In The

Supreme Court of Virginia

RECORD NO. 081178

RONESHA BENJAMIN, an Infant, who sues through EVELINE BENJAMIN, her Mother and Next Friend,

Appellant,

v.

RONALD H. HUNT, PATRICIA L. HUNT and GENESIS PROPERTIES, INC.,

Appellees.

OPENING BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The action was brought alleging permanent brain damage to a young child from hazardous code violations in her rental home. Her mother and next friend, the tenant, alleged in her complaint that her landlord concealed his knowledge of these latent hazards from her, despite having been warned of the likelihood of brain damage from lead paint on multiple occasions by the local health department. The trial court dismissed all claims on summary judgment.

This case presents important issues which have arisen in the wake of this Court's decisions in Isbell v. Commercial Investments Associates, 273 Va. 605, 644 S.E.2d 72 (2007) and Wohlford v. Quesenberry, 259 Va. 259, 523 S.E.2d 821 (2000). For more than twenty years, trial courts in Virginia have permitted infant tenants such as Ronesha Benjamin to bring actions in tort against landlords for their lead poisoning injuries.[1] While a careful

[1] It is a tragedy and ironic that the Richmond Circuit Court previously addressed essentially the same issues herein (i.e., whether a landlord has a duty in tort to comply with building and housing codes concerning lead paint and a duty to warn of latent defects) after the lead poisoning of another child in the **identical** rental house. In Mabry v. Beckstoffer, 9 Va. Cir. 244 (Richmond Cir. Ct. 1987), the court concluded that lead paint ordinances were intended to protect the infant plaintiff and imposed duties upon landlords. The court also held that a landlord has a duty to warn of latent defects. Id.

reading of Isbell[2] and Wohlford[3] makes it clear that it was not this Court's intention to leave infant tenants without any remedy for their personal injuries, unfortunately, the Richmond Circuit Court's interpretation of these decisions in this case has done just that—left the infant tenant, Ronesha, without any remedy for her personal injuries. The court granted Appellees' motion for summary judgment, dismissing Appellant's negligence per se and common law negligence claims for personal injuries. Even though the Appellees specifically agreed to comply with building and housing codes under a written lease and were required to do so as landlords under the VRLTA, the Court, in essence, held without explanation, that the Appellees were not responsible for complying with the statutory duties imposed by

[2] In Isbell, this Court held that a landlord's violation of the Virginia Residential Landlord and Tenant Act (Code of Virginia § 55-248.2, et seq.) ("VRLTA") does not provide a tenant with a statutory cause of action in tort for personal injuries; however, this Court did not limit a tenant's remedies to consequential damages in a breach of contract action (as argued by the defendants), except with regard to an action brought directly under the VRLTA, and did not prohibit actions in tort for personal injury damages under alternative theories such as negligence per se and common law negligence when the duties exist independent of any duties under the lease.

[3] In Wohlford, this Court found that the tenant, rather than the landlord, was responsible for complying with building and housing codes because the oral lease was silent with regard to this duty and the tenant had exclusive possession and control of the property, but limited the ruling to the facts of the case, and clearly qualified the ruling by emphasizing that it is "**absent an agreement to the contrary**."

building and housing codes, because the Appellees cannot be held liable in tort for personal injury. The Court not only dismissed the **entire** action, but also overruled its own prior decision recently rendered on August 10, 2007, in Latoria Brooks, an infant, who sues through Debra Brown, her mother and next friend v. Ronald H. Hunt, et al., Case No. LT-1920-1.[4] Appellant believes that the decision in Brooks was correct and that the holding in the present case was rendered in error and sets a precedent that will have a ripple effect throughout this Commonwealth if not corrected on appeal by this Court. Therefore, the very important issues raised by this appeal include whether Isbell and Wohlford have eliminated all of a tenant's actions in tort against a landlord for personal injury.

[4] In Brooks, a lead poisoning case, the plaintiff also alleged negligence per se and common law negligence and that the landlord defendant assumed the duties of compliance with building and housing codes under a written lease. The court denied the defendant's motion for summary judgment, holding that under the written lease, the landlord assumed responsibilities beyond its common law duties to comply with building and housing codes and the plaintiffs were owed those duties. See the Brooks Order (Appendix ("App.") at 95-96).

ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Count I (alleging negligence per se for violation of building and housing codes) and holding that the common law governs who had the responsibility to comply with building and housing codes and that the Hunt defendants cannot be held liable in tort; and in failing to find that there were material facts genuinely in dispute.

2. The trial court erred in dismissing Count II (alleging common law negligence for the Hunt defendants' failure to use ordinary care in making repairs and/or negligent abatement of the lead paint hazard, and failure to warn of the lead paint hazard), because it did not specifically rule upon this count; however, to the extent the trial court's Order can be interpreted as including a ruling upon Count II, the trial court erred in holding that the Hunt defendants cannot be held liable in tort for these common law duties; and in failing to find that there were material facts genuinely in dispute.

QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, the Hunt defendants can be held liable in tort for negligence per se for their failure to comply with building and housing codes and, if so, whether material facts were genuinely in dispute, making summary judgment inappropriate. **(Assignment of Error No. 1)**

2. Whether, under the circumstance of this case, the Hunt defendants can be held liable in tort for common law negligence for their failure to use ordinary care in making repairs of the deteriorating lead paint and abating the lead paint hazard and failure to warn the Benjamins of the lead paint hazard and, if so, whether material facts were genuinely in dispute, making summary judgment inappropriate. **(Assignment of Error No. 2)**

STATEMENT OF THE CASE

On October 25, 2006, Eveline Benjamin filed a lawsuit as the mother and next friend of the infant, Ronesha Benjamin ("Ronesha"), against Ronald H. Hunt and Patricia L. Hunt ("the Hunts"), Genesis Properties, Inc. ("Genesis"), Henry Beckstoffer's Children, lnc., and R & W Beckstoffer Three, Inc. for Ronesha's lead-related injuries ("Lawsuit No. 1").[5] (Henry Beckstoffer's Children, lnc. and R & W Beckstoffer Three, Inc. will be referred to collectively as the "Beckstoffer defendants.") On November 1, 2007, Plaintiff nonsuited her claims against the Hunts and Genesís in Lawsuit No. 1. On December 17, 2007, Plaintiff filed this action ("Lawsuit No. 2") against the previously nonsuited defendants, the Hunts and Genesís. An Order consolidating these lawsuits for the purposes of discovery and trial was entered on January 23, 2008.

These consolidated personal injury actions seek damages for the injuries suffered by Ronesha, who was lead poisoned when a child as a result of exposure to deteriorating lead paint while residing at a home leased to Ronesha's mother, Eveline Benjamin (f/k/a Eveline Burrell), by the Beckstoffer defendants from approximately June 1991 to October 1995

[5] The lawsuit is styled Ronesha Benjamin, an Infant, who sues through Eveline Benjamin, her Mother and Next Friend v. Henry Beckstoffer's Children, Inc., et al., Case No. CL06-6779-3.

and by the Hunts, who assumed the contractual duties of the Beckstoffers under the lease assigned to them by the Beckstoffers, from October 1995 to November 1996. (Ronesha and her family shall sometimes be referred to collectively as "the Benjamins".)

Lawsuit No. 2 against the Hunts and their agent, Genesis (collectively referred to as "the Hunt defendants"), alleges, in Count I, a cause of action for negligence per se for the Hunt defendants' violation of building and housing codes related to lead paint. In Count II, Plaintiff alleges a cause of action for common law negligence for the Hunt defendants' failure to use ordinary care in making repairs of the deteriorating lead paint and/or negligent abatement of the lead paint hazard and failure to warn Eveline Benjamin about the lead paint hazard. Count III is a damages count.

On January 7, 2008, prior to the consolidation of the cases and completion of discovery, the Hunt defendants filed their Motion for Summary Judgment. The Beckstoffer defendants who were named in Lawsuit No. 1 did not join in the Hunt defendants' Motion for Summary Judgment.[6] (Facts concerning the Beckstoffer defendants are, nevertheless, relevant and important and will be discussed, infra.)

[6] On May 15, 2008, the Beckstoffer defendants did, however, file a Motion for Summary Judgment based upon the trial court's decision in this case but the motion has not yet been heard.

Plaintiff filed Plaintiff's Memorandum in Opposition to the Hunt defendants' Motion for Summary Judgment, which was written relying on the trial court's ruling in Brooks, supra.[7] The Hunt defendants subpoenaed Eveline Benjamin to appear at the hearing in support of their Motion for Summary Judgment; however, she was not called to testify. In Plaintiff's Opposition, Plaintiff specifically objected to the use of Eveline Benjamin's testimony at the hearing as being prohibited by Rule 3:20 of the Rules of the Supreme Court of Virginia. In light of the Hunt defendants' subpoena of Eveline Benjamin, Plaintiff used excerpts of testimony in the opposition without agreeing to the use of depositions, and presented parol evidence with regard to the missing lease in order to defend against the motion and to show that material facts were genuinely in dispute.[8]

On April 22, 2008, the trial court granted the Hunt defendants' Motion for Summary Judgment and, without specifically referencing either Count I or Count II in its Order or addressing Plaintiff's failure to warn claim, dismissed Plaintiff's Complaint in its entirety. The trial court stated that "[w]hile this court has in the past ruled in favor of the plaintiff in cases

[7] See Preliminary Statement, supra at 2 and n.4.

[8] While deposition cites were included within Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment, they are not included in the Statement of Facts, infra, because those facts do not appear to be disputed. Plaintiff has noted all facts that are in dispute.

identical to this case, further review of [Isbell, supra] and [Wohlford, supra] leads it to a conclusion that its prior decisions for plaintiffs were incorrect." Thus, the trial court held that "[t]he defendants are correct that the common law governs their responsibility and, under the circumstances of this case, they cannot be held liable in tort to the plaintiff."

STATEMENT OF FACTS

Ronesha was lead poisoned while residing at 1313 N. 28th Street, Richmond, Virginia ("the premises") from approximately June 1991 until November 1996. The premises was built in 1900. At the time that Ronesha and her mother, Eveline Benjamin, moved into the premises, the property was owned by the Beckstoffer defendants. In about June 1991, the Beckstoffer defendants and Eveline Benjamin executed a written lease ("the Beckstoffer lease"), utilizing the standard lease form that the Beckstoffer defendants used in all of their residential transactions at that time. The Beckstoffer defendants were large-scale landlords. In contrast, when Eveline Benjamin entered into the lease in June 1991, she was a young mother (24 years old) with a young child (approximately 6 months old) and could only afford to rent a very inexpensive home. According to Eveline Benjamin, she read the Beckstoffer lease carefully before she signed it and the Hunt defendants were responsible for all maintenance

and repair and compliance with building and housing codes under the lease. Eveline Benjamin only remembers signing one lease during her tenancy from 1991 to 1995, which was the Beckstoffer lease. The Hunt defendants do not contend that she ever executed another lease with either the Hunts or Genesis after the Hunts became owners of the premises.

In October 1995, the Beckstoffer defendants sold a block of 28 residential properties ("the Church Hill properties") to the Hunts who contractually assumed all landlord responsibilities under the leases, including the lease of Eveline Benjamin, by assignment.[9] The Hunt defendants do not dispute that the Beckstoffer defendants' lease was assigned[10] to them, but do dispute the terms of the assigned lease because a copy of the lease has not been found.[11] App. at 107, lines 18-25.

Plaintiff proffered a copy of the lease of another tenant of the Church Hill properties, which was executed only months after Eveline Benjamin signed the Beckstoffer lease, as evidence of the standard lease form

[9] See the unexecuted Assignment, with Schedule A listing the premises, and letter which refers to "Three executed Assignments of Leases" with regard to the "28 Homes in Church Hill" (App. at 72-76).

[10] Defense counsel has stipulated that the transcript is in error in that it uses the word "signed," which should have been "assigned."

[11] Eveline Benjamin has been unable to locate a copy of the Beckstoffer lease and both the Beckstoffer defendants and the Hunt defendants have failed to produce a copy of the lease.

utilized by the Beckstoffer defendants at that time.[12] This standard lease imposes the duty of maintenance and repair of the premises and compliance with building and housing codes upon the Beckstoffer defendants. Paragraph 4(b) of the Lease provides that the **"Lessor shall make all repairs to the premises . . . and shall comply with the requirements of all applicable building and housing codes materially affecting health and safety."** (emphasis added). The lease also states in Paragraph 15 that "[t]he rights and responsibilities of the persons signing this Lease are governed by the [VRLTA] . . . and to the extent any provision of this Lease is in conflict with the [VRLTA], the provisions of the Act will control." The Hunt defendants dispute that this is the same standard lease that the Beckstoffer defendants' used for Eveline Benjamin.[13]

In 1995 when the Hunts purchased the premises, they owned approximately 150 properties. The Hunts owned and operated Genesis,

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[12] The lease, which is dated September 1, 1991, from Beckstoffer's Children, Inc., to Charles Benjamin, the father-in-law of Eveline Benjamin, is offered by Plaintiff only for the purpose of showing the standard lease form utilized by the Beckstoffer defendants at that time. See Beckstoffer standard lease form (App. at 69-71).

[13] They relied upon the deposition testimony of William Beckstoffer, stating that "Mr. Beckstoffer said, I don't know if [the standard lease proffered by Plaintiff] is the lease we always use." App. at 109, lines 7 to 8. (It does not appear that the trial court relied upon the deposition of William Beckstoffer in making its decision.)

which managed and maintained the Hunts' rental properties. During the 1995 time period, Genesis managed about 350 rental units and it currently manages over a thousand rental units. According to Ronald Hunt, the Genesis staff was trained with regard to the VRLTA and it was their responsibility to make sure any code violation on the property was repaired.

On March 8, 1996, the Richmond Health Department issued an "Official Notice of Violation – Lead-Based Paint" to the Hunts, finding that the premises violated building and housing codes due to the presence of hazardous lead-based paint. App. at 77-82. On March 12, 1996, the Hunts received a copy of the notice. The notice required that the Hunts commence abatement on or before April 11, 1996, with a final abatement compliance date to be set at that time. Ronald Hunt was the only individual authorized to respond to such notices. In his sworn deposition testimony, Ronald Hunt admitted that he had received **at least four lead paint violation notices** for other rental properties prior to the March 1996 notice. His standard procedure in all instances was to respond to the notice of code violation because it was his contractual obligation to bring the property back into code compliance. He states that he spent $7,000 on one property attempting to bring it into compliance. Ronald Hunt admitted that he never had a contractual relationship with a tenant in which the

responsibility to maintain the property under the building and housing codes was the tenant's responsibility. Ronald Hunt also admitted that he did not provide a copy of the notice of violation to Eveline Benjamin. Ronald Hunt further admitted that after receiving the notice of violation, he did not advise Eveline Benjamin of the specific locations where the lead paint was located. According to Eveline Benjamin, after the Hunts purchased the premises, she never had any communications with the Hunts or Genesis about the condition of the premises.

Additionally, Ronald Hunt admitted that the Church Hill properties he purchased from the Beckstoffer defendants were clearly not in compliance with building and housing codes at the time of the purchase. Mr. Hunt states that he knew that they were in "bad shape," however, he purchased the properties with the intent to renovate them. While he admits that it was his responsibility to bring the properties back into compliance with building and housing codes, he claims the process was delayed by difficulty in obtaining financing. He has never contended that any tenant had exclusive control of a rental property or that it was the tenant's responsibility to comply with building and housing codes.

After the City of Richmond conducted environmental lead testing at the premises, rather than complying with the orders from the Richmond

Health Department that required the hazardous lead paint be removed in an approved manner, the Hunt defendants concealed the location and nature of the hazards from the Benjamins.

In November 1996, more than eight months after the notice of violation, and having still failed to comply with the code, the Hunt defendants decided to evict the Benjamins from the premises. The eviction letter gave the family until January 1, 1997 to move out. App. at 87. During the period from March 1996 when Ronald Hunt received the notice of violation until the Benjamins moved out in January of 1997, Ronesha's lead levels increased as a result of the Hunts failure to abate and/or negligent abatement of the lead paint hazard.

STANDARD OF REVIEW

Because "the decision to grant a motion for summary judgment is a drastic remedy," such motions are disfavored by Virginia courts. Slone v. General Motors Corp., 249 Va. 520, 522, 457 S.E.2d 51, 52 (1995). Additionally, whether the Hunt defendants were responsible for complying with building and housing codes and can be held liable in tort for their negligence per se and common law negligence is a mixed question of law and fact, which this Court reviews de novo. Andrews v. Browne, 276 Va. 141, 146, 662 S.E.2d 58, 61 (2008).

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING COUNT I FOR NEGLIGENCE PER SE BECAUSE THE HUNT DEFENDANTS WERE RESPONSIBLE FOR COMPLYING WITH BUILDING AND HOUSING CODES AND CAN BE HELD LIABLE IN TORT FOR PERSONAL INJURIES.

In Count I, the Benjamins sufficiently alleged the elements of negligence per se as set forth in this Court's recent decision in McGuire v. Hodges, 273 Va. 199, 639 S.E.2d 284 (2007). In McGuire, a wrongful death case, this Court re-affirmed its prior decisions with regard to the validity of a tort action for violation of building and housing codes; therefore, the trial court erred in holding that Isbell, supra, and Wohlford, supra, prohibit Ronesha from seeking personal injury damages in a tort action.

A. The Benjamins' Complaint states a valid negligence per se claim for violation of BOCA which supports a recovery for personal injury damages.

Count I of the Benjamins' Complaint alleges a cause of action for negligence per se for the Hunt defendants' violation of the BOCA National Property Maintenance Code (1993) ("BOCA"). The Benjamins further allege that the Hunt defendants' failure to comply with BOCA constitutes a violation of the Virginia Uniform Statewide Building Code (Code of Virginia § 36-97, et seq.), ("VUSBC"), and the Richmond Building Maintenance Code. Specifically, the Benjamins allege that the Hunt defendants violated

BOCA by failing to correct all defective paint surfaces, failing to remove or cover the lead-based paint in an approved manner, and permitting occupancy of the leaded premises when the premises were not in compliance with the requirements of BOCA.[14]

In McGuire, this Court reiterated the elements necessary to establish negligence per se as follows:

> To establish negligence sufficient to sustain a judgment against Mrs. Hodges, McGuire was required to show the existence of a legal duty, a breach of the duty, and proximate causation resulting in damage. . . . By alleging the violation of the [National Building Code and Botetourt County Code], McGuire presented a claim of negligence per se. . . .
>
> The doctrine of negligence per se represents the adoption of the requirements of a legislative enactment as the standard of conduct of a reasonable person. . . . A party relying on negligence per se does not need to establish common law

[14] The applicable sections of BOCA (1993) provide as follows:

PM–301.2 **Responsibility:** The *owner* of the *premises* shall maintain the structures and *exterior property* in compliance with these requirements, except as otherwise provided for in Sections PM-306.0 and PM-307.0. A *person* shall not occupy as *owner-occupant* or permit another *person* to occupy *premises* which do not comply with the requirements of this chapter.

PM–304.1 **General:** The exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare.

PM-305.4 **Lead-based paint:** Interior and exterior painted surfaces of dwellings and child and day care facilities, including fences and outbuildings, which contain in excess of 0.06 percent lead by weight shall be removed or covered in an approved manner. Any surface to be covered shall first be marked with warnings as to the lead content of such surface.

> negligence provided the proponent produces evidence [1] supporting a determination that the opposing party violated a statute enacted for public safety, [2] that the proponent belongs to the class of persons for whose benefit the statute was enacted and the harm suffered was of the type against which the statute was designed to protect, and [3] that the statutory violation was a proximate cause of the injury.

273 Va. at 206, 639 S.E.2d at 288 (citations and internal quotes omitted). McGuire makes it clear that a plaintiff alleging a violation of building and housing codes may recover damages in tort by satisfying the aforementioned elements of negligence per se and "does not need to establish common law negligence" or a breach of contract. Id.

In the present case, the Benjamins have sufficiently stated a claim for negligence per se for the Hunt defendants' violation of building and housing codes. The first element of negligence per se is satisfied because the Hunt defendants violated BOCA which was enacted for public safety and imposed duties upon the Hunt defendants.[15] These duties are not based upon the landlord-tenant relationship or the Beckstoffer lease—they are

[15]The VUSBC is intended "to protect the health, safety and welfare of residents of the Commonwealth." Va. Code § 36-99. See also Virginia Elec. and Power Co. v. Savoy Constr. Co., 224 Va. 36, 44, 294 S.E.2d 811, 817 (1982) (stating that "[t]he dominant purpose of the Building Code . . . is to provide comprehensive protection of the public health and safety" and "[t]here must be compliance with the Building Code . . . to safeguard persons and property.").

statutory[16] duties imposed by the VUSBC, which are intended to protect the public including tenants, invitees, and others.[17] The Hunt defendants breached these duties when they violated BOCA PM-301.2 by permitting Ronesha and her family to occupy the property when the property was not in compliance with the requirements of BOCA; violated BOCA PM-304.1 by failing to maintain the exterior of the structure in good repair so as not to pose a threat to public health; and violated BOCA PM-305.4 by failing to remove or cover the lead-based paint on interior and exterior painted surfaces in an approved manner.

The second element of negligence per se is satisfied because Ronesha, who was a tenant at the premises, is clearly a member of the class intended to be protected by BOCA and the harm she suffered, lead poisoning, is unquestionably the sort of harm that BOCA, which specifically

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[16] The VUSBC, which adopts BOCA, provides "mandatory, statewide, uniform regulations to protect occupants of all existing buildings and structures." VUSBC, Vol. II, Preface (1993). A regulation of the VUSBC "is legislative in character and has the force of a statute since it is a regulation adopted pursuant to Virginia Code § 36-97, et seq." Dodson v. Shenandoah County, 27 Va. Cir. 479, 482 (Shenandoah County 1983) (citing Bd. of Supervisors of Fairfax County v. Miller & Smith, Inc., 222 Va. 230, 279 S.E.2d 158 (1981)).

[17] See, e.g., Savoy, 224 Va. at 45, 294 S.E.2d at 817 (holding in a **tort** action that a construction company was in violation of the VUSBC, as a matter of law, and thus negligent per se, and that an electric company was within the class of persons that the VUSBC was designed to protect).

addresses lead-based paint, was designed to protect against. Thus, under McGuire, if the Benjamins can prove that the Hunt defendants' violations of BOCA were the proximate cause of Ronesha's injuries, which is an issue to be decided by a jury, then the Benjamins will have made out a negligence per se cause of action for violation of BOCA and the VUSBC, which is also a violation of the Richmond City Code.

Isbell provides no support for the trial's court's dismissal of Plaintiff's negligence per se claim because this Court **expressly** stated that it was not addressing the issue of "whether a landlord's breach of the statutory duties imposed by the [VRLTA] can form the basis of a common law claim for negligence per se," as that issue was not before this Court on appeal. Id. at 611, 644 S.E.2d at 74 n.2. Also, this Court did not address the issue in this case—whether a landlord's breach of statutory duties that are independent of the VRLTA, i.e., duties imposed by BOCA, can form the basis of a claim for negligence per se.

Additionally, Isbell does not support the Hunt defendants' argument, or the trial court's holding, that they cannot be held liable tort. In making this argument, the Hunt defendants' relied upon the common law rule that "where complete possession is surrendered to the lessee, no action of tort can be maintained against the lessor except for fraud or concealment,

hence that no recovery can be had for personal injuries on account of the landlord's failure to repair and that his covenant to repair renders him liable only to an action for the breach of covenant . . . ." Id. at 612, 644 S.E.2d at 72 (citing Caudill, 185 Va. at 239-41, 38 S.E.2d at 460). The trial court erred in finding that the Hunt defendants surrendered complete possession and control, see infra at Section I.B.3. Additionally, the Benjamins' claims are not based upon duties that arise only under the Beckstoffer lease. The Hunt defendants have mischaracterized the Benjamins' negligence per se claim as nothing more than a failure to perform contractual duties. While recovery in tort is not allowed where the plaintiff alleges "nothing more than disappointed expectations. . . . [r]ecovery in tort is available . . . when there is a breach of a duty to take care for the safety of the person or property of another." Sensenbrenner v. Rust, Orling & Neale Architects, 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988). See also Augusta Mut. Ins. Co. v. Mason, 274 Va. 199, 205, 645 S.E.2d 290, 293 (2007) ("[A] single act or occurrence can, in certain circumstances, support causes of action for breach of contract and for breach of a duty arising in tort."); Mitchum v. Counts, 259 Va. 179, 187, 523 S.E.2d 246, 250 (2000) ("The same conduct or occurrence can support more than one theory of recovery."). The source of the duty alleged here is the VUSBC/BOCA, not the Beckstoffer lease;

therefore, the Benjamins' negligence per se action is based upon duties that are independent of the Beckstoffer lease and Ronesha's remedies are not limited to a breach of contract action. Thus, while Isbell found no personal injury cause of action in tort directly under the VRLTA against a landlord for violation of the landlord's duties imposed by the VRLTA, Isbell does not eliminate a plaintiff's negligence per se claim for failure to comply with building and housing codes when such cause of action is completely independent of the VRLTA. (Additionally, Isbell does not in any way affect or eliminate Count II, discussed infra, which is based upon common law negligence.) Therefore, the trial court erred in holding that the Hunt defendants could not be held liable in tort for negligence per se.

B. Under the circumstances of this case, the common law rule that a tenant in exclusive possession and control has the duty of maintenance does not govern who was responsible for complying with BOCA.

The common law rule that a tenant in exclusive possession has the duty of maintenance does not apply where the defendant landlord contractually assumes the responsibility to maintain the leased premises in compliance with building and housing codes under the terms of a written lease. Since the Beckstoffer lease has not been found and the Hunt defendants have admitted the existence of this written lease but disputed its terms, a factual issue exists with regard to the terms of the lease. Also,

the common law rule does not apply where the landlord is governed by the VRLTA, which delegates the duty to comply with building and housing codes to the landlord; therefore, a landlord governed by the VRLTA is statutorily obligated, regardless of what a lease says, to comply with building and housing codes. In other words, like the written lease, the VRLTA dictates **who** is responsible for complying with building and housing codes. The common law rule is also inapplicable where the tenant, in fact, does not have exclusive possession and, under the circumstances of this case, a factual issue exists as to whether the Hunt defendants completely surrendered possession and control to Eveline Benjamin.

1. The assigned Beckstoffer lease modified the common law rule as to who was responsible for maintenance and repair of the premises.

The trial court's conclusion that, under the circumstances of this case, the common law governs who is responsible for maintaining the premises in compliance with building and housing codes is not supported by either Isbell or Wohlford. In Isbell, supra, this Court stated that "under the common law, a landlord has no duty to maintain in a safe condition any part of the leased premises that is under a tenant's exclusive control." 273 Va. at 611, 644 S.E.2d at 74. This Court further stated, however, that "[a]t common law, a landlord would not have these responsibilities [to comply

with building and housing codes] **unless the landlord expressly covenanted to assume them in an agreement with the tenant**." Id. at 615, 644 S.E.2d at 76 (emphasis added). Similarly, in Wohlford, this Court held that that BOCA did not modify the common law rule that a tenant who has exclusive possession and control of the premises is responsible for its maintenance and repair, "**absent an agreement to the contrary**." Id. at 259, 523 S.E.2d at 821 (emphasis added). Therefore, an agreement to assume the responsibilities of maintenance and repair is clearly an exception to the common law default rule of landlord non-liability. This exception applies in this case because, unlike in Wohlford, there is a lease that modified the common law rule with regard to **who** was responsible for compliance with building and housing codes. The Beckstoffer lease clearly and unequivocally places this duty upon the Beckstoffer defendants because they specifically agreed in Paragraph 4(b) of the Beckstoffer lease to **"make all repairs to the premises" and to "comply with the requirements of all applicable building and housing codes affecting health and safety."** App. at 69. Thus, the common law rule that the landlord has no duty to maintain the premises where the tenant has exclusive control does not apply in this case, as the trial court concluded,

because the Hunt defendants assumed responsibilities beyond their common law duties.

Although the Hunt defendants argued in their Motion for Summary Judgment, and memorandum in support, that they had no duty to comply with building and housing codes, they conceded at the hearing that if there is a lease under which a landlord assumes the responsibility to maintain the premises in compliance with building and housing codes, then that landlord would be responsible to comply with building and housing codes and the common law rule making the tenant responsible would not apply. App. at 106, lines 4 to 20. They also admitted that they would have stepped into the shoes of the Beckstoffer defendants with regard to the responsibilities of the landlord under the assigned Beckstoffer lease, if there was a lease that they could find between Beckstoffer and Eveline Benjamin. App. at 106, line 21, to 107, line 25. They dispute, however, that the lease proffered by Plaintiff is the same lease used but admit that the terms could be a factual issue and jury question. App. at 108, lines 2 to 14. They further admit that "maybe down the road . . . [Plaintiff's counsel is] going to find a witness to say, Yes, this is the form we always use . . . " App. at 109, lines 9 to 13. The Benjamins should be permitted to establish the terms of

the Beckstoffer lease at the trial of this matter by circumstantial and parol evidence.[18]

Thus, the trial court erred in holding that the common law governs who was responsible for complying with BOCA because the Hunt defendants assumed the responsibility to comply with building and housing codes under a written lease and material facts concerning the terms of the lease are in dispute.

2. The VRLTA also dictates who is responsible for complying with building and housing codes.

The VRLTA imposes obligations on certain landlords, specifically, those landlords who are natural persons who own in their own name more than ten single-family residences subject to a rental agreement, or, where the single-family residences are located in any city or county having either the urban executive county form or county manager plan of government, more than four single-family residences. Va. Code § 55-248.5(A)(10) (1995). Both the Beckstoffer defendants and the Hunts owned many more

[18] See Baber v. Baber, 121 Va. 740, 94 S.E. 209, 213 (1917) (stating that where the "proof of the former existence of [an instrument] and its loss . . . is strong and conclusive, even parol evidence would be admissible of its contents, under well settled rules on the subject, and if such proof of its contents were strong and convincing, it would set up and establish the lost instrument").

times the requisite number of properties covered by the VRLTA; therefore, they are landlords governed by the VRLTA.

The VRLTA provides that a landlord "shall" comply with the requirements of applicable building and housing codes materially affecting health and safety. Va. Code § 55-248.13(a)(1) (1995). The VRLTA also explicitly prohibits any provision in a rental agreement whereby a tenant agrees to waive any right or remedy provided by this chapter of the VRLTA. Va. Code § 55-248.9(a)(1) and (b) (1995).[19] Thus, pursuant to the VRLTA, a landlord governed by the VRLTA is obligated to comply with building and housing codes and cannot shift this duty to the tenant by including provisions in a lease that the tenant is responsible for compliance with building and housing codes because such provisions are unenforceable.

Wohlford and Isbell are not contrary to a finding that the VRLTA dictates **who** had this responsibility, because the Benjamins have not brought an action directly under the VRLTA. Also, the duty imposed upon the Hunts, as landlords, by the VRLTA is not in conflict with the duties

[19] Subsection (1) of 55-248.9(A) states that "A rental agreement shall not contain provisions that the tenant . . . [a]grees to waive or forego rights or remedies under this chapter . . . ." Subsection B states that "[a] provision prohibited in subsection A included in a rental agreement is unenforceable. . . ." See 1995 code sections (App. at 97-101).

imposed by the Beckstoffer lease.[20] Furthermore, because § 55-248.13(a)(1) of the VRLTA is a remedial statute concerning health and safety, Virginia law requires that the statute be liberally interpreted to accomplish the intent of the legislature, i.e., to protect tenants from hazards such as the lead paint hazard at the premises. See Barr v. S.W. Rodgers Co., 34 Va. App. 50, 58, 537 S.E.2d 620, 623 (2000) ("[A] remedial statute . . . should be construed liberally so as to *suppress the mischief* and advance the remedy, as the legislature intended.")

Thus, the trial court erred in failing to find that the Hunt defendants, who were subject to the VRLTA, were responsible for complying with building and housing codes at the premises, regardless of whether or not they were required to do so under a lease.

3. Eveline Benjamin was not responsible for maintenance of the premises because the Hunt defendants never surrendered complete possession and control to her.

In order for the common law rule (i.e., that a landlord has no duty to maintain or repair a leased premises in the exclusive possession and

[20] To the extent there is any conflict, the VRLTA controls pursuant to Paragraph 15 of the lease, which states that "[t]he rights and responsibilities of the persons signing this Lease are governed by the [VRLTA]. . . and to the extent any provision of this Lease is in conflict with the [VRLTA], the provisions of the Act will control." App. at 70.

control of the tenant) to apply, the landlord must surrender **"complete"** possession and control to the tenant. Isbell, 273 Va. at 612, 644 S.E.2d at 72 (quoting Caudill v. Gibson Fuel Co., 185 Va. 233, 239-41, 38 S.E.2d 465, 460 (1946) (emphasis added). In Caudill, this Court found that the tenant had "complete possession and control" because "there was **no reservation of the right of possession for the purpose of making repairs**" and no common areas. Id. at 239, 38 S.E.2d at 468 (emphasis added).[21]

In this case, this common law rule does not govern who had the responsibility of complying with building and housing codes because there is no evidence that the Hunt defendants ever surrendered complete possession and control of the premises to Eveline Benjamin. To the contrary, Ronald Hunt admitted during his deposition that it was his responsibility to make all repairs, abate the hazardous lead condition, and to bring the properties into compliance with building and housing codes. The fact that he did not consider this to be the duty of Eveline Benjamin is

[21] This Court held in Caudill, however, that the landlord was not liable in tort because "the failure of the landlord to fulfill his promise to repair property in the possession and control of the tenant does not impose upon him any liability in tort." Id. at 240, 38 S.E.2d at 469 (emphasis added).

evidenced by his admission that upon receipt of the Richmond Health Department's notice of violations of lead-related building and housing codes, he did not provide a copy of the notice to Eveline Benjamin and he personally responded to the notice, acknowledging that it was his sole responsibility to take the steps necessary to comply with the codes. This fact is not disputed.

Because Ronald Hunt acknowledged that it was always the Hunt defendants' responsibility to comply with building and housing codes, they clearly reserved the right of possession for the purpose of making repairs. Thus, the Hunt defendants never surrendered complete possession and control of the premises to Eveline Benjamin. With all inferences taken in favor of the Benjamins, the trial court erred in not finding that the Hunt defendants, in fact, assumed all responsibilities for complying with building and housing codes (regardless of what the lease states) and that Eveline Benjamin never had exclusive possession of the premises, or at a minimum, that there was a factual issue as to whether she ever had complete possession and control.

II. THE TRIAL COURT ERRED IN DISMISSING COUNT II BECAUSE RONESHA BENJAMIN MAY RECOVER IN TORT FOR THE HUNT DEFENDANTS' COMMON LAW NEGLIGENCE AND MATERIAL FACTS ARE GENUINELY IN DISPUTE.

Count II alleges claims for negligent repair and failure to warn of latent defects, which are based upon common law duties that are independent of any duties a landlord owes to a tenant under a lease. Therefore, the trial court's dismissal of these claims was made in error as a matter of law and because there were material facts genuinely in dispute. In fact, the Hunt defendants' counsel conceded that it was "not so clear as far as whether summary judgment would apply [to Count II]." App. at 112, lines 10 to 12.

A. The Hunt defendants' duty to use ordinary care in making repairs exists regardless of the terms of the Beckstoffer lease and their liability is "unaffected by the doctrine of landlord and tenant."

Under common law, while a landlord was under no implied covenant to repair premises in the exclusive possession of the tenant, a landlord did have a duty to use ordinary care when making repairs. See Holland v. Shively, 243 Va. 308, 311, 415 S.E.2d 222, 224 (1992); Oliver v. Cashin, 192 Va. 540, 543, 65 S.E.2d 571 (1951); and Tugman v. Riverside and Dan River Cotton Mills, 144 Va. 473, 478-479, 132 S.E.2d 179, 180 (1926). In Holland, supra, this Court stated that "[i]t has long been the law of Virginia

that where a landlord enters leased premises, after delivering possession to the tenant, for the purpose of making repairs, he must use reasonable care in performing the work." 243 Va. at 311, 415 S.E.2d at 224. This Court further stated that "[i]n order for the tenant to recover for injuries caused by a defective condition resulting from the repairs, he must show that the repairs were made in a negligent manner." Id.

The liability of a landlord for negligent repairs is "unaffected by the doctrine of landlord and tenant" and "does not grow out of any act of the defendant as landlord, whether of omission or commission, but out of a positive act of negligence on [the landlord's] part." Tugman, 144 Va. at 478, 132 S.E. at 180. The landlord's liability is for "the affirmative wrong in creating a dangerous condition." Id. at 479, 132 S.E. at 180. This duty to use ordinary care when making repairs arises "if the landlord, after he has delivered possession to the tenant, enters to make repairs, whether voluntarily or by agreement." Oliver, 192 Va. at 543-44, 65 S.E.2d at 573 (emphasis added). Since this common law duty is an independent duty, beyond any duty imposed by the Beckstoffer lease, the Hunt defendants' argument that they cannot be held liable in tort for their negligent repair or abatement of the lead hazard, where such repair creates a dangerous condition, is without merit.

While the Hunt defendants acknowledged that a landlord does have a duty to use ordinary care when making repairs and that this is "[o]ne exception to the general principle of non-liability of a landlord," they argued that "there are no allegations contained in the plaintiff's Complaint to suggest that any of the defendants voluntarily undertook repairs to the premises or that such repairs were performed negligently." App. at 21. In Count II, however, the Benjamins did allege that the Hunt defendants failed to use ordinary care in making repairs of the deteriorating lead paint and negligently abated the lead paint. See paragraphs 39 and 40 of the Complaint (App. at 6). Whether the repairs were done voluntarily or because the Hunt defendants assumed the duty to comply with building and housing codes under the terms of the Beckstoffer lease does not matter since a landlord will be liable for negligent repairs whether they are made voluntarily or pursuant to an agreement. Oliver, 192 Va. at 543-44, 65 S.E.2d at 573.

Therefore, to the extent that the trial court even ruled upon this negligent repair claim, it erred in dismissing the claim as a matter of law and because material facts concerning whether the repairs were done in a negligent manner are genuinely in dispute.

B. The Hunt defendants had a common law duty to warn Eveline Benjamin of the lead paint hazard because it was a known latent defect.

At the hearing on the Motion for Summary Judgment, counsel for the Hunt defendants conceded that **"the case law is very clear [that] the landlord has a duty to warn a tenant of latent defects of which the landlord is aware and the tenant is not."** App. at 112, lines 15 to 18. In Mabry, supra, the Richmond Circuit Court denied the defendants' demurrer with regard to the plaintiff's claim that the defendants knew that the lead-based paint was a latent defect and failed to warn the plaintiff, stating that "accepting as true . . . that the landlord knew of the existence of a dangerous condition, a cause of action has been stated [because] [a] landlord has a common law duty to warn tenants of known latent defects." The court in Mabry relied upon Oliver, supra, and Appalachian Power Co. v. Sanders, 232 Va. 189, 349 S.E.2d 101 (1986). In Appalachian, this Court stated that "[t]he following rule and its stated qualifications have been consistently applied in this Commonwealth":

> On the owner's surrender of control of the premises to his lessee, in the absence of any warranty of their condition or fraudulent concealment of *known* defects, or agreement to repair, he is not liable to the lessee or to his invitees for defects known to the lessee, or which he could have discovered by reasonable inspection, and the invitee stands in the shoes of the lessee with respect to his right to recover from the lessor.

Id. at 193, 349 S.E.2d at 104 (quoting Oliver, 192 Va. at 543, 65 S.E.2d at 572-73). Under this rule, a landlord can be held liable where he has actual knowledge of a defect that is not known to the lessee and the defect is not one that the lessee could discover by reasonable inspection, such as the lead paint hazard in Mabry, supra, and this case.

Additionally, the following language in Caudill, supra, shows that a landlord's non-liability is only for a "patent" rather than a "latent" defect:

> Under common law, as a general rule, the landlord does not engage his liability to the tenant or to any one else when he lets a building, or apportion of it, in a **patently** defective condition. The tenant takes the premises as they are, and his invitees take the risks of the situation.

Id. at 240, 38 S.E.2d at 469 (citation omitted) (emphasis added). Thus, the Hunt defendants may be held liable for their failure to warn about a "latent" defect.

Ronald Hunt failed to disclose to Eveline Benjamin the latent lead paint hazards revealed by the notice of violations he received on March 5, 1996, from the City of Richmond. He has acknowledged that he did not provide a copy of the notice of lead paint violations to tenants such as Eveline Benjamin and she has said that this information was never communicated to her. Importantly, not all interior and exterior surfaces had lead-based paint; therefore, this notice provided crucial information about

the locations of the lead-based paint hazards at the premises. These lead paint hazards were latent because, absent sophisticated testing equipment, it was impossible for Eveline Benjamin to determine which paint at the premises presented a hazard to Ronesha.

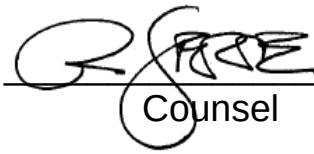
The Hunt defendants did not dispute the above facts at the hearing, but argued that "since [Eveline Benjamin] was living on that property for four years before [they] purchased it, and during those four years her daughter was taken to the clinic . . . tested positive for lead, [and Eveline Benjamin] was advised of the dangers of lead, she was certainly aware there was lead on the premises, and for all those reasons [the Benjamins] cannot prevail on [this] count, but . . . concede[d] that [it] could be a factual issue for a jury to determine as far as what [Eveline Benjamin] knew versus what [the Hunt defendants] knew." App. at 112, line 19, to 113, line 6. The knowledge of the Hunt defendants and Eveline Benjamin regarding the hazardous condition at the premises are material facts genuinely in dispute.

Thus, to the extent that the trial court even ruled upon this failure to warn claim, it erred in dismissing the claim as a matter of law and because material facts were genuinely in dispute.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the trial court's ruling, which dismissed Appellant's Complaint in its entirety, and reinstate the action on the trial court's docket.

RONESHA BENJAMIN, an Infant,
who sues through EVELINE BENJAMIN,
her Mother and Next Friend

By 
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CERTIFICATE

Counsel for Appellant hereby certifies that, pursuant to Virginia Supreme Court Rule 5:26(d), twelve (12) copies of the Opening Brief of Appellant and Appendix were hand filed in the Office of the Clerk of the Supreme Court of Virginia; that an electronic copy of the Brief and Appendix was provided to the Court by CD-ROM; and that three (3) copies were served via first class mail upon:

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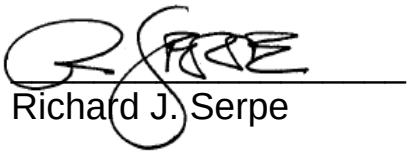
on the 26th day of November, 2008



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