have a strong disincentive against innovating with safety equipment that exceeds established standards. A less safe vehicle—one without any airbags—might well be more merchantable than a safer vehicle. And the Plaintiffs' expert made clear that the Tiburon with the side airbag was safer than a vehicle without a side airbag. *See* Tr. 1065:24-1066:1 (describing the airbag as "a good design" and "well executed"). Critically, the Plaintiffs' argument was not that the optional side airbag *caused* the driver's injury—it is certainly possible that an innovation might have made the vehicle less safe—but rather, they claimed that the side airbag's failure to *prevent* the injury rendered the 2008 Tiburon unmerchantable. Under the Plaintiffs' theory, Hyundai's decision to *exceed* the minimum safety standards set forth by the FMVSS was a mistake. Such a result is contrary to sound public policy.

D. A Clear Standard for Merchantability Is Essential to Prevent Plaintiffs from Evading Limits on Tort Recovery.

Finally, the result below, if allowed to stand, would obliterate the distinction between tort-based product liability claims and contract-based product liability claims.

At the outset, the Court should note that the Plaintiffs here appear to have made a tactical choice about which product liability theories to pursue. They abandoned any tort-based theory perhaps because there was strong evidence that the driver's negligence played a role in causing the accident. Any tort-based theory therefore would have triggered a contributory negligence defense. *See Jones v. Ford Motor Co.*, 263 Va. 237, 261, 559 S.E.2d 592, 605 (2002) (recognizing that "contributory negligence is a defense to a negligence claim in a product liability action"). The Plaintiffs avoided that defense by couching their claim in contract. *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 463, 143 S.E.2d 897, 902 (1965) ("[W]e hold that the contributory negligence of the plaintiff will not be material on the issue of the defendants' breach of implied warranty of fitness."). The Plaintiffs were well within their rights to make that election. But the trial court should have held them to the distinct burden a breach-of-warranty plaintiff faces. It did not, and instead allowed Plaintiffs to merely disguise a negligent-design theory as a breach of implied warranty.

The theory that the Plaintiffs and their expert attempted to advance was improper in a breach of implied warranty of merchantability case. Contract-based breach of warranty cases focus on "product value" and "frustrated expectations." Thus, "in [implied warranty cases], the focus is on the product and its attributes" rather than "the defendant's conduct." *Abbot by Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1115-16 (4th Cir. 1988). Actions for breaches of implied warranties thus are intended to ensure that customers receive sufficient "product value." *See East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 872 (1986) ("The maintenance of product value and quality is precisely the purpose of express and implied warranties."). When goods are found to be unmerchantable, a consumer may revoke his acceptance of the goods and bring an action for breach of contract. *See id.*; *see also* Va. Code § 8.2-608 (recognizing the right of a buyer to "revoke his acceptance" when the non-conformity of the goods "substantially impairs its value to him").

Viewed in this context, the problems with the jury's conclusions are obvious. If the decision of the trial court is affirmed, and the 2008 Tiburon is determined unmerchantable, then no doubt the plaintiffs' bar will seek to extend it to other 2008 cars that lack side airbags configured just so.

If allowed to stand, the trial court's misinterpretation of the law of the implied warranty of merchantability could have severe repercussions for the conduct of business in Virginia. *Amici* urge this Court to reverse the judgment of the trial court.

II. The Trial Court Erred in Admitting Expert Testimony Lacking Proper Foundation. (Appellants' Assignment of Error No. 2)

Expert testimony is often appropriate, even necessary, in an action for breach of the implied warranty of merchantability. "Absent an established norm in the industry, it [is] a matter of opinion of trained experts what design was safe for its intended use." *Bartholomew*, 224 Va. at 430, 297 S.E.2d at 680. Even where the governing standard is established, expert testimony may well be probative of the merchantability of a defendant's product or the cause of a plaintiff's injury.

Nonetheless, "the admission of expert testimony is subject to certain basic requirements, including the requirement that the evidence be based on an adequate foundation." *John v. Im*, 263 Va. 315, 319-20, 559 S.E.2d 694, 696 (2002). Even where an individual might properly be qualified as an expert, based on training or experience, "[e]xpert testimony is inadmissible if it is speculative or founded on assumptions that have an insufficient factual basis." *Id.* at 320, 599 S.E.2d at 696. Expert testimony is also inadmissible "when an expert has failed to consider all variables

bearing on the inferences to be drawn from the facts observed." *Id.* This Court reviews the decision to admit expert testimony under an abuse of discretion standard, *id.*, but, where the challenged expert testimony "is founded upon assumptions lacking a sufficient factual basis, relies upon dissimilar tests, and contains too many disregarded variables," it is "unreliable as a matter of law." *Tittsworth v. Robinson*, 252 Va. 151, 155, 475 S.E.2d 261, 263-64 (1996).

The Plaintiffs' liability expert, Geoffrey Mahon, provided expert testimony that was so speculative as to be "unreliable as a matter of law." The trial court's decision to admit the testimony was particularly egregious because Mahon himself explained that a proper expert analysis of the optimal location of the side airbag sensor would require crash testing. Mahon did not conduct crash testing, nor did he conduct any other tests, analyses, calculations, or demonstrations. While he relied on tests performed by Hyundai and others, he reviewed no reports in which the airbag sensor had been located where he recommended. In fact, Mahon simply speculated that a different location of the airbag sensor *might* have triggered the airbag in a similar crash. Indeed, not only was Mahon's opinion speculation derived from conjecture, bereft of factual support, it

was utterly uninformative to the issue in the case: whether the location of the sensor in the 2008 Tiburon rendered the vehicle unmerchantable.

The expert testimony found admissible in *Bartholomew* provides a useful contrast. In *Bartholomew,* the expert "studied instruction manuals and data . . . consulted with other experts; experimented with the transmission systems in plaintiff's Lincoln, a Cadillac, and his own Ford automobile; observed mechanics as they disassembled transmission components; and disassembled one transmission with his own hands." 224 Va. at 430, 297 S.E.2d at 679. The expert explained that "his opinion was based on the experiments he conducted and upon an analysis of the interrelationship of all the components of the transmission linkage system . . . ." *Id.*

This case is more akin to the situation in *Brown v. Corbin*, 244 Va. 528, 423 S.E.2d 176 (1992), where the trial court abused its discretion in allowing speculative expert testimony to be presented to a jury. In *Brown*, the expert testified about the "friction factors for the road and shoulder surfaces." *Id.* at 532, 423 S.E.2d at 179. However, "[t]he record [did] not show that he arrived at the figures through any scientifically accurate tests or formulas, but instead it shows only that [the expert] estimated the friction on the surfaces on 'an August day.' His opinion, therefore, was nothing

more than speculation, and the trial court abused its discretion when it allowed [the expert] to present that speculation to the jury as a scientifically accurate opinion." *Id.*

As this Court has recognized, "[t]he sole purpose of permitting expert testimony is to assist the trier of fact to understand the evidence presented or to determine a fact in issue." *Velazquez v. Commonwealth*, 263 Va. 95, 103, 557 S.E.2d 213, 218 (2002). Proper screening of expert testimony by the trial judge is essential because "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound*, 138 F.R.D. 631, 632 (1991). The designation of "expert" provides the witness with a cloak of authority that poses a substantial risk of misleading the jury when the expert's opinion lacks a basis in fact and, as a result, the trial court is required to act as a gatekeeper and permit only reliable expert evidence from getting to the jury.

There is a particular danger is cases such as this where the subject of the expert testimony is utterly foreign to the jury. Trial courts thus have a special burden to assess the bases of the opinion when "scientific evidence" is at issue. *See Spencer v. Commonwealth*, 240 Va. 78, 97, 393 S.E.2d 609, 621 (1990) ("When scientific evidence is offered, the court

must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system.").

The failure to strike Mahon's testimony in this case is a clear example of a trial court failing to exercise its gatekeeping role. This Court should correct this misapplication of Virginia law and reinforce established law governing the admissibility of expert testimony.

III. The Trial Court Erred in Instructing the Jury. (Appellants' Assignment of Error No. 5(b))

The trial court magnified the errors discussed above by failing to properly instruct the jury on the law of merchantability in Virginia.

Defendants asked for, and the trial court refused to give, a series of instructions that attempted to clarify the proper elements, under Virginia law, for a breach of implied warranty as informed by the decisional authority discussed *supra* Section I. *See* Tr. 2897:10-19. Instead, the instructions the trial court gave the jury omitted any reference to the first step in any implied warranty of merchantability analysis—the establishment of the standard of merchantability in the industry. The trial court simply informed the jury that a product was not merchantable if it was "unreasonably dangerous" for ordinary use, Tr. 2734:22-24, and that it was unreasonably

dangerous if it had "a design defect that renders it unreasonably dangerous." Tr. 2735:23-25. Missing from these instructions is an instruction on the definition of merchantability and how the jury should determine whether a product was unmerchantable.

The effect of this error is obvious. After retiring to deliberate, the jury promptly asked: "What is the definition of implied warranty of merchantability?" Tr. 2910:23-24. The trial judge informed the jury that "the definition was within the charge and they were to consider the charge." Tr. 2914:22-23. Of course, there was no satisfactory definition contained in the charge, because the trial court had excluded the proposed definitions that provided guidance. The law in this area is complicated. Without proper instruction, the jury never had a chance to answer the right question.

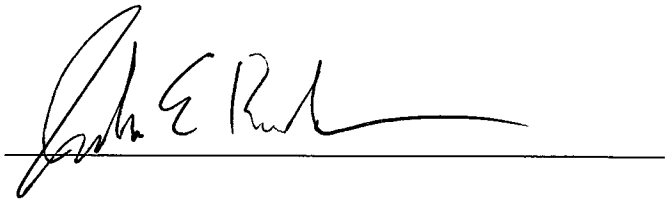
While *Amici* urge this Court to reverse the judgment of the trial court and enter judgment for Defendants, at minimum, this Court should remand the case for a new trial so that a properly instructed jury can weigh the admissible evidence.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that he judgment of the trial court be reversed.

Dated: July 11, 2014

Respectfully submitted,



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CERTIFICATE

The undersigned hereby certifies that the foregoing Brief of *Amici Curiae* in support of Appellants complies with Rules 5:26 and 5:30 of this Court and that the foregoing brief was filed with the written consent of all parties, attached as Exhibit 1 to this brief. The undersigned further certifies that on July 11, 2014 fifteen (15) copies of this brief were filed with the Court and that three (3) copies of the brief were served upon each counsel by first-class mail addressed to:

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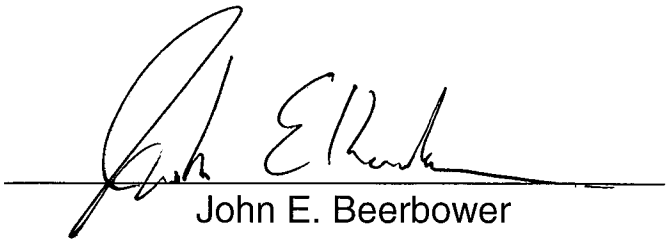

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EXHIBIT 1

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA

HYUNDAI MOTOR COMPANY, LTD.
and
HYUNDAI MOTOR AMERICA, INC.

Appellants,

v. RECORD NO. 140216

KEITH ALLEN DUNCAN and
VANESSA DUNCAN, Guardians
and Conservators for ZACHARY
GAGE DUNCAN, incapacitated,
KEITH ALLEN DUNCAN and
VANESSA DUNCAN, Individually

Appellees.

JOINT CONSENT

The parties, by counsel, hereby consent to the filing of briefs amicus curiae herein by any person, group, or entity desiring to file such a brief.

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