



# I

The defendant Wal-Mart Stores, Inc. (“Wal-Mart”) has filed two separate motions for summary judgment. One challenges this court’s jurisdiction over the separate claim of Karen Denise Taylor and John Richard Taylor<sup>1</sup> because the amount in controversy requirement of 28 U.S.C.A. § 1332 (West 1993 & Supp. 2000) has not been satisfied. Wal-Mart has also moved for summary judgment on the basis that the plaintiffs are unable to establish that Wal-Mart was negligent. The defendant CR/PL, L.L.C. (“Crane”), a manufacturer of sinks and other plumbing fixtures, has moved for summary judgment based on 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 plaintiffs on the summary judgment record, are as follows. The plaintiff Jonathan Ray Taylor, a six-year-old child, visited the Wal-Mart store in Big Stone Gap, Virginia, on June 11, 1999, and was alone in a public restroom when a sink, also referred to as a lavatory, dislocated from the wall, injuring his right

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<sup>1</sup> 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 on June 20, 2000, all of the plaintiffs were joined in one action.

hand. The sink, which was designed and manufactured by Crane, had been installed during a \$200,000 remodeling of the store by Wal-Mart in 1991.

The plaintiffs brought suit against Wal-Mart, Crane, and Rick Vogel, doing business as Vogel Heating & Plumbing,<sup>2</sup> who allegedly installed the sink. In an opinion and order entered March 12, 2001, the court granted summary judgment in favor of Vogel because the claim against him as an installer of an improvement on real property was barred by Virginia's statute of repose. *See* Va. Code Ann. § 8.01-250. The plaintiffs have now moved for reconsideration of the grant of summary judgment to Vogel in order to allow them to amend their complaint to assert that Vogel was negligent insofar as he was also the "supplier" of the sink, and therefore falls within an exception to the statute of repose. *See id.*

The parties have presented written and oral arguments regarding Wal-Mart and Crane's motions for summary judgment and the plaintiffs' motion to amend.<sup>3</sup> The issues are ripe for decision.

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<sup>2</sup> The Plaintiffs' Third Amended Complaint 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."

<sup>3</sup> Crane has filed a Motion in Limine to Exclude the Expert Testimony of Leighton E. Sissom, the plaintiffs' expert. The plaintiffs have filed a Motion for Jury View and a Motion in Limine to exclude evidence of contributory negligence by the child. In light of the rulings contained in this opinion, however, I need not address these motions.

## II

First, I must address this court's jurisdiction over the claim of Karen Denise Taylor and John Richard Taylor, the parents of the injured child. Jurisdiction exists in federal court where the parties are citizens of different states and "where the matter in controversy exceeds the sum or value of \$75,000 . . . ." 28 U.S.C.A. § 1332(a). In their Third Amended Complaint, the parents seek compensation for past and future medical expenses incurred on behalf of their son, Jonathan Ray Taylor, and assert that the amount in controversy exceeds \$75,000 as required. Wal-Mart contends, however, that the discovery process has revealed that the parents' actual damages will be less than \$20,000. As such, Wal-Mart urges this court to dismiss the parents' claim for want of subject matter jurisdiction.

Where the claims of several plaintiffs are joined for convenience or otherwise, each plaintiff must meet the jurisdictional requirements. *See Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 218 (3d Cir. 1999). Therefore, the claims of several plaintiffs cannot be aggregated for purposes of determining the amount in controversy. *See id.* In this case, the parents seek compensation for their son's past and future medical expenses. The amount in controversy raised by this claim, therefore, must exceed \$75,000.

In determining whether jurisdiction exists, however, it is the “amount in controversy,” and not necessarily the “actual damages,” that controls. *See Garza v. Rodriguez*, 559 F.2d 259, 260 (5th Cir. 1977). Therefore, a plaintiff’s good faith claim for damages in excess of \$75,000 is usually sufficient, unless it appears “to a legal certainty that the claim is really for less than the jurisdictional amount.” *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1937). Events subsequent to a plaintiff’s complaint that reduce the amount in controversy below the jurisdictional amount will not remove jurisdiction. *See id.* at 289-90. Jurisdiction is denied only where it is proved that at the time of the filing of the complaint, it was legally impossible for the plaintiff to recover the minimum requirement for amount in controversy. *See id.* at 289.

In the present case, I do not find that it was legally impossible for the parents to recover greater than \$75,000 in their claim. At the time the complaint was filed, the parents sought compensation for past and future medical expenses. Although Mrs. Taylor has now testified that her past expenses approximate \$19,000, and that she does not anticipate future medical expenses, it was by no means a legal certainty at the time of filing that future expenses were impossible. For example, potential complications from the injury might have warranted recovery for future medical expenses.

Therefore, I find that jurisdiction exists under 28 U.S.C.A. § 1332, and I will not dismiss the parents' claim.

### III

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not “a disfavored procedural shortcut,” but an important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Id.* at 327.

In opposing summary judgment, the nonmoving party must “set forth such facts as would be admissible in evidence.” Fed. R. Civ. P. 56(e). Inadmissible hearsay cannot be used to oppose summary judgment. *See Greensboro Prof. Fire Fighters Ass’n v. City of Greensboro*, 64 F.3d 962, 967 (4th Cir. 1995).

A

Wal-Mart contends that the plaintiffs have not shown sufficient evidence to support their claims of negligence by the store. Specifically, Wal-Mart argues that the plaintiffs cannot prove that Wal-Mart had actual or constructive notice of a hazardous condition on the store's premises, in order to establish a prima facie case of negligence.

Under Virginia law, a plaintiff seeking recovery for premises liability must prove that the owner of the premises had actual or constructive knowledge of a defective condition. *See Grim v. Rahe, Inc.* 434 S.E.2d 888, 889 (Va. 1993). Here, the plaintiffs have produced no evidence that Wal-Mart had actual notice of a defect in the sink or in the manner in which it was attached to the wall. Thus, in order for the plaintiffs' case to stand, it must be shown that Wal-Mart had constructive notice of the hazard.

Virginia case law provides that constructive knowledge of a hazardous condition may be shown by evidence that the defect (1) was noticeable, and (2) had existed for a sufficient length of time to charge the owner with notice of its condition. *Id.* at 890. The plaintiffs have failed to provide sufficient evidence on both of these prongs.

First, the plaintiffs have not established that there was a noticeable defect in the sink. The plaintiffs have proffered the affidavit of Leighton E. Sissom, Ph.D., an engineer. Dr. Sissom opines that Wal-Mart should have noticed the following defective

conditions: “(1) the lavatory was no longer being secured by the wall mount bracket and (2) the anchor screws were either not present or loose.” (Sissom Aff. of 3/23/2001 at 5.) This opinion, however, lacks any foundation in fact. Dr. Sissom states that “it is evident that the lavatories had not been adequately secured to the wall for some time,” (*Id.*), but the plaintiffs present no observations, testing, or witnesses to support this assertion. In fact, Dr. Sissom admits that he does not know if the sink was even screwed into the wall. (*Id.*) On this point, he provides alternative theories: if there never were screws, then Wal-Mart should have noticed them missing, but if there were screws, Wal-Mart should have noticed them loose. (*Id.*) This unsupported and circular opinion is not sufficient to establish that there was a noticeable defect on Wal-Mart’s premises.

An expert retained by Crane—Patrick J. Higgins— testified at deposition that the sink in question was made for residential, not commercial, purposes. (Higgins Dep. at 18-20.) However, Higgins did not testify that the selection of the wrong kind of sink constituted a defect. In fact, he stated that properly installed, the sink would not have fallen off the wall as it did in this case. (*Id.* at 56, 39-40.) Therefore, the installation of a residential sink could not have been a hazard that Wal-Mart should have noticed. A store owner does not have a duty to inspect the premises for latent or hidden defects. *See City of Richmond v. Hood Rubber Prods. Co.*, 190 S.E. 95, 100 (Va. 1937).

Further, even if the plaintiffs could establish that there was a noticeable defect, they must also establish evidence as to when the defect originated. As stated in *Grim*, “if the evidence fails to show *when* a defect occurred on the premises, the plaintiff has not made out a prima facie case.” *Grim*, 434 S.E.2d at 890 (emphasis in original). The plaintiffs’ expert attests that the sink had not been adequately secured to the wall “for some time.” (Sissom Aff. at 5.) Yet, there is no evidence when the sink became loose. As presented in Sissom’s alternative theories, the sink may have always been loose because it was never properly screwed to the wall, or it may have become loose over time through the loosening of screws. (*Id.*) The plaintiffs’ evidence has not produced sufficient evidence as to when the defect originated.

Crane’s expert Higgins testified that there was a “gap” between the sink and the wall which may indicate that the sink had not been properly installed. (*Id.* at 41.) When asked about the cause of the gap, however, Higgins provided a variety of possibilities:

It could be a weakness in the wall. It could be a failure to provide backing boards. It could be a failure of undersizing the screws or supports or failure to provide the proper lag bolts, failure to use washers for additional support. It could also be due to people abusing the product.

(*Id.* at 41.) Again, the expert is not able to determine whether the dangerous condition originated at installation or over time.

In *Grim*, the Virginia Supreme Court held that a plaintiff failed to make out a prima facie case of negligence where a child was injured by a broken fluorescent light receptacle at a restaurant. 434 S.E.2d at 888. The court denied the plaintiff's claim, stating, "there is absolutely no evidence as to when the fixture was broken, how it was broken, no evidence that the owner knew about it. It could have been broken five minutes ago or sooner." *Id.* at 890. Likewise, in the present case, while the plaintiffs have offered several alternative theories as to how and when the sink became loose from the wall, they have presented no facts to support these assertions. As such, the plaintiffs have failed to make a prima facie case of negligence on behalf of Wal-Mart, and I will grant summary judgment in Wal-Mart's favor.

## B

Crane contends that the plaintiffs' claims were untimely filed.<sup>4</sup> 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, 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 clear that the plaintiffs filed suit more than five years after the sink was installed.<sup>5</sup> I have also previously held that the sink installed during the store

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<sup>4</sup> The plaintiffs have also filed a cross motion for partial summary judgment against Crane contending that their claims are not barred.

<sup>5</sup> The plaintiffs contend that a genuine issue of material fact exists as to when the sink was installed. I disagree. In response to an interrogatory asking when the sink was installed, Wal-Mart responded, "The lavatory was installed during a remodeling job in 1991. . . . Following installation, Wal-Mart has performed standard, routine maintenance and cleaning of the bathroom." (Vogel's Mem. Supp. Mot. Summ. J., Ex. B.) Vogel admitted to have installed sinks during the 1991 remodel. (Vogel Dep. at 56.) He denied, however, that he would have installed a Crane sink. (*Id.* at 57.) No

remodel constitutes an improvement to real property within the meaning of the statute of repose. Therefore, the issue now to be determined is whether the sink is “equipment or machinery” within the exception to the statute of repose. Va. Code Ann. § 8.01-250. If the sink is “equipment or machinery,” the statute of repose would not apply to Crane as a manufacturer. *Id.*

In determining whether the exception to the statute of repose is applicable, the Virginia Supreme Court has drawn a distinction between manufacturers of equipment and machinery, which are excepted, and providers of “ordinary building materials,” which are not excepted. *See Cape Henry Towers, Inc. v. Nat’l Gypsum Co.*, 331 S.E.2d 476, 480 (Va. 1985). In defining “ordinary building materials,” the court identified materials “which are incorporated into construction work outside the control of their manufacturers or suppliers, at the direction of architects, designers, and contractors.” *Id.* An important factor in determining the classification of a fixture is whether the manufacturer offers independent manufacturer’s warranties and/or requires strict compliance with manufacturer’s installation and assembly instructions. *See id.*; *Cooper Indus., Inc. v. Melendez*, 537 S.E.2d 580, 589 (Va. 2000). Another factor is

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evidence has been introduced that the sinks installed in 1991 have been replaced at any time since the store was remodeled. The discrepancy in discovery raises an issue of fact as to *who* installed the sink, and *what* type of sink Vogel installed. There is, however, no genuine issue of material fact raised as to *when* the sink was installed.

whether the items “[i]ndividually serve[] no function other than as generic materials to be included in the larger whole . . . .” *Luebbers v. Fort Wayne Plastics, Inc.*, 498 S.E.2d 911, 913 (Va. 1998).

Under this analysis, the court has found that exterior wall panels, *Cape Henry Towers*, 331 S.E.2d 476, an electrical panel box, *Grice v. Hunderford Mech. Corp.*, 374 S.E.2d 17 (Va. 1988), and swimming pool structural components, *Luebbers*, 498 S.E.2d 911, are all ordinary building materials, and therefore do not fall within the exception to the statute of repose. On the other hand, the Virginia Supreme Court recently held that an industrial circuit breaker, located underneath a pier and used to supply power to docked submarines, did fall within the “equipment or machinery” exception. *Cooper Indus., Inc.*, 537 S.E.2d at 590-91.

I find that the sink in this case is an ordinary building material. Crane’s expert testified in deposition that the industry practice with regard to the installation of sinks is that a master plumber knows how to install various types and brands of fixtures regardless of a manufacturer’s recommendations and instructions. (Higgins Dep. at 37.) Furthermore, he testified that manufacturers do not include component parts for installation such as screws, bolts, or two-by-fours. (*Id.* at 59.) It is left to the plumber’s discretion to determine which bolts would be the most effective for installation, even if the manufacturer makes recommendations. (*Id.*)

As such, I think that the sink is more closely analogized with ordinary building materials as previously identified by the Virginia Supreme Court, and is not “equipment or machinery” within the exception to the statute of repose. As stated by Crane’s expert, the industry practice is not to impose strict assembly and installation instructions on the plumber installing the fixture. (*Id.* at 37, 57.) Therefore, the plumber is like an architect, designer, or contractor incorporating the item “into construction work outside the control of [the fixtures’] manufacturers or suppliers.” *Cape Henry Towers, Inc.*, 331 S.E.2d at 480; *see also Grice*, 374 S.E.2d at 19 (finding “ordinary building material” where component parts and instructions for installation of electrical panel box were determined by architect rather than manufacturer of box). That the sink may have included manufacturer’s instructions does not preclude a finding that the sink is nevertheless an ordinary building material. The swimming pool components in *Luebbers* included manufacturer’s warranties and instructions, but the court found that they were ordinary building materials because the swimming pool installers had the ultimate discretion to determine which parts to use for a particular pool construction project. *Luebbers*, 498 S.E.2d at 913. Such is the case here, where the plumber installing the sink had to use his own expertise to determine the best way to install the sink under the conditions of the store’s restrooms.

Furthermore, the sink was not “self-contained and fully assembled” by its manufacturer before being installed at Wal-Mart. *Cooper Indus., Inc.*, 537 S.E.2d at 590. As Crane’s expert testified, the industry practice is for the plumber, not the manufacturer, to supply all of the parts necessary for installation. (Higgins Dep. at 59.) Before installation, the sink “serve[s] no function other than as [a] generic material[] to be included in the larger whole.” *Luebbers*, 498 S.E.2d at 913. The “larger whole” in which the sink was included was the Wal-Mart building. Unlike the industrial circuit breaker in *Cooper Industries*, which the court noted was not a part of the electrical system of the pier, the sink was an integral part of the building and connected to its plumbing system and wall. *See Cooper Indus., Inc.*, 537 S.E.2d at 590. Therefore, I find that the sink constitutes an ordinary building material, and therefore does not fall within the exception to the statute of repose. As such, the plaintiffs’ claims against Crane, more than five years after the installation of the sink, are untimely under the statute of repose. *See Va. Code Ann. § 8.01-250*. I will grant summary judgment in favor of Crane on this basis.

## C

Because the sink constitutes an ordinary building material as discussed above, a claim against Vogel as a supplier of the sink would also be barred by the statute of repose. I therefore deny the plaintiffs' motion to amend the complaint on the ground that the amendment would be futile. *See Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995).

## III

For the foregoing reasons, I will grant summary judgment in favor of Crane and Wal-Mart and will deny the plaintiffs' motion to amend their complaint.

DATED: April 2, 2001

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United States District Judge