

Eggshell Plaintiffs Can Help Maximize Your Subrogation Recovery to Include Building Code Upgrades

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In a recent unpublished opinion, *Hale v. Bassette*, No. HHD-CV-20-6124046-S, 2022 Conn. Super. LEXIS 2292, the Superior Court of Connecticut held that the plaintiff was entitled to recover building code upgrade costs associated with repairing a 150-year-old home damaged by the defendant's negligence. In reaching its decision, the court applied the eggshell plaintiff doctrine, a legal principle that is more commonly applied in personal injury actions. The doctrine says that a negligent defendant takes the injured plaintiff as he or she is found, making the defendant responsible for any injury that is magnified by the plaintiff's pre-existing condition or injury. The court found the fact that the home was 150 years old and susceptible to greater damage did not relieve the defendant of its obligation to make the plaintiff whole.

The primary purpose of tort law is to place the injured party in the same position they were in prior to the loss. The measure of damages for damage to real property is generally the reasonable cost to repair if that cost does not exceed the diminution in market value. However, the costs associated with repairing older buildings is often more expensive – and may exceed the diminution in value. The building must be brought up to current code standards, whether required by law or local ordinance.

When an insurer covers the cost of code upgrades pursuant to the terms of its policy, the question becomes whether those costs are recoverable in a subrogation claim. The majority rule holds that a plaintiff is entitled to recover the costs because including such costs allows property owners to be made whole. The minority rule holds that the upgrade would constitute a betterment making those costs unreasonable and therefore not recoverable. See 13 New Appleman on Insurance Law Library Edition § 162.08 (2022).

In *Hale*, the court awarded the plaintiff damages for the full estimated cost of repairing his home after the defendant drove his SUV onto the plaintiff's property, striking trees on the plaintiff's property, and ultimately, striking the side of the plaintiff's home. The impact resulted in damage to the brick exterior, the chimney stack and two studs in an adjacent wall, among other things. The plaintiff testified that, although the 150-year-old home was not livable when he first purchased it a few years prior to the incident giving rise to this case, since that time he completed some renovation work, including a complete roof replacement.

The plaintiff presented expert testimony from a structural engineer with specialized knowledge and training in historic preservation and experience working on antique structures. The plaintiff also presented testimony from a contractor experienced in the restoration of antique homes. The engineer inspected the home following the collision and prepared a report outlining the scope of repairs. He explained that the repairs had to be completed in compliance with current code standards. The load bearing chimney was damaged beyond repair and the current building code required that a new chimney would have to be larger with more clearance to combustibles. The contractor testified that the estimated cost of repairing the home in accordance with the plans prepared by the engineer were fair, reasonable, and the work necessary. The court found the testimony to be credible.

The defendant argued that the damages sought by the plaintiff were not recoverable because they exceeded the value of the plaintiff's property. He further argued that the home was in a "state of significant despair" prior to the collision and that holding him responsible for the full estimated cost of repairs would be unreasonable. The court found the defendant's viewpoint understandable but, ultimately, awarded the plaintiff damages for the full estimated cost of repairing his home.

The court found that the evidence established that the defendant's actions resulted in significant damage to the plaintiff's home. Further, the court found that the home could not simply be restored to its pre-loss condition without bringing the building into code compliance.

In reaching its decision the court applied the eggshell plaintiff doctrine, a legal principle that is more commonly applied in personal injury actions. As explained by the court, "[t]he eggshell plaintiff doctrine states that [w]here a tort is committed, and injury may reasonably be anticipated, the wrongdoer is liable for the proximate results of that injury, although the consequences are more serious than they would have been, had the injured person been in perfect health.... The eggshell plaintiff doctrine is not a mechanism to shift the burden of proof to the defendant; rather, it makes the defendant responsible for all damages that the defendant legally caused even if the plaintiff was more susceptible to injury because of a preexisting condition or injury." The court found the mere fact that the home was considered antique and susceptible to greater damage did not relieve the defendant from making the plaintiff whole.

Subrogation professionals practicing in Connecticut can use the *Hale* decision as persuasive authority to recover the costs associated with bringing an existing building into code compliance. In addition, subrogation professionals should consider hiring a qualified engineer and/or building consultant to establish and ultimately prove that the building repairs had to be completed in compliance with current code standards. Effective subrogation involves identifying and evaluating damages early in the investigation and litigation process.

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