

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

JONATHAN RAY TAYLOR, ETC., ET)	
AL.,)	
)	Case No. 2:99CV00068 (Lead)
Plaintiffs,)	
)	OPINION AND ORDER
v.)	
)	By: James P. Jones
WAL-MART STORES, INC., ET AL.,)	United States District Judge
)	
Defendants.)	

In this case involving injury to a customer from a sink in a store’s public restroom, I grant summary judgment in favor of the plumber who allegedly installed the sink because the suit was not timely filed under Virginia’s statute of repose for improvements to real property.

I

In this diversity case involving Virginia law, the defendant Rick Vogel, doing business as Vogel Heating & Plumbing,¹ has moved for summary judgment based on

¹ The Plaintiffs’ Third Amended Complaint, filed June 20, 2000, names Rick Vogel and Vogel Heating & Plumbing as separate defendants. However, it is established that the business is a sole proprietorship, and these defendants will be referred to here collectively as “Vogel.”

the Virginia statute of repose for improvements to real estate. *See* Va. Code Ann. § 8.01-250 (Michie 2000).

The essential facts of the case, either undisputed or, where disputed, recited in the light most favorable to the nonmovant on the summary judgment record, are as follows. The plaintiff Jonathan Ray Taylor, a six-year-old child,² visited the Wal-Mart store in Big Stone Gap, Virginia, on June 11, 1999, and was in a public restroom when a sink, also referred to as a lavatory, dislocated from the wall, injuring his right hand. The sink had been installed by Vogel, a plumbing contractor, during a \$200,000 remodeling of the store by the owner in 1991. The other defendants in this case are Wal-Mart Stores, Inc., the store owner, and CR/PL, L.L.C., also known as Crane Plumbing, the designer and manufacturer of the sink.

II

Virginia's statute of repose provides that

No action to recover for any . . . bodily injury . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, surveying,

² Initially two cases were filed and were consolidated for trial. One is Case No. 2:99CV00068, in which the plaintiff is the child seeking recovery for his injury, and the second is Case No. 2:99CV00069, in which his parents seek recovery for medical expenses. When the Plaintiffs' Third Amended Complaint was filed, all of the plaintiffs were joined in one action.

supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property .

...

Va. Code Ann. § 8.01-250. This statute protects architects, engineers, and building contractors from exposure to long-term liability for injuries that occur in buildings long after their work is complete. *See Hess v. Snyder Hunt Corp.*, 392 S.E.2d 817, 820 (Va. 1990). It is undisputed that the plaintiffs filed suit more than five years after the sink was installed. Therefore, the issues to be determined are (1) whether the sink in this case constitutes an improvement to real property within the meaning of the statute of repose, and (2) if so, whether the statute of repose is applicable to Vogel as an installer of an improvement to real property.

Virginia case law provides a broad definition as to what constitutes an “improvement” to real property. The term has been interpreted to comprise any addition or other change in the structure of a building calculated to add to its useable value. *See Eppes v. Eppes*, 27 S.E.2d 164, 172 (Va. 1943); *Effinger’s Ex’x v. Kenny*, 23 S.E. 742, 743-44 (Va. 1895). This broad definition was applied to the statute of repose in *Wiggins v. Proctor & Schwartz, Inc.*, 330 F.Supp. 350, 352 (E.D. Va. 1971).

To prevent unintended consequences of such a broad definition of “improvements” within the statute of repose, the Virginia legislature thereafter amended the statute to except from its coverage “manufacturer[s] and supplier[s] of any equipment or machinery” Va. Code Ann. § 8.01-250; *see Dinh v. Rust Int’l Corp.*, 974 F.2d 500, 501 (4th Cir. 1992) (describing legislative history of amendment). In so doing, the legislature did not reject the *Wiggins* court’s broad definition of improvements, but rather excepted certain equipment or machinery *despite* the fact that they may still fall within the definition of “improvements.” *See Cape Henry Towers, Inc. v. Nat’l Gypsum Co.*, 331 S.E.2d 476, 479 (Va. 1985).

It is clear that the sink in this case constituted an “improvement[] to real property” under the statute of repose. It was affixed to the wall and connected to the plumbing system in the course of a remodeling project by the owner.³ The installation of the sink was a “development . . . to the future benefit or enrichment of the premises.” *Eppes*, 27 S.E.2d at 172. There are no genuine issues of material fact in dispute

³ While the intent of the party making the annexation is the most important and controlling consideration in determining the status of a fixture, *see Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 553 (4th Cir. 1994) (applying Virginia law), where, as here, the annexation is by the owner of the real estate, an intent to annex permanently to the real estate is presumed. *See Myers v. Hancock*, 39 S.E.2d 246, 247 (Va. 1946) (concerning electric hot water heater). In any event, “a fixture by definition, is an improvement to real property, but an improvement to real property need not be a fixture. The term ‘improvement’ includes not only buildings and fixtures of all kinds, but many other things as well.” 41 Am. Jur. 2d *Improvements* § 1 (1995).

concerning its status as an improvement to real property and thus summary judgment is appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)

If the plaintiffs' cause of action against Vogel was based on the claim that he was a supplier of the sink, I would have to determine whether the sink falls within the "equipment or machinery" exception. For reasons discussed below, however, I do not need to reach that question.

In his discovery deposition, Rick Vogel testified that he had performed a number of plumbing contracts for Wal-Mart stores, and as part of his contracts "typically" provided the fixtures. (Vogel Dep. at 59-60.)⁴ However, as asserted in the plaintiff's complaint, Vogel's liability, if any, rests on the installation of the sink. (*See* Pl.'s Third Am. Compl. ¶ 18; Pl.'s Mem. in Opp'n to Vogel's Mot. for Summ. J. at 3.) Regardless of the categorization of an improvement, "the installer of such machinery or equipment [is] entitled to the protection of the first sentence of the statute." *Eagles Court Condo. Unit Owners Ass'n v. Heatilator, Inc.*, 389 S.E.2d 304, 306 (Va. 1990). Thus, even if I found that the sink constituted machinery or equipment within the exception, the statute of repose would still protect Vogel because the claim is based on

⁴ He denied, however, that he had ever supplied or installed a Crane fixture. (Vogel Dep. at 57, 62, 63, 70, 81.)

Vogel's negligent installation, and not supply, of the sink.⁵ As such, summary judgment in favor of Vogel is warranted. *See id.* at 306-07 (affirming summary judgment in favor of installer of improvement).

III

For the foregoing reasons, it is **ORDERED** that the motion for summary judgment by the defendants Rick Vogel and Vogel Heating & Plumbing is granted, and judgment is hereby entered in favor of said defendants.

ENTER: March 12, 2001

United States District Judge

⁵ Vogel argues alternatively that the sink constituted "ordinary building materials" and not equipment and machinery and thus does not fall within the exception to § 8.01-250, *see Cape Henry Towers, Inc.*, 331 S.E.2d at 480, but it is not necessary for me to decide this question.