

STATUTE OF REPOSE AND THE SAFE PLACE STATUTE

In July of this year, the Wisconsin Court of Appeals took another look at the Wisconsin Safe Place statute in a case brought by a visitor against a commercial building owner after she fell and broke her foot while negotiating a three-inch-high step that violated the state building code. Affirming the Milwaukee County circuit court, the Court of Appeals held that (1) the claim that a three-inch-high step was unsafe was a structural defect claim subject to a ten-year statute of repose; (2) the step had been in an unchanged condition for more than ten years such that the statute of repose barred the visitor's structural defect claim, and (3) the owner did not have constructive notice of the alleged unsafe condition of the building's step as required to support the claim for a breach of the duty to properly maintain or repair the unsafe condition.

Since the case involves the interpretation of the Statute of Repose and the application of the Safe Place Statute, it is of interest to professional engineers.

Under the Safe Place Statute, Wis. Stat. 101.11, every employer and owner of a public building is to provide a place that is safe for frequenters of that place, and every owner of a public building is required to construct, repair or maintain the building as to render it safe. The owner of a public building is liable for structural defects and unsafe conditions associated with the structure of the building. In *Rosario v. Acuity And Oliver Adjustment Co., Inc.*, 2007 WI App. 194, 738 N.W.2d 608, the Court of Appeals discussed whether the three-inch-high step was a "structural defect" or "an unsafe condition associated with the structure." Under Wisconsin law, a property owner must have actual or constructive notice of the defect to be liable for an unsafe condition associated with the structure of the building.

In the case, Rosario contended that her injuries resulted from Oliver's failure to warn of the small step outside of the building which constituted an unsafe condition associated with the structure. She argued that the trial court had erred when it concluded that her claim for injury was fundamentally based upon a structural defect and consequently barred by the ten-year Statute

of Repose found in Wis. Stat. 893.89.

The Court of Appeals noted that a structural defect has been defined as a “hazardous condition inherent in the structure by reason of its design or construction,” and that a property owner is liable for injuries caused by a structural defect regardless of whether it had notice of the defect. On the other hand, a property owner is liable for an unsafe condition only when it has actual or constructive notice of the condition.

The Court of Appeals affirmed the trial court’s determination that the Statute of Repose found in Wis. Stat. 893.89 barred the safe place claim for injuries caused by structural defects beginning ten years after a structure is substantially completed. The Court determined as a matter of law that because it is uncontroverted that the defectively designed and constructed front step to Oliver’s building had been in an unchanged condition since 1965, the ten year exposure period of the Statute of Repose has expired and Rosario’s claim is barred.

The Court then went on to observe that Rosario’s alternative claim was that there was a lack of markings or signs warning of the irregular step that caused her fall, and that the lack of markings or warning signs constituted a breach of duty to properly maintain or repair an unsafe condition associated with the structure. She argued that although Oliver had no actual notice, he had constructive notice because the condition of the lack of warning has existed unchanged for 40 years. The Court of Appeals noted that the record of the court proceedings established that Oliver had purchased the premises in 1999 while the accident had occurred in June of 2004, approximately five years after Oliver became the owner, a period of time much shorter than contended by Rosario. The defectively designed step was constructed in 1965 and no change to the step had been made since 1965 when it was originally constructed. The record also showed that Oliver was not aware of any modifications to the front step of the building since its purchase

in 1999, there was no evidence that any building code violations were ever filed relating to the step, nor was it claimed that Oliver allowed the condition of the step to deteriorate or fail to maintain it in a safe manner. The Court also noted that there had been no accidents involving the front step of the building since Oliver purchased it in 1999.

The Court held that the lack of warning was not the cause of Rosario's injuries but rather the unsafe condition of the short step which was the result of a design defect which was no longer actionable because of the Statute of Repose. The Court concluded:

Ms. Rosario endeavors to elude the bar imposed by the Statute of Repose by arguing that these circumstances are an unsafe condition because defendant should have warned of the step. This appears to me to be intrinsically circular logic. To accept it would be to undo the Statute of Repose. It would be tantamount to saying that an unsafe condition is created by a failure to warn of a design defect barred by the Statute of Repose.

The Rosario case evidences that our Court of Appeals is not about to allow an end run around the Statute of Repose so that claims can be brought under the Safe Place Statute by alleging that the failure to warn of the design defect amounted to an actionable unsafe condition of which the owner has notice and which is not barred by the Statute of Repose.