VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

LATORIA BROOKS, an infant,
who sues through DEBRA BROWN,
her Mother and Next Friend,

Plaintiff,

v. Case No. LT-1920-1

RONALD H. HUNT,
GENESIS PROPERTIES, INC.,
and J. EWARD DUNIVAN,

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANT
J. EDWARD DUNIVAN'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, by counsel, files this opposition to the Motion for Summary Judgment of the defendant, J. Edward Dunivan, and states as follows:

FACTS AND RELEVANT PROCEDURAL HISTORY

The above-styled action seeks damages for the lead-related injuries suffered by the Infant, Latoria Brooks ("the Infant"), who was lead poisoned as a result of exposure to deteriorating lead paint while residing at and visiting 3013 Grayland Avenue from approximately November 1995 through February 1996. The property, which is owned by Defendant Dunivan, was leased to Latonia Alexander (now Latonia Pretlow), the Infant's aunt, by a Lease dated October 26, 1994, which included a Lease Addendum. Dunivan's agent, Genesis Properties ("Genesis), is named as the "Landlord" in the Lease and the Lease Addendum. The duty of maintenance and repair of the property and compliance with building and housing codes is placed upon the Landlord by

Paragraph 4[1] of the Lease. (A copy of the Lease with Lease Addendum is attached as **Exhibit A**.) Additionally, the Lease specifically provides that the Landlord shall be "liable for any injury or damage to persons or property . . . [that is] the result of the deliberate or negligent act of Landlord."[2]

The deposition testimony of the Infant's aunt, Latonia Pretlow, indicated that the front porch had peeling paint that she had to sweep up. (Deposition at 21, lines 10-26) On August 1, 1995, the Richmond Health Department found that the property contained high levels of lead paint on the exterior of the house. It is undisputed that the lead-based paint on the exterior of the house was present at the time of the lease inception on October 26, 1994; that the lead-based paint had neither been removed nor covered prior to the property being leased, as required by building and housing codes (to be discussed herein); and that the Defendant did not make any repairs at the property after leasing the property.[3] As a result of the Infant's exposure to lead paint, the Infant was found to have an excessive blood lead level while residing at the property, which caused her to suffer severe lead-related injuries.

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[1] Paragraph 4 of the Lease provides that the "Landlord covenants that the Property shall comply with the requirements of building and housing codes materially affecting health and safety and applicable to the property."

[2] Paragraph 12 states: "Landlord shall not be liable for any injury or damage to persons or property either caused by or resulting from falling plaster, dampness, overflow, or leakage upon or into the Property of water, rain, snow, ice, sewage, steam, gas, or electricity or by any breakage in or malfunction of pipes, plumbing fixtures, air conditioners or appliances or leakage, breakage or obstruction of soil pipes, nor for any [sic], nor for any injury or damage from any other cause, **unless any such injury or damage shall be the result of the deliberate or negligent act of Landlord** . . ." (emphasis added)

[3] See Defendant's Memorandum Of Law In Support Of Defendant's Motion For Summary Judgment at 4 ("[T]here will be no evidence that Mr. Dunivan made any repairs to the paint while Latonia Alexander was a tenant or during any period when plaintiff alleges to have resided upon the property.)

Plaintiff's Amended Motion for Judgment sets forth three causes of action and a damages count. Count I sets forth a cause of action for negligence per se for Defendant's violation of building and housing codes, i.e., the BOCA National Property Maintenance Code ("BOCA"), the Virginia Uniform Statewide Building Code, Volume II[4] ("VUSBC"), and the Richmond Building Maintenance Code ("the Richmond Code"). Count II sets for a cause of action for negligence per se for Defendant's violation of §§ 55-248.13(a)(1)-(2)[5] of the Virginia Residential Landlord and Tenant Act ("VRLTA"). Count III sets for a cause of action for common law negligence for failure to warn and failure to use ordinary care in making repairs.

On April 20, 2007, the Virginia Supreme Court issued its ruling in Isbell v. Commercial Inv. Assocs., ___ Va. ___, 644 S.E.2d 72, 78 (2007), holding that the VRLTA did not abrogate the common law with regard to the duties of a landlord and did not provide a tenant with a statutory cause of action in tort for personal injuries resulting from the landlord's violation of the duties imposed by the VRLTA. Id. at 78. The Isbell Court found that the VRLTA "provides a comprehensive scheme of landlords' and tenants' contractual rights and remedies." Id. Thus, the court concluded that the "damages" action in the VRLTA referred only to actions for breach of contract. Id. at 76.

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[4] Volume II of the applicable VUSBC contains the maintenance code for existing structures, which is known as the "Building Maintenance Code." (Volume I is the new construction code.) Copies of the relevant portions of the BOCA National Property Maintenance Code/1993 and VUSBC (1993 ed.) are attached as **Exhibits B and C**, respectively. The successor to the BOCA code is the International Building Code.

[5] Section 55-248.13(a)(1) provides that a landlord shall "[c]omply with the requirements of applicable building and housing codes materially affecting health and safety . . . ." Section 55-248.13(a)(2) states that a landlord shall "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition."

On July 12, 2007, Defendant filed a Motion for Summary Judgment stating that Plaintiff's "three separate counts of negligence" fail to state any claim upon which relief may be granted. In making this argument, Defendant relies upon Isbell and the cases cited therein that set forth the common law duties of a landlord. While Defendant is correct that Plaintiff's cause of action for Defendant's violation of the VRLTA (Count II) has been, in effect, eliminated by Isbell, the ruling does not eliminate Plaintiff's negligence per se claim for violation of building and housing codes (Count I), which is completely independent of the VRLTA claim. In fact, on January 12, 2007, the validity of Plaintiff's negligence per se claim for Defendant's violation of building and housing codes was re-affirmed by the Virginia Supreme Court's decision in McGuire v. Hodges, ____ Va. ___, 639 S.E.2d 284 (2007), which held that the violation of BOCA and a county building code constituted negligence per se. Additionally, Isbell does not in any way affect or eliminate Plaintiff's Count III negligence claim[6] for failure to warn, which is based upon the common law.

For these reasons, as more fully discussed below, Defendant's Motion for Summary Judgment should be denied with regard to Counts I and III.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

"Summary judgment shall not be entered if any material fact is genuinely in dispute." Va. Rule Sup. Ct. 3:20 (2007). Thus, in order for this Court to grant

[6] Count III of Plaintiff's Amended Complaint also alleges failure to use ordinary care in making repairs and negligent abatement, to the extent any repairs were made; however, in light of Defendant's admission that no repairs were ever made, Plaintiff will withdraw these allegations.

Defendant's motion for summary judgment, the only disagreement between the parties must concern a pure matter of law and Defendant, as the moving party, must be entitled to prevail on the relevant legal issues. See Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 5, 82 S.E.2d 588, 591 (1954). Additionally, this Court must draw all inferences "in the light most favorable" to Plaintiff. Slone v. Gen. Motors Corp., 249 Va. 520, 522, 457 S.E.2d 51, 52 (1995).

II. PLAINTIFF HAS SUFFICIENTLY ALLEGED A NEGLIGENCE PER SE CAUSE OF ACTION IN COUNT I FOR DEFENDANT'S VIOLATION OF BUILDING AND HOUSING CODES.

A. The Virginia Supreme Court has held that the violation of BOCA and other building and housing codes constitutes negligence per se.

Plaintiff alleges in Count I that Defendant 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 by the Infant and her family when the premises were not in compliance with the requirements of BOCA.[7] Plaintiff further alleges that Defendant's failure to comply with BOCA constitutes a

[7] 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.

violation of the VUSBC[8] and the Richmond City Code. Section 101.1 of the VUSBC adopts BOCA as its building and maintenance code and § 5-1 of the Richmond City Code, which is attached as **Exhibit D**, adopts the VUSBC as its building code. Plaintiff also alleges that the Defendant's violations of these building codes constitute negligence per se.

The Virginia Supreme Court has repeatedly held that "the violation of the [VUSBC], like the violation of any statute enacted to protect health, safety, and welfare is negligence per se." MacCoy v. Colony House Builders, Inc., 239 Va. 64, 69, 387 S.E.2d 760, 763 (1990) (citing VEPCO v. Savoy Constr. Co., 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982)). In its 2007 decision, McGuire, supra, the Virginia Supreme Court reaffirmed its prior decisions, holding in a wrongful death action that allegations of an owner's violation of the BOCA National Building Code and the county's building code presented a claim of negligence per se.

This Court has also held that building and housing codes constitute negligence per se. See, e.g., Stevens v. Hospital Authority of the City of Petersburg, 42 Va. Cir. 321, 328 (Richmond 1997);[9] Mabry v. Beckstoffer, 9 Va. Cir. 244, 245 (Richmond

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[8] The VUSBC Building Maintenance Code provides "mandatory, statewide, uniform regulations to protect occupants of all existing buildings and structures." VUSBC, Vol. II, Preface (1993). The VUSBC regulations have the same force and effect as a statute. Dodson v. Shenandoah County, 27 Va. Cir. 479, 482 (Shenandoah County 1983) (holding that 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.") (citing Bd. of Supervisors of Fairfax County v. Miller & Smith, Inc., 222 Va. 230, 279 S.E.2d 158 (1981)).

[9] The court in Stevens held that violations of the VUSBC constituted negligence per se because they were enacted to protect health, safety, and welfare, but held that violations of Medicaid regulations did not constitute negligence per se and did not provide a private right of action because the Medicaid regulations were not adopted for the explicit purpose of protecting the health, safety, and welfare of the public. Id. at 329. See also Rainey v. City of Norfolk, 14 Va. App. 968, 973, 421 S.E.2d 210, 213-14 (1992) (stating that "[t]he legislative purpose underlying the [VUSBC] is to 'protect the health, safety and welfare of the residents of this Commonwealth'")

1987) (holding that if the plaintiff can prove that the defendant violated the Richmond city ordinances prohibiting lead paint and requiring maintenance of the premises in which the lead paint was peeling and that this was the proximate cause of the plaintiff's injuries, she would have made out a cause of action). In Mabry, this Court rejected the defendant's suggestion that the plaintiff's count for violation of Richmond city ordinances governing lead-based paint was dependent upon the VRLTA, stating "[t]hat issue does not have to be addressed." Id. at 245. Thus, notwithstanding the decision in Isbell, supra, concerning the VRLTA, Plaintiff still has a valid claim for violation of building and housing codes if Plaintiff can satisfy the elements of negligence per se.

In McGuire, supra, the court reiterated the elements necessary to establish a negligence per se cause of action, stating:

> 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. . . .
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> 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 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.

639 S.E.2d at 288 (citations and internal quotes omitted). The court further stated that "[w]hether the statutory violation was a proximate cause of the injury is generally a factual issue to be decided by the trier of fact [and] if the violation of the statute is in dispute, that issue is also for the trier of fact." Id.

McGuire was a wrongful death case in which Cody, an infant, drowned in a backyard swimming pool. The Virginia Supreme Court reversed the trial court's ruling which granted the homeowner's motion to set aside the jury's verdict, holding that the evidence was sufficient to support the jury's finding that the homeowner's violation of the building code, regarding the fence and gate surrounding the pool, was the proximate cause of the child's death. The McGuire Court stated that "the evidence was clearly sufficient, and trial court ruled as a matter of law, that Mrs. Hodges [the owner] violated the [BOCA National Building Code and Botetourt County Code][10] because the pool gate latch was not self-latching and the latch itself was substantially lower (32 inches from the ground instead of 48 inches) than required." Id. The McGuire Court further found that the child "was clearly within the class of individuals meant to be protected because Section 616.9 of the National Building Code specifically required the fence to make the pool entirely 'inaccessible to small children' [and] [t]he harm suffered . . . Cody's drowning, was the type against which the statute was designed to protect." Id. Thus, the McGuire Court stated that the "case turns on whether McGuire, as plaintiff, produced credible evidence to show that the foregoing statutory violations by Mrs. Hodges were a proximate cause of Cody's death." Id. at

[10] It is important to note that in McGuire, the Virginia Supreme Court took judicial notice of the 1984 BOCA National Building Code. Id. at 286 n.3. This Court should also take judicial notice of the applicable BOCA, VUSBC, and Richmond Code sections set forth herein. These codes sections show that, contrary to Defendant's statement (i.e., "that the mere existence of lead-based paint upon the defendant's property does not constitute any form of actionable negligence [and] [t]here is no law or regulation within the Commonwealth or under federal jurisdiction which makes it unlawful for lead-based paint to exist upon leased property"), lead paint that has not been removed or covered in an approved manner is a violation of BOCA, the VUSBC, and the Richmond Code, which constitutes negligence per se.

288-89. The Virginia Supreme Court held that the evidence was sufficient even though the evidence presented with regard to proximate cause was all circumstantial.

In the present case, the elements of negligence per se have been satisfied. The building and housing codes set forth herein were enacted for public safety and imposed duties upon Defendant. Defendant and Genesis breached their duties under the applicable building and housing codes when they violated BOCA PM-301.2 by permitting the Infant's aunt, the Infant, and other family members 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 the public health; and violated BOCA PM-305.4 by failing to remove or cover the lead-based paint in an approved manner. The Infant, who was a tenant at Defendant's property, is clearly a member of the class intended to be protected by the building and housing codes. Also, the harm suffered by the Infant, i.e., lead poisoning, is unquestionably the sort of harm that § PM-305.4 of BOCA, which specifically addresses "Lead-Based Paint," was designed to protect against. Thus, under McGuire, if Plaintiff can prove that Defendant's violations of BOCA were the proximate cause of the Infant's injuries, which is an issue to be decided by a jury, then Plaintiff 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.

B. The Lease provisions modified the common law rule as to who would be responsible for complying with BOCA.

In Isbell, supra, the Virginia Supreme 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." 644 S.E.2d at 74 (internal quotations and

alterations omitted). Thus, "at common law, a landlord would not have [the] responsibilities [to comply with building and housing codes and make all necessary repairs] **unless the landlord expressly covenanted to assume them in an agreement with the tenant**." Id. at 76 (emphasis added). 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 the present case, as Defendant contends, because Defendant's agent, Genesis, "**expressly covenanted to assume them in an agreement"** with the Infant's aunt. The Lease and Lease Addendum clearly and unequivocally place these duties upon Genesis, as the "Landlord" under the Lease. Genesis agreed in Paragraph 4 of the Lease to "comply with the requirements of building and housing codes materially affecting health and safety and applicable to the property."[11]

In Wohlford v Quesenberry, 259 Va. 259, 523 S.E.2d 821 (2000), the Virginia Supreme Court specifically addressed the issue of "whether the [Virginia] Uniform Statewide Building Code (the BOCA code) has modified the common law rule that a tenant who has exclusive possession and control of a premises, **absent an agreement to the contrary**, is responsible for its maintenance and repair." Id. at 259, 644 S.E.2d at 821 (emphasis added). While the parties agreed that duties existed under the BOCA code, they disagreed as to who had the duties. Id. at 261, 523 S.E.2d at 822. The tenant acknowledged that under the common law, she would have had the duties "since the [oral] lease [was] silent on the subject" and contended that

[11] The responsibility of Defendant to comply with building and housing codes in accordance with the Lease and Lease Addendum is brought to the Court's attention solely for the purpose of establishing who is required to comply with such codes. Plaintiff does not rely in any way upon these contractual obligations in order to establish Plaintiff's claims for Defendant's violation of building and housing codes.

BOCA shifted these responsibilities to the landlord. Id. The landlord contended that Virginia Code § 36-97 and § 202.0 of the BOCA Code embraced the common law rule by their inclusion of "a lessee in control of a building or structure" in their definition of an "owner." Id. The court held that BOCA did not modify the common law rule that a tenant who has exclusive possession and control of the premises, absent an agreement to the contrary, is responsible for its maintenance and repair. The court stated that "[b]ecause the tenant was the person in control of the premises, not the landlord, the tenant is the defined "owner" **under the facts of the case**, and the tenant has the maintenance and repair responsibilities claimed." Id. at 262, 523 S.E.2d at 822 (emphasis added). It is important to emphasize, however, that Wohlford concerned an oral lease in which no agreement whatsoever had been made with respect to the duty to repair and maintain the premises.

In this case, unlike Wohlford, there is **"an agreement to the contrary"** and thus the Lease provisions modified the common law rule as to who would be responsible for maintenance and repair and for complying with building and housing codes. Under the Lease and Lease Addendum, clearly the obligation to comply with building and housing code requirements ran to Defendant. Therefore, **under the facts of this case**, the common law default rule does not govern with respect to who has the duty to comply with BOCA. Since Defendant clearly had the duty to comply with building and housing codes, Defendant's argument that he has no duty because the property was surrendered to the Infant's aunt is without merit. Thus, under McGuire, Defendant's violation of the building and housing codes is a breach of statutory duties imposed by law and negligence per se.

C. Plaintiff may recover damages for personal injuries in a tort action for Defendant's violation of building and housing codes.

The fact that the Virginia Supreme Court in Isbell concluded that the VRTLA does not provide a cause of action in tort for personal injury is of no consequence with regard to Plaintiff's negligence per se claim for violation of building and housing codes. The specific question addressed in Isbell was "whether the [VRLTA] abrogates the common law and provides a tenant with a statutory cause of action in tort against his or her landlord for personal injuries resulting from the landlord's violation of obligations and duties imposed by the [VRLTA]." Id. at 74. After a careful review of the statute, the court concluded that the VRLTA was a "statutory scheme governing *contractual relationships* between landlord and tenants" and that the "General Assembly did not intend to provide relief beyond that normally available for a breach of contract." Id. at 76 (emphasis original). The court did not hold that a negligence per se cause of action for personal injuries resulting from a landlord's violation of building and housing codes could not exist and, in fact, the 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 the court on appeal. Id. at n.2. The Isbell Court "limited . . . the issue [to] whether the circuit court erred in holding that the [VRLTA] could not be relied upon by [Isbell] in support of a private cause of action for damages." Id. at 73-74. The Isbell Court did issue not address the issue of whether there was a cause of action for violation of building and housing codes when such violation is alleged as a separate cause of action that is independent of the VRLTA.

Plaintiff's negligence per se claim for violation of building and housing codes is not based upon the contractual relationship between a landlord and tenant nor does it depend upon the duties set forth in the lease or the common law duties that a landlord owes to a tenant—it is based upon the statutory duties imposed by the building and housing codes. See McGuire, supra. See also Cooper v. Ingersoll Rand Co., 628 F. Supp. 1488, 1493 (W.D. Va. 1986).[12] Furthermore, the duties under the VUSBC are not duties owed only to tenants nor are the duties owed only by owners of property. 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). See also McGuire, supra (homeowner owed duty to invitee).

Additionally, damages for personal injury are permitted in a tort action for violation of building and housing codes because the VUSBC is intended "to protect the health, safety and welfare of residents of the Commonwealth." Va. Code § 36-99. See also Savoy, 224 Va. at 45, 294 S.E.2d at 817 (finding that compliance with the VUSBC is required "to safeguard persons and property"); and McGuire, supra (permitting recovery for wrongful death resulting from building code violations).

Thus, Plaintiff may recover damages for personal injury in a tort action for violation of the building and housing codes by "produc[ing] evidence" to satisfy the aforementioned elements of negligence per se and "does not need to establish

[12] In Cooper, the court stated: "Generally, under the doctrine of negligence *per se* a standard of care, or duty, is created by a statute, ordinance or regulation so that violation thereof is negligence in itself. The burden of proving the existence of a particular duty on the part of the alleged tortfeasor is no longer on the party alleging breach and injury. . . ."

common law negligence" or a breach of contract. McGuire, 639 S.E.2d at 288. Furthermore, recover of damages for personal injury is not contrary to the Lease provisions, as contended by Defendant, since the Landlord may be held liable for "any injury or damage to persons."[13]

D. Defendant's argument that, under the terms of the Lease, the Infant's aunt agreed to hold Defendant free from liability is without merit.

Defendant argues that "[i]t is clear at the time of contracting that Ms. Alexander would hold herself liable to any injury upon the property within her control" because under the terms of Paragraphs 12[14] and 19[15] of the Lease the Infant's aunt "agreed to hold the landlord free from liability for injury or damage to person or property [and] agreed to maintain liability insurance for all claims of personal injury, personal property and property damages." Defendant's Memorandum at 7. (Defendant also argues that Paragraph 19 concerning the lead-based paint warning also supports this statement; however, the alleged lead paint warning will be address in Section III, infra.) This argument is without merit, first, because Paragraph 12 of the Lease states that the Landlord "shall not be liable for any injury or damage to persons or property . . . **unless any such injury or damage shall be the result of the deliberate or negligent act of [the] Landlord** . . . ." Second, even if provisions of the Lease constituted an agreement by the Infant's aunt to hold the Landlord free of liability for

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[13] See n.4, supra.

[14] See id.

[15] Paragraph 19 states: "Tenant shall obtain and maintain during the Term of the Lease and any renewal or extension thereof, liability insurance against all claims of personal injury, personal property, and property, and property damage for which Tenant may, as a result of use or occupancy of the Property become liable."

his negligence, which they clearly do not, any hold harmless provision in the Lease is rendered void by Paragraph N(3)[16] of the Lease Addendum.

Plaintiff has set forth sufficient allegations to establish a negligence per se cause of action for Defendant's violation of building and housing codes; therefore, Defendant is not entitled to summary judgment as a matter of law on Count I. Additionally, there is a material fact genuinely in dispute with regard to whether Defendant's violation of the building and housing codes was the proximate cause of the Infant's injuries.

For the foregoing reasons, Defendant's motion for summary judgment should be denied with regard to Count I.

III. PLAINTIFF HAS SUFFICIENTLY ALLEGED A CAUSE OF ACTION IN COUNT III FOR COMMON LAW NEGLIGENCE FOR DEFENDANT'S FAILURE TO WARN.

Count III sets for a cause of action for common law negligence for failure to warn. This Court has previously held that "[a] landlord has a common law duty to warn tenants of known latent defects." Mabry, supra. It is undisputed that excessive levels of lead-based paint existed on the exterior of the premises at the inception of the lease and therefore this lead paint hazard constituted a latent defect, which was not obvious to the Infant's aunt. Plaintiff contends that Defendant and/or his agent,

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[16] Paragraph N(3) of the Lease Addendum states:

> (N) Prohibited Lease Provisions.
>
> Notwithstanding anything to the contrary contained in the Lease, any provision of the Lease which falls with the classifications below shall be inapplicable.
>
> . . .
>
> (3) Exculpatory Clause. Agreement by the Tenant not to hold the Landlord or Landlord's agents legally responsible for any action or failure to act, whether intentional or negligent.

Genesis, as the "Landlord," had knowledge of the hazards associated with lead-based paint in older buildings such as the property in question. Defendant failed to warn and/or failed to adequately warn the Infant's aunt and her family members of the lead paint hazard that existed on the property at the time she leased the property. Defendant contends that Paragraph 16 of the Lease sufficiently warned the Infant's aunt of the lead paint hazard. This paragraph states:

> 16. Tenant agrees to comply with the rules and regulations pertaining to the Landlord's apartments and homes as they may be amended from time to time. **WARNING**: This property could have lead based paint and ingestion of such could be hazardous to the tenants [sic] health. The landlord Is not responsible for such and tenant should take it on himself to protect himself from such potential hazard.

This warning does not inform the tenant of the hazard that clearly existed on the property at the time of the execution of the lease. It merely states that the property "could" have lead-based paint. It does not inform the tenant that the property did, in fact, have lead levels in excessive of that allowed by the building and housing codes that Genesis agreed to comply with within the Lease and Lease Addendum. Additionally, the "warning" attempts to place the burden upon the tenant to protect herself from the potential hazard when Genesis, as the Landlord, agreed to comply with building and housing codes that required the removal or covering of the lead paint hazard prior to occupancy by a tenant. The question of Genesis' and the Defendant's knowledge concerning the lead paint hazard and whether the warning provided in Paragraph 16 of the Lease was sufficient are issues of fact in dispute that must be resolved by a jury, not upon a motion for summary judgment.

For the foregoing reasons, Defendant's motion for summary judgment should be denied with regard to Plaintiff's common law claim for negligent failure to warn of latent defects set forth in Count III.

CONCLUSION

Plaintiff's claim for violation of building and housing codes (Count I) has been sufficiently plead and is supported by the well established principles of negligence per se and the Virginia Supreme Court's recent decision in McGuire, supra, specifically finding violation of such codes to be negligence per se in a wrongful death action. Furthermore, a finding by this Court that Plaintiff's claim in Count I is valid is not contrary to the decisions in Isbell or Wohlford, supra, since the Lease and Lease Addendum placed the duty of maintenance and repair and duty of complying with building and housing codes, which included removing or covering the lead-based paint, upon Genesis, Defendant's agent. Additionally, with regard to Plaintiff's failure to warn claim (Count III), there is clearly a material fact genuinely in dispute with regard to the adequacy of the warning provided in the Lease. Therefore, Defendant has not met his burden to show that he is entitled to prevail on all legal issues or that there are no material issues of fact in dispute.

WHEREFORE, for the foregoing reasons, this Court should deny Defendant's Motion for Summary Judgment with regard to Count I for violation of building and

housing codes and Count III with regard to common law negligence based upon failure to warn.

LATORIA BROOKS, an Infant
who sues through DEBRA BROWN,
her Mother and Next Friend

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2007, a true and correct copy of the following pleading was served via facsimile and first-class mail upon:

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_____
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