

STRUCTURAL DEFECT OR UNSAFE CONDITION - IT MAKES A DIFFERENCE WHEN INJURY RESULTS

Under §101.11 of the Wisconsin Statutes, every owner of a place of employment or building frequented by the public must furnish a safe place. That obligation extends to the use of all available safety devices and procedures and encompasses the obligation to do every other thing reasonably necessary to protect the life and safety of employees and frequenters.

In February of this year the Wisconsin Court of Appeals issued a decision regarding a worker who sustained injuries when a granite tile fell from an elevator wall in a building in which he worked. The employee brought a claim against the building owner and its insurer under the safe place statute. The Circuit Court for Milwaukee County absolved the owner and its insurer from any responsibility and the worker appealed to the Court of Appeals. The Court of Appeals held that the worker had failed to demonstrate that the tiles, as originally installed, constituted a structural defect or that the owner had actual or constructive notice of any defect.

The granite tile that struck the worker was a 20-pound tile that fell from an elevator wall onto her head. The granite tiles had not been originally part of the building but were installed during a reconstruction effort. They were attached to the elevator walls by adhesive. After the accident the employer mechanically anchored the tiles to the wall. The issue arising was whether the employer had violated the safe place statute by failing to do everything reasonably necessary to protect employees and frequenters of the building.

Based upon a previous case decided by the Wisconsin Supreme Court, the Court of Appeals held that it was necessary to determine whether the falling of the granite tile was a “structural defect” which is a hazardous condition inherent in the structure by reason of its design or structure as distinguished from a “condition” related to the structure but not inherent in the structure itself. The reason that this threshold issue had to be decided is because there are differing notice requirements that exist in safe place cases.

The Supreme Court had previously observed that the statute imposes three duties on owners of places of employment or public buildings: (1) the duty to construct, (2) the duty to repair, and (3) the duty to maintain a safe place of employment or public building.

Three categories of unsafe property conditions exist under the statute: (1) structural defects, (2) unsafe conditions associated with the structure, and (3) unsafe conditions unassociated with the structure. The classification of the condition of the property is often determinative of the outcome of the case because the court has grafted a notice requirement to the statute where the second category exists, that is, where the injury is caused by an unsafe condition associated with the structure. Where the injury is caused by a structural defect in the original structure, the owner or employer is liable to an injured employee or frequenter whether or not the owner or employer is notified of the unsafe condition prior to an injury. Where the injury is caused by an “unsafe condition associated with the structure” rather than by a defect in the structure itself, the owner or employer must have actual or constructive notice of the unsafe condition. Conditions associated with the structure are those arising out of needed repairs or maintenance.

The Court of Appeals attempted to give examples of what constituted a “structural defect” where no notice was necessary in order to hold the property owner liable, i.e., the failure to install a handrail along a staircase, a hole in the roof without a surrounding railing, a false ceiling that did not support a worker’s weight. The Court also gave examples of an unsafe condition associated with the structure of the building where the employer or owner must have actual or constructive notice before the employer or owner is liable, i.e., improper lighting, a loose window screen, a missing theater seat. The Court recognized that such safe place cases are highly fact specific requiring each case to be determined based upon the evidence of what occurred.

The Court of Appeals noted that the plaintiff argued that the loose tile was a defect in the original structural design, rendering the employer or building owner liable without notice of any defect, while the defendant building owner argued that the falling tile was an unsafe condition associated with the structure. The Court

of Appeals therefore had to make a legal determination whether the falling granite tile represented an original structural defect or a condition associated with the structure.

The Court of Appeals held that the remodeling of the building had not been undertaken to fix a potentially dangerous condition, but rather to perform a general remodeling unconnected with any perceived danger. The Court held that the fact that the building owner installed mechanical anchors after the plaintiff had been injured did not prove that the tiles had originally been incorrectly installed. The Court concluded that the circumstance involving the falling tile was legally a condition associated with the structure rather than a defect in the structure itself. Accordingly, the Court of Appeals held that the plaintiff was required to show that the building owner had actual or constructive notice that the tile was loose. The Court of Appeals reviewed the evidence in the record and concluded that the mere remodeling of the building was not enough to provide the building owner with constructive notice that the tiles were in danger of falling.

This case, *Kristin D. Rizzuto et al. v. Cincinnati Insurance Company and Jackson Street Real Estate, LLC*, 2003 Wisconsin WI App. 59, 659 N.W.2d 476 (Wis.App. 2003), illustrates the substantial legal responsibility placed upon an owner of a public building or place of employment to make the building as safe as reasonably possible while at the same time protecting the owner from claims arising out of "conditions" in the building of which the owner has no actual or constructive notice. This effort to balance the need for safety with fair considerations to a building owner who has no actual or constructive notice of any safety deficiency may leave readers with mixed emotions. In any event, design professionals and contractors need to be informed of the safe place liability exposure so they can bring foresight to the employer or owner.

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