

## Original Owner/Builder of Apartment Can be Sued for Defect 10 Years Later

by

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Owner/builders now face potential additional liability for extended periods of time after selling their construction project to a buyer, according to Missouri's Western District Court of Appeals. The case is *Thompson, et al. v. Higginbotham and Sherlock*, 187 S.W.3d (Mo. App. W.D. 2006), decided January 10. (The Missouri Supreme Court recently declined a request to consider this appeal, so the Western District's decision is now final.)

No Missouri appellate court had previously been asked to decide whether Missouri law allows a former owner to continue to face potential litigation more than 10 years after owning the property. The court decided that the claim could proceed given allegations that the former owners may have had superior knowledge of a defect in their construction.

The issue arose after a balcony collapsed at the apartment owned by the current owners, a college professor and a dentist. They, along with about 10 others, were injured and sued the O'Rileys.

The O'Rileys had conveyed the apartment by warranty deed to the current owners more than 10 years before the collapse.

Three deck screws in the balcony used to fasten the deck's outer edge to the 4x4 supports caused the balcony's collapse. It would have been difficult to determine, the court stated, whether the screws, while visible with some effort from the balcony's underside, were adequate after construction was complete to support the load.

In addition to owners and builders, the O'Rileys also were the subcontractors, designers, developers and marketers of the apartment. Ultimately, their combined roles as owners and builders proved to be decisive to the outcome.

Given an increased emphasis in today's construction market on design/build contracts where the developer designs, also owns and then sells, the court's decision is an important caution about how long a former owner may remain potentially liable for defects in the property.

The O'Rileys had argued that Missouri has an established statute of repose, Section 516.097 R.S.Mo., that requires that all lawsuits for personal injury must be brought within 10-years of completion of the improvement. The statute protects architects, engineers and builders whose "sole connection with the improvement is performing or furnishing, in whole or part, the design, planning or construction, including architectural, engineering or construction services, of the improvement."

The Act does not apply, however, to those who conceal a defect or deficiency in the design, planning or construction, where the defect or deficiency directly results in the defective or unsafe condition.

The court's decision turned on whether the O'Rileys were solely connected to the defective condition in the apartment as designers, planners and builders, or whether their additional status as former owners made them potentially liable.

The Western District considered a prior decision, *Magee v. Blue Ridge Prof. Bldg. Co.*, 821 S.W.2d 839, 842 (Mo. Banc 1991), where Missouri's Supreme Court concluded that a designer/contractor of a building who previously was an officer and shareholder of the corporation that built and owned the building was not enough to remove the 10-year limitation.

As in *Magee*, the O'Rileys' were not present but rather former owners and thus they had no possessory interest in the property at the time of the incident.

Thus, the Western District decided that to the extent plaintiffs based their argument to avoid the statute of repose on the O'Rileys' additional status as former owners, this was not enough to overcome the "sole connection" aspect of the statute of repose. But the plaintiffs had further alleged that the O'Rileys were liable for the injuries because they were builders and planners who also sold the property with superior knowledge of the defect.

The court noted that while former owners generally do not owe a duty to those later injured by a defective or unsafe condition, there is an exception contained in a section of the Restatement of Torts. It provides that someone who sells property involving an unreasonable risk is subject to liability to the buyer and his guests for physical harm caused.

No Missouri appellate court had yet adopted this section even though many other state courts recognize it as a positive development reflecting

an “increased regard for human safety and the need to improve bargaining ethics.”

The court decided to adopt this section, and thereby “foster greater openness and candor in real estate transactions.” The Western District recognized that its decision opened the door to potentially unlimited extensions of liability.

“Because we believe that each case must be decided on its facts, we do not believe that this potential negative consequence outweighs the potential benefits.”

The court noted that the plaintiffs alleged the O’Rileys to be sophisticated, knowledgeable and experienced builders. “They may have had reason to know that the use of three deck screws to attach the balcony floor to its support would not hold the weight of more than a few people.”

The Western District sent the case back to the trial court for a trial.

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