They All Fall Down:
An Overview of the Law on Deck and Balcony Collapses

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Imagine a summer holiday as you enjoy a cookout with family and friends. With a cool, refreshing beverage and a hot dog in hand, you walk to the back deck to join your friends. As soon as you step outside, the deck breaks away from the house. Laughter turns to screams as everyone on the deck plunges twelve feet to the concrete below.

There are more existing decks and balconies now than will be built in the next five to fifteen years.[1] With the continued aging of decks and balconies, the probability of a sudden, traumatic, and preventable scenario will likely increase in the future. More people are "injured in accidents related to faulty wooden decks and balconies than from injuries stemming from all other wood building components combined."[2] Further compounding this issue is grandfathering, which can circumvent building codes.

Ensuing litigation can be quite complicated and highly technical. Statutes of repose, determination of the plaintiff's status (guest, trespasser, tenant, landlord, owner), and the deck's composition (wood, concrete, metal, or some combination) are among issues to be considered.

The Cause

One must determine the cause of the collapse, including the portion of the deck that gave way and why (e.g., flaws in the original construction, modification, or repair). An examination of the deck by a building inspector or qualified contractor will help identify the cause.

Building Codes

Building codes determine what construction standards the deck or balcony should have met and whether the plaintiff has a claim for negligence *per se*. Which building codes apply may depend on when the deck was constructed, inspected, or repaired.

Assume that a defective ledger board was constructed in the late 1990s, repaired

in 2007, and collapsed in 2010. The 2006 Virginia Construction Code (VCC) and International Residential Code (IRC) would not apply to the repairs because their statewide statutory effective date was May 1, 2008.[3] Instead, the preceding 2003 building codes would govern.[4] County codes can also influence this analysis.

Grandfathering

When a deck or balcony collapses due to issues with the original construction, a defendant may be grandfathered in under previous building codes. This protection can disappear where there is negligent repair work or maintenance.

For example, section R502.2.1 of the 2003 IRC (incorporated into the 2003 VCC via paragraph 101.2) required that decks/balconies be positively anchored to the structure, the attachment not be accomplished with nails subject to withdrawal, and where a positive connection cannot be verified, then the decks/balconies shall be self-supporting. Consequently, as of the effective date of November 16, 2005, decks and balconies constructed in Virginia must have been well-connected to buildings. If not properly connected, the decks/balconies should have self-supporting beams or columns.[5]

In 2006, the IRC and VCC requirements for decks were significantly expanded and became specific to include minimum requirements for the proper size, penetration, and placement of bolts used to affix decks and balconies to structures.[6] Moreover, section 103.5 (exception two) of the 2006 VCC indicates that any repairs to decks/balconies located more than thirty inches above grade must meet all of the current code provisions for structural loading capacity, connections, and structural attachment.

Statutes of Repose

Like a statute of limitation, a statute of repose cuts off certain legal rights if they are not acted upon by a specific deadline.

If the collapsed deck or balcony was recently constructed, Virginia Code section 8.01-250 would govern and any action to recover damages would have to be brought within five years of its construction.[7] However, if the deck or balcony collapsed due to defective repairs, section 8.01-243 would govern and any action would have to be brought within two years.[8] Thus, one should quickly identify the applicable statute(s) of limitation or repose and ensure that a party files its case within the appropriate time limits.

Parties' Status

Either parties' status as invitee, trespasser, tenant, landlord, owner, or a repair company can significantly change the outcome of a case.

Landlords and property owners in Virginia have statutory duties to keep the common areas of their properties safe through good construction, repair, and maintenance. Those duties are detailed in the Virginia Construction Code (13 VAC 5-63-10, *et seq.*) and the Virginia Maintenance Code (13 VAC 5-63-450, *et seq.*).[9] Their purpose is to protect the health, safety, and welfare of residents of the commonwealth.[10]

Accordingly, landlords and owners are liable to tenants and guests for any injury caused by a failure to exercise reasonable care in maintaining common areas in proper repair and a safe condition.[11] By contrast, they owe no such duty for any part of the leased premises under a tenant's exclusive control, unless an exception applies.[12] One such exception exists when a landlord or owner undertakes repairs of premises within a tenant's exclusive control and does so negligently.[13]

Common Areas

Whether a particular part of an apartment is a common area or not is a question of fact within the province of the jury.[14] Examples of structures within a tenant's exclusive possession and control include a cabinet,[15] malfunctioning furnace,[16] and stairs[17] located *inside* the leased apartment. A stairway that provides the only access to two apartments on the second floor, by contrast, is a common area.[18] Decks may or may not be common area depending on the facts of your case.

Notice

In a negligent repair and maintenance claim "[a]ctual or constructive knowledge on the part of landlord of the defect causing the injury is necessary to render him liable. The burden is on the injured tenant to show that the landlord knew of the defect or that it had been in an unsafe condition for such a length of time that he should have known of it."[19] Proof of such notice can include complaints

from previous or current residents.[20]

Alternatively, a plaintiff may be barred from recovering if they had notice of the defect before the accident.[21] In *Caudill v. Gibson Fuel Company*, the tenants knew the porch was rotten and that two holes had already broken through during their tenancy.[22] They asked the landlord to fix the defect.[23] The Supreme Court of Virginia held that "[i]f negligence in permitting a dangerous condition is to be charged to the defendant, then equal negligence in using the porch is to be attributed to the plaintiff. . . . [They] were put on equal notice."[24]

Overall, cases involving deck and balcony collapses can be very complicated. The issues set forth above are by no means exhaustive,[25] but provide a starting point for evaluating a case. Be sure to consider all of them so your argument does not become the next trap door.

Endnotes:

1 Lynn Davis, *Research Focuses on Deck Safety, Awareness*, Virginia Tech: Invent the Future (May 10, 2010), http://www.vt.edu/spotlight/impact/2010-05-10-deck-safety/safety.html.

2 *Id.*

3 The 2003 Virginia Construction Code's effective date was November 16, 2005. The 2006 Virginia Construction Code's effective date was May 1, 2008. The 2009 Virginia Construction Code's effective date was March 1, 2011.

4 Specifically 2003 Virginia Maintenance Code § 105.1 and 2003 International Building Code § 3403.2 (incorporated in the 2003 Virginia Construction Code per § 101.2) would govern. They require that if unsafe or unsound conditions are found while making repairs, then the unsound element should be made to conform to the requirements for new structures.

5 Per Section 3403.2 of the 2003 International Building Code ("IBC"), these same requirements apply to repairs of existing decks when the contractor performing repairs finds that the uncovered structural elements are unsound or otherwise structurally deficient.

6 *See* Paragraphs R502.2.2 in the 2006 International Residential Code and Table R502.2.2.1 in the 2006 Virginia Construction Code

7 Virginia Code section 8.01-250, entitled *Limitation on certain actions for damages arising out of defective or unsafe condition of improvements to real property*, states in relevant part:

> No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death . . . shall be brought . . . more than five years after the performance or furnishing of such services and construction.

8 Virginia Code section 8.01-243(a), entitled *Personal action for injury to person or property generally; extension in actions for malpractice against health care*, states: "Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery . . . shall be brought within two years after the cause of action accrues." Exceptions may exist such as when the injured party is an infant.

9 *See also Paytan v. Rowland*, 208 Va. 24, 26, 155 S.E.2d 36, 37 (1967) ("[The owner] has a duty to use ordinary care to maintain in reasonably safe condition any part of the leased premises that was reserved for the common use of all tenants.").

10 Virginia Construction Code § 102 (13 VAC 5-63-20).

11 *Williamson v. Wellman*, 156 Va. 417, 423-7, 158 S.E. 777, 778-780 (1931) ("[I]f the landlord knew, or by the exercise of reasonable care should have known of the defective condition long enough before the accident to have made the repairs and failed to do so, then he is liable, not only to the tenant but to an invitee of the tenant's family, for injuries received by reason of this defect.").

12 *Id.* at 421, 158 S.E. at 778 ("Neither of the tenants could have exclusive control or exclusive use and occupancy of these approaches. Therefore neither would have any responsibility for keeping them in repair or in proper condition for the use of the other. It follows that the possession and control of the stairway and platform remained in the landlord."); *Paytan*, 208 Va. at 26, 155 S.E.2d at 37.

13 *Holland v. Shively*, 243 Va. 308, 415 S.E.2d 222 (1992). Note, also, that negligence *per se* claims can be based on violations without a building official's pre-accident finding of a code violation. *See McGuire v. Hodges*, 273 Va. 199, 639 S.E.2d 284 (2007) (reversing Circuit Court's judgment for owner where claim for negligence *per se* was based on building code violations related to a non-code compliant latch on a pool gate which caused infant's drowning death). There is also no language in these codes indicating that modifications and maintenance are only required after a building official has deemed a building to be unfit. Instead, landlords and owners have a duty to make inspections themselves. *Gumenick v. United States*, 213 Va. 510, 518-19, 193 S.E. 2d 788, 795 (1973); *Taylor v. Va. Constr. Corp.*, 209 Va. 76, 78, 161 S.E.2d 732, 734 (1968).

14 *Paytan*, 208 Va. at 26, 155 S.E.2d at 38 (reversing the Circuit Court's entry of summary judgment because the question of whether the tenant had exclusive possession of the back porch or whether it was a common area was a question of fact for the jury).

15 *Luedtke v. Phillips*, 190 Va. 207, 56 S.E.2d 80 (1949) (landlord not liable when tenant's cabinet fell on tenant).

16 *Wohlford v. Quesenberry*, 259 Va. 259, 523 S.E.2d 821 (2000) (landlord not liable for negligence *per se* based on building codes because tenant had "exclusive possession and control" of the defective premises).

17 *Isbell v. Commercial Inv. Assocs.*, 273 Va. 605, 618, 644 S.E.2d 72, 78 (2007).

18 *Wellman*, 156 Va. at 421, 158 S.E. at 778 ("Neither of the tenants could have exclusive control or exclusive use and occupancy of these approaches. Therefore neither would have any responsibility for keeping them in repair or in proper condition for the use of the other. It follows that the possession and control of the stairway and platform remained in the landlord."); *see also Taylor v. Va. Constr. Corp.*, 209 Va. 76, 161 S.E.2d 732 (1968) (reversing Circuit Court's judgment because landlord was liable for the plaintiff's injury caused by negligently maintained door in common area of an apartment complex); *Gumenick v. United States*, 213 Va. 510, 193 S.E. 2d 788 (1973) (affirming judgment awarding tenant damages for injuries from a fall off an apartment's defective porch because owners breached the duty to maintain porch and its railings in a reasonable state of repair and did not exercise ordinary care by failing to inspect the porch).

19 *Revell v. Deegan*, 192 Va. 428, 433, 65 S.E.2d 543, 546 (1951) (citation omitted). The length of time includes however long it would have taken to discover the defect if the landlord or owner had exercised reasonable care.

20 This assumes that, following a complaint, an inspection of the underside of the deck by a reasonably competent contractor would have confirmed the defects.

21 An analysis of this issue should include whether the plaintiff could see the defects from his demised premises or from any other location accessible to him and whether the defects were latent to the defendant.

22 185 Va. 233, 237-38, 38 S.E.2d 465, 469 (1946).

23 *Id.*

24 *Id.* at 242, 38 S.E.2d at 470.

25 Other considerations include insurance coverage and whether the deck or balcony was being used for its intended and lawful purposes (e.g., not exceeding allowable load capacity), to name a few.

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