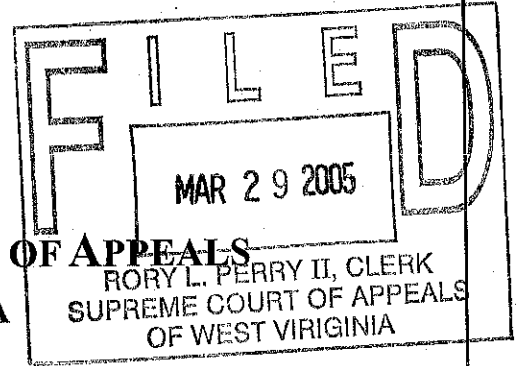


Docket No. 31947



**BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**Kenneth G. Bennett, Rosilyn K. Bennett,
Rebecca A. Bennett and Bob Bennett Homes, Inc.,**

Plaintiffs/Appellants,

vs.

**ADEMCO Group, a Division of Pittway Corporation;
Pittway Corporation; System Sensor; and Honeywell Inc., et. al.**

Defendants/Appellees.

**BRIEF OF APPELLEES ADEMCO GROUP, PITTPWAY CORPORATION,
SYSTEM SENSOR, AND HONEYWELL INC.**

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TO THE HONORABLE JOSEPH P. ALBRIGHT, CHIEF JUSTICE, AND THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Now comes the Appellees, **ADEMCO GROUP, PITTPWAY CORPORATION, SYSTEM SENSOR, AND HONEYWELL INC.**¹, by counsel, **Richard A. Hayhurst** and **George W. Flynn**, and as and for their brief in this matter represent and show unto this Honorable Court as follows, to-wit:

I. STATEMENT OF THE CASE.

This products liability action arises from a March 25, 1998, fire at Appellants Kenneth, Rosilyn, and Rebecca Bennett's residence. Appellants allege that a Toyota Camry started the fire. They further claim that the alarm system in the home, installed by ASCO Services, Inc., malfunctioned and contributed to their damages. The alarm system allegedly contained component products manufactured by ADEMCO: a siren and strobe light, a speaker box, smoke detectors, and control panels.

Appellants claim that the alarm system failed to provide audible warnings and failed to timely detect the fire. The undisputed evidence, however, establishes that the alarm system worked properly before, and at the time of, the fire. (Kenneth Bennett ("K.B.") Dep. at 27, 71-75; Rosilyn Bennett ("R.B.") Dep. at 84; Rebecca Bennett ("Becky") Dep. at 52). Indeed, the undisputed evidence establishes that the alarm system detected the fire, notified ASCO's monitoring service, and ASCO responded to the alarm signal by calling Appellants promptly and then alerting emergency services. (R.B. Dep. at 11; K.B. Dep. at 102, 187). Even Appellants' own experts cannot identify any defect in the alarm equipment and cannot rule out that any alleged malfunction was due to an installation or serving error by ASCO. (Sandy Report; Sandy Dep. at 295-96; Zwirn Report; Zwirn Dep., at 70, 81, 98, 101-03, 110-11, 114-

¹ ADEMCO Group, System Sensor, Pittway Corporation, and Honeywell Inc. are hereinafter collectively referred to as "ADEMCO."

17, 156). Furthermore, the evidence establishes that a battery-operated smoke detector in the home sounded, immediately alerting Appellants to the fire. (R.B. Dep. at 10, 77). Finally, the alarm system components were destroyed at Appellants' request after the fire, making it impossible for Appellants to prove their case and prejudicing ADEMCO. (K.B. Dep. at 122, 286-89).

In August 2001, ADEMCO moved for summary judgment. Appellants opposed the motion under Rule 56(f) as premature and the court delayed ruling on the motion pending further discovery. After two additional years of discovery, ADEMCO renewed its motion for summary judgment. On October 2, 2003, the Circuit Court granted ADEMCO's motion for summary judgment, finding "the undisputed evidence establishes that the alarm system was not defective when it left the control of the manufacturer; and Plaintiffs cannot identify a manufacturing defect in the ADEMCO products, nor can they eliminate reasonable secondary reasons for the alarm malfunction." (Transcript of October 2, 2003, Summary Judgment Proceedings at 193). Appellants appeal from this ruling.

II. RESPONSE TO ALLEGED ERROR.

Alleged Error: Appellants allege that the Circuit Court erred when it granted summary judgment to ADEMCO on Appellants' products liability claims.

Response: The Circuit Court properly dismissed Appellants' products liability claims against ADEMCO because (1) the undisputed evidence establishes that the ADEMCO products were not defective when they left ADEMCO's control; (2) Appellants cannot identify a defect in the ADEMCO products, nor can they eliminate improper installation or improper maintenance as causes for the alleged malfunction; (3) any alleged defect in the ADEMCO products did not cause Appellants' damages; and (4) Appellants destroyed the ADEMCO products before they were investigated and should be barred from offering evidence that they

were defective. No rational trier of fact could find otherwise. Therefore, this Court should affirm the Circuit Court's order granting summary judgment for ADEMCO.

III. STATEMENT OF FACTS.

A. The Alarm System.

ASCO installed a burglar and fire alarm system in Appellants' home in 1995. (K.B. Dep. at 9-12, 20). The fire alarm system consisted of heat detectors manufactured by Chemetronics of Carbide, Inc. and Kidde-Fenwal, Inc. and the following ADEMCO products: a siren and strobe light, a speaker box, smoke detectors, and control panels. The heat and smoke detectors were located in each bedroom, the offices, the breakfast nook, the laundry room, the living room (referred to by Appellants as the "Great Room"), the upstairs hallway and the garage. (K.B. Dep. at 47- 56, Dep. Ex. 1, Dep. Ex. 2). One siren was located outside of Rebecca's bedroom window. (Becky Dep. at 52). Appellants claim it had a blue strobe light. (K.B. Dep. at 12). When activated, the alarm had a loud siren noise and a voice warning that stated "Fire. Fire. Evacuate the premises immediately." (R.B. Dep. at 82-83, K.B. Dep. at 28-29, 67-68, 71; Becky Dep. at 52). In addition to the ASCO alarm, Mr. Bennett also installed eight to ten battery-operated smoke alarms. (K.B. Dep. at 18). Appellants do not know the manufacturer of the battery-operated alarms. (K.B. Dep. at 39-40).

The ASCO alarm system was triggered on approximately four to six occasions before October 1997. (K.B. Dep. at 27, 71-75; R.B. Dep. at 84; Becky Dep. at 52). On each of these occasions, the alarm system responded properly—a signal was sent to ASCO's monitoring facility and the siren and strobe light activated. (K.B. Dep. at 28-29, 67; R.B. Dep. at 84; Becky Dep. at 51-55, 58, 67). Once, the alarm was triggered by a leaf blower in the garage, and another time the alarm triggered when a pot boiled over in the kitchen. (K.B. Dep. at 25; Becky

Dep. at 53). Appellants do not remember the circumstances of the other alarms. (K.B. Dep. at 27-30; Becky Dep. at 51-54).

The alarm triggered around Halloween of 1997 while Appellants were away from home. (K.B. Dep. at 71; Becky Dep. at 53). The ADEMCO control signaled the monitoring company and they dispatched a fire truck to the scene. (K.B. Dep. at 71; Becky Dep. at 53; ASCO Alarm History Report at 1). They found no fire. Appellants called ASCO to service the alarm. (K.B. Dep. at 75-76). An ASCO repairperson came to the home and determined that the cause of the false alarm was a spider or cobweb. (K.B. Dep. at 76-77; Becky Dep. at 64). After this ASCO repair, the alarm strobe light and siren never went off again. (Becky Dep. at 65, 91). Rebecca Bennett believes that when "the gentleman came to repair the system, he may have disarmed it." (Becky Dep. at 119-20).

B. The Fire.

The evening before the fire, Mrs. Bennett and Rebecca Bennett returned home from running errands in the 1995 Toyota Camry at 9:45 p.m. (R.B. Dep. at 8). Mrs. Bennett was the last to go to sleep that night at 1 a.m. (R.B. Dep. at 9).

Appellants appeal brief is misleading in that it states Mrs. Bennett awoke shortly after 1 a.m. and discovered the fire, then later that ASCO called at 1:18 a.m. (Appellants' Appeal Brief at 4-5). The actual testimony was that Mrs. Bennett woke up at approximately 1:18 a.m. (R.B. Dep. at 75) and ASCO called at 1:18 a.m. (K.B. Dep. at 83-84). Specifically, the testimony was as follows:

Mrs. Bennett woke up at approximately 1:18 a.m. to the sound of the furnace turning on. (R.B. Dep. at 75). She smelled smoke and then a battery-operated wall-unit smoke alarm sounded in her bedroom. (R.B. Dep. at 10, 77). She immediately woke up Rebecca. (R.B. Dep. at 11). She then looked in the garage and saw the Toyota Camry on fire. (R.B. Dep. at

11). She then woke up her husband. (R.B. Dep. at 11). Mrs. Bennett estimates that less than one minute elapsed from the time she woke up to the time she woke up Mr. Bennett. (R.B. Dep. at 46, 104). According to Appellants the ADEMCO siren and strobe light never activated. (Becky Dep. at 57, 92, 67; K.B. Dep. at 97; R.B. Dep. at 91).

Ten seconds after Mr. Bennett got out of bed the ASCO alarm servicing company called the Bennetts in response to a signal from the ADEMCO control. (R.B. Dep. at 11; K.B. Dep. at 102, 187). Mr. Bennett testified the call came at 1:18 a.m. (K.B. Dep. at 83-84). Mr. Bennett informed the caller that the fire department was needed. (K.B. Dep. at 93, 187-88; R.B. Dep. at 11). Mr. Bennett then quickly looked at the fire in the garage and Mrs. Bennett went upstairs for her purse, shoes, and jacket. (R.B. Dep. at 26, 79; K.B. Dep. at 96).

The fire department records show they arrived at 1:26 a.m., but both Mr. Bennett and Rebecca Bennett testified the fire department arrived much later, at 1:43 a.m., about twenty-five minutes after they were called. ((Fire Incident Investigation Report; K.B. Dep. at 107; Becky Dep. at 62). The fire destroyed most of the home. (K.B. Dep. at 111). Post-fire investigation concluded that the fire started in the garage. (Fire Incident Investigation Report).

C. Destruction of the Alarm System.

At Mr. Bennett's request, the remains of the home, including the alarm system, were destroyed approximately one month after the fire. (K.B. Dep. at 122, 286-89). Mr. Bennett claims that he thought the insurance company had removed the alarm equipment. (K.B. Dep. at 280). Appellants, however, did not ask the insurance company to keep the equipment. (K.B. Dep. at 125). In fact, the insurance company was not informed that the Bennetts believed the alarm did not work until a week or two after the fire. (K.B. Dep. at 125). Mr. Bennett states that the insurance company said they would keep the involved equipment, but that he was not sure if they meant the alarm equipment. (K.B. Dep. at 125).

IV. ARGUMENT.

A. Standard of Review.

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995).

B. There is No Proof of a Defect in the Alarm System When it Left the Manufacturer.

Appellant’s claims against ADEMCO were properly dismissed because there is no evidence that the ADEMCO products were defective when they left ADEMCO’s control. Under West Virginia products liability law, Appellants must show that any defect existed when the alarm system left ADEMCO’s control. Syl. Pt. 4, Morningstar v. Black & Decker Manufacturing Co., 162 W. Va. 857, 883, 253 S.E.2d 666, 680 (1979) (adopting strict liability in products liability cases and stating that “[o]nce it can be shown that the product was defective when it left the manufacturer and that the defect proximately caused the plaintiff’s injury, a recovery is warranted absent some conduct on the part of the plaintiff that may bar his recovery.”). A prima facie case in strict liability can be shown by circumstantial evidence “so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect.” Syl. Pt. 3, Anderson v. Chrysler Corporation, 184 W. Va. 641, 646, 403 S.E.2d 189, 194 (1991). When relying on circumstantial evidence, however, the plaintiff must also show that there is no “reasonable secondary cause for the malfunction.” Id.

The evidence is undisputed that the alarm system was working through October of 1997, and, thus, had no defect. Appellants admit that the alarm system, including the siren, strobe

light and smoke detectors, had been tripped up to six times. (Appellants' Appeal Brief at 3-4; Becky Dep. at 52). That meant the wiring, the sensory equipment, the reporting equipment, and the alarming equipment all worked—the alarm sounded on the premises and the signal was sent to the monitoring facility.

Appellants' assertion of a defect in manufacture or design with the ADEMCO equipment rests on the unsupported speculation of their alarm expert, Jeffrey Zwirn. His opinion is that the reported failure of the alarm system to sound an alarm in the home during the fire was caused by an installation or servicing error (by defendant ASCO) or a defect in manufacture or design. (Zwirn report; Zwirn Dep., at 70, 81, 98, 101-03, 110-11, 114-17, 156). In other words, the alleged failure of the alarm to sound could be caused by anything. Mr. Zwirn concedes he did not examine the alarm equipment at Appellants' home because it was destroyed after the fire. (Zwirn Dep. at 94-96). He further concedes that all of the ADEMCO equipment complies with the design and manufacturing standards applicable in the alarm industry. (Id.).

In their Appeal Brief, with no citation to the record, Appellants assert for the first time that Zwirn's opinion is that there was a defect in the circuitry of the ADEMCO control panel. (Appellants' Appeal Brief at 20-21). This directly contradicts Zwirn's deposition testimony:

Q. (ADEMCO attorney) ... you don't know, circuitry-wise, if there was some defect in the circuitry, do you?

A. (Mr. Zwirn) Not with regard to the actual circuitry.
(Zwirn Dep. at 201-102).

Indeed, Zwirn's testimony was clear that his opinion is based not on an identification of a specific defect, but rather on his knowledge of what the Appellants heard that night and his professional experience. (Zwirn Dep. at 89-124). He cannot identify a specific manufacturing

or design defect, nor can he identify the mechanism of failure caused by the unknown defect. (Zwirn report; Zwirn Dep., at 70, 81, 98, 101-03, 110-11, 114-17, 156). Most importantly, he cannot, based upon the destruction of the evidence, discern if the alleged failure of the alarm system was caused by ASCO in its installation or service work, or ADEMCO in its manufacture or design. (Zwirn report; Zwirn Dep., at 70, 81, 98, 101-03, 110-11, 114-17, 156).

On appeal, Appellants also cite to their cause and origin expert Jack Sandy's opinion regarding the alarm system. (Appellants Appeal Brief at 19). Mr. Sandy admits he is not an expert in burglar and fire alarm systems. (Sandy Dep. at 271). Even putting aside Mr. Sandy's lack of qualifications to testify as an alarm expert, however, Sandy's opinions regarding the alarm suffer from the same defects as Zwirn's. Just like Zwirn, Sandy cannot identify a defect in the alarm equipment and cannot rule out that the acts of ASCO caused the alleged failure. (Sandy Dep. at 295-296, 300-302). In short, whatever hypothetical problem existed with the alarm system cannot be identified by Appellants' own experts—leaving no basis for a products liability claim against ADEMCO.

Appellants cannot establish a defect in the ADEMCO products directly because the alarm system has been destroyed. Indeed, the destruction of the evidence is the capstone of Appellants' entire case against their insurance company and permeates the opinions of their experts. According to Zwirn and Sandy, the destruction of evidence precludes their ability to determine the cause of the alarm failure. (Zwirn Dep. at 98-99; Sandy Dep. at 301-302). If he had an opportunity to test the alarm equipment, Zwirn claims he could determine the cause of the failure. (Zwirn Dep. at 98-99). The destruction of the alarm equipment, however, precludes this.

Appellants attempt to save their case by relying on Adkins v. K-Mart Corp., 204 W. Va. 215, 511 S.E.2d 840 (1998) for the proposition that they can prove the ADEMCO components

were defective through circumstantial evidence. In Adkins, the plaintiffs brought suit against the manufacturer and the retailer of a gas grill that exploded while plaintiffs were using it. Id. at 218, 511 S.E.2d at 843. The grill was inspected by plaintiffs' insurer's expert, who reported on numerous possible defects and causes for the grill's explosion, but it was subsequently discarded before the defendants had an opportunity to inspect it. Id. The defendants brought motions for summary judgment arguing that plaintiffs could not prove a product defect based on the evidence spoliation. Id. at 219, 511 S.E.2d at 844. The circuit court granted the motions. Id. The Supreme Court of Appeals, *per curiam*, reversed finding that plaintiffs had circumstantial evidence to support their case, including evidence that the grill exploded, that plaintiffs did not alter or modify the grill, and an expert had opined that the grill was defective. Id. at 222, 511 S.E.2d at 847. It levied no sanctions for the spoliation because it was plaintiffs' insurer who destroyed the evidence, not plaintiffs. Id. at 222-23, 511 S.E.2d at 847-48.

Appellants' reliance on Adkins is misplaced. Here, Appellants cannot rely on circumstantial evidence of a product defect because they cannot rule out reasonable secondary causes of the alleged malfunction. Syl. Pt. 3, Anderson v. Chrysler Corporation, 184 W. Va. 641, 646, 403 S.E.2d 189, 194 (1991) (elimination of reasonable secondary causes of malfunction is necessary when relying solely on circumstantial evidence in a products liability claim). ASCO repaired the alarm in late October or early November 1997, after Appellants complained about a false alarm. (K.B. Dep. at 76). After this repair, the alarm did not sound again. (Appellants' Appeal Brief at 4; Becky Dep. at 91). ASCO's repairs to the alarm system could reasonably be the cause of the alleged alarm malfunction. Indeed, Zwirn makes ASCO's acts in installation or servicing an equally possible cause of the alleged alarm failure as the undefined defect in manufacture or design by ADEMCO. (Zwirn report; Zwirn Dep., at 70, 81, 98, 101-03, 110-11, 114-17, 156).

Further, unlike in Adkins where an expert examined and found possible defects and causes for the grill explosion before it was discarded, here no one inspected the alarm system after the incident. And, unlike in Adkins where there was eye-witness testimony that the grill exploded, here, except for Appellants' claim that the siren did not sound, all the available evidence indicates that the ADEMCO products properly detected the fire and notified ASCO. Moreover, as discussed further below, Appellants are responsible for the spoliation of the alarm system. They had a crew tear down the home and dispose of the wreckage, including the alarm system, about a month after the fire, even though they should have anticipated it would be needed for litigation. (K.B. Dep. at 122, 286-289). For that reason, Appellants should be barred from offering any evidence that the alarm system was defective. See Syl. Pt. 2, Tracy v. Cottrell, 206 W. Va. 363, 370, 524 S.E.2d 879, 887 (1999).

C. Appellants Cannot Prove that Any Alleged Defect Caused Their Damages.

Further, Appellants' claims were properly dismissed because the alleged defects in the alarm system did not proximately cause their damages. Under West Virginia products liability law, Appellants must show that the defect in the alarm system was a proximate cause of their damages. Brady v. Deals on Wheels, Inc., 208 W. Va. 636, 641, 542 S.E.2d 457, 462 (2000) (*per curiam*); Syl. Pt. 7, Morningstar, 162 W. Va. at 883, 253 S.E.2d at 680. "A proximate cause of an injury is the last negligent act contributing thereto, without which such injury would not have resulted." Brady, 208 W. Va. at 642, 542 S.E.2d at 463.

Appellants' claim that their damages were greater because the alarm system failed to sound is both unsupported by the facts and speculative. It is undisputed that Appellants were alerted to the fire by a telephone call from ASCO and the battery-operated smoke detector. Appellants cannot prove that the ASCO alarm would have gone off any sooner than the telephone call or the battery-operated smoke alarm that sounded. Further, the fact remains that

Appellants claim it took the volunteer fire department twenty-five minutes to reach the home. It is pure speculation to assume that the damages would have been less if the ADEMCO alarm siren had sounded.

D. Appellants' Case Was Properly Dismissed Because Appellants Destroyed the Relevant Evidence.

While the Circuit Court did not base its summary judgment decision on the spoliation of evidence, Appellants' destruction of the evidence is a valid basis for upholding ADEMCO's dismissal. "It is a fundamental principle of law that a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence." Syl. Pt. 2, Tracy v. Cottrell, 206 W. Va. 363, 370, 524 S.E.2d 879, 887 (1999). Where evidence is destroyed, the trial court may dismiss the plaintiff's case. Id. In determining whether to impose the sanction of dismissal for spoliation of evidence the courts look to the following factors: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) the party's degree of fault in causing the destruction of the evidence. Id. at 374, 524 S.E.2d at 890.

Appellants had control over the alarm system and did not preserve it. Mr. Bennett states that they wanted to have the remains of the home destroyed because their former neighbors were complaining about the smell and hazard of the charred home. (K.B. Dep. at 122, 286-289). Mr. Bennett had a crew tear down the home and dispose of the wreckage about a month after the fire. (K.B. Dep. at 286-89). The demolition was completed without removing the alarm system.

ADEMCO is substantially prejudiced by the destruction of the alarm system. No one had a chance to inspect the alarm system before it was destroyed. Hence, there is no way to determine if the ADEMCO equipment was in any way defective or whether the actions of

ASCO in installing or repairing the alarm caused any of the alleged defects. Without this information, ADEMCO is substantially prejudiced and cannot properly defend this case.

Appellants destroyed the alarm system even though they should have reasonably anticipated it would be needed for litigation. Appellants claim that they noticed during the fire that the alarm system siren did not work. (Becky Dep. at 57, 92). This should have immediately alerted them to the possibility of a lawsuit.

Appellants try to shift the blame for the destruction of the alarm system by claiming that they thought the insurance company preserved it. (K.B. Dep. at 280). This is not credible given the fact that they did not ask the insurance company to save the alarm system and did not tell the insurance company about its alleged failure until one or two weeks after the fire. (K.B. Dep. at 125, 282).

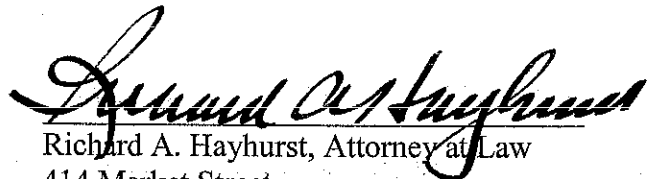
It should also be noted that Appellants are suing their insurers claiming spoliation of evidence based on the destruction of the alarm system and the car. The complaint alleges that the insurers should have preserved the evidence because they should have known of "Appellants' desire and intention to pursue lawsuits" against liable third parties. (Appellants' Amended Complaint, ¶ 69). Appellants claim that "as a direct and proximate cause of the destruction and spoliation of such evidence, Appellants have been severely prejudiced inasmuch as they may be unable to prove the liability of third parties for their losses and damages." (Appellants' Amended Complaint, ¶ 71). Thus, in this lawsuit Appellants essentially acknowledge that they cannot prove their case against the defendants without the evidence that has been destroyed. See Stewart v. Johnson, 209 W.Va. 476, 549 S.E.2d 670 (2001) (*per curiam*) (stating that statements made in pleadings are judicial admissions).

CONCLUSION.

Appellants have no evidence that the ADEMCO products were defective, that any alleged defect existed when the products left ADEMCO's control, or that any alleged defect caused their damages—three essential elements of their case. Furthermore, Appellants' destruction of the evidence makes it impossible for them to prove the allegations in their complaint and substantially prejudices ADEMCO. Therefore, this Court should affirm the Circuit Court's decision granting ADEMCO's motion for summary judgment.

Respectfully Submitted,

Dated: March 28, 2005



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CERTIFICATE OF SERVICE

Pursuant to the provisions of Rule 15(c) of the West Virginia Rules of Appellate Procedure, the undersigned counsel for the defendants Ademco Group, Pittway Corporation, System Sensor, and Honeywell Inc., hereby certifies that on the 28th day of March, 2005, he served the foregoing and hereto-appended **BRIEF OF APPELLEES ADEMCO GROUP, PITTWAY CORPORATION, SYSTEM SENSOR, AND HONEYWELL INC.**, upon the parties hereto by depositing true copies thereof in the facilities of the United States Postal Service, postage prepaid, in envelopes addressed as follows, the addresses of said counsel last known to the undersigned:

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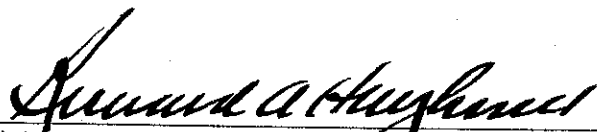
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