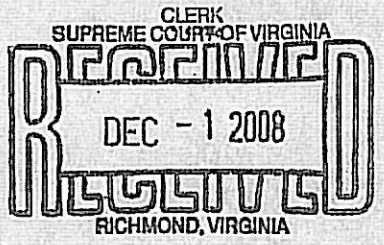
In The

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.

BRIEF *AMICUS CURIAE* OF THE VIRGINIA TRIAL LAWYERS ASSOCIATION

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ASSIGNMENTS OF ERROR

The VTLA supports the position of the Appellant with respect to Appellant's Assignment of Errors, which state as follows:

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

The VTLA accepts the Questions Presented as stated by the Appellant as follows:

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 the material facts were genuinely in dispute, making summary judgment inappropriate. **(Assignment of Error No. 1)**

2. Whether, under the circumstances 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

The VTLA accepts Appellant's Statement of the Case and it is incorporated here by reference.

STATEMENT OF FACTS

The VTLA accepts Appellant's Statement of Facts and it is incorporated here by reference.

ARGUMENT

INTRODUCTION

The questions raised by this appeal, as articulated so well by the Appellant (Appellant's Brief at 4), call upon this Honorable Court to decide whether the state legislature and the City of Richmond, in adopting provisions specifically requiring a landlord to remedy or warn about lead-based paint hazards, and this Court, in its rulings in *Isbell v. Commercial Investments Associates Inc.*, 273 Va. 605, 644 S.E.2d 72 (2007); and *Wohlford v. Quesenberry*, 259 Va. 259, 523 S.E.2d 821 (2000), could have possibly intended the result argued for by the landlord in this case: that an infant tenant seriously injured by exposure to such lead-based paint *has no*

personal injury remedy against a negligent landlord (who has violated the enacted safety and health provisions) because of Virginia's continued adherence to the common law concept of landlord-tenant negligence duties that, in essence, protects guilty landlords and undermines the rights and remedies of innocent residential tenants.

In construing the Residential Landlord and Tenant Act, Va. Code §§ 55-248.2 et seq., the Court applied various rules of statutory construction in *Isbell* to conclude that the legislature did not clearly manifest an "intent" to abrogate the common law rule "that a landlord is not liable in tort for a tenant's personal injuries sustained as a result of the landlord's failure to repair premises under the tenant's possession and control." 644 S.E.2d at 75. Such a reading of the Act seems to effectively vitiate the express statutory requirement under V.C.A. § 55-248.13(A)(1), that "[t]he landlord *shall* . . .[c]omply with the requirements of applicable building and housing codes," even in situations where the hazard within the demised premises is obvious, is clearly dangerous, the landlord has actual notice, and yet he simply chooses to ignore it. The only incentive to fix the dangerous condition under the Court's reading of the Residential Landlord Tenant Act, which was specifically enacted "to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations

of landlords and tenants," § 55-248.3, would arise when the tenant finally gets fed up with the hazardous condition, stops paying rent, or moves out. Such a rather toothless incentive would seem to fly in the face of the VRLTA and building code requirements, both of which clearly place the burden of repairing and complying with the building code on the landlord in the present situation – one involving specific lead-based paint legislation aimed at requiring the landlord, not the renter, to clean up or warn about the hazard.

The ultimate effect of *Isbell* and *Wohlford* in situations where there has been a clear building code or safety code violation by the landlord as to a condition within the demised premises – a situation which would otherwise give rise to a negligence action based on the doctrine of negligence per se – now requires further judicial gloss by this Court. The state and local statutory schemes pertaining to lead-based paint place responsibility for compliance with the safety codes squarely on the landlord. Moreover, we are well past the days of agrarian 15th Century England, where the usual landlord and tenant arrangement amounted to land, and crops, and a tenant who occupied the tenancy to make a living. Today, the economic realities of the typical residential landlord-tenant arrangement militate against the tenant bearing the physical or monetary

responsibility to make fundamental structural repairs to bring the demised premises up to building code requirements. That is the landlord's responsibility. Under the *Isbell* court's reading of the VRLTA, however, the contract remedies afforded by that reading offer very little incentive for the landlord to carry out those statutory responsibilities, even if he has actual notice of a clearly dangerous condition within the demised premises. Ordinarily, of course, such a safety statute violation would amount to tort liability based on negligence per se. *See McGuire v. Hodges*, 273 Va. 199, 639 S.E.2d 284, 288 (2007).

The doctrine of negligence per se must be examined in this case, however, where the old common law landlord-tenant duties, and the duties imposed under the VRLTA and the doctrine of negligence per se for a violation of building code provisions (specifically, the requirements concerning the abatement of a lead-based paint hazard), come into what would appear to be an irreconcilable conflict. If the doctrines are not in conflict but can be reconciled, then the parties in this action, as well as similarly situated tenants throughout the state, need clarification from the Court as to whether its understanding and application of the common law under *Isbell* and *Wohlford*, the doctrine of negligence per se, and the statutory scheme governing the removal or warnings about lead-based

paint hazards, really mean what is suggested by the trial court's ruling and the landlord's argument in this case: that the child tenant, who was intended to be protected by the lead-based paint safety legislation, has no personal injury damages remedy against a landlord who *chooses to do nothing* to comply with his responsibilities under the lead-based paint legislation.

In enacting the VTRLA, building and safety code provisions pursuant to BOCA, and specific legislation concerning the abatement of lead-based paint hazards, the legislature certainly appears to have attempted to bring Virginia in line with a modern view of the residential landlord-tenant relationship. This Court should now take the opportunity to reconcile its rulings in *Isbell* and *Wohlford* in recognition of the public policy enacted by the legislature and the City of Richmond in their adoption of the VTRLA, the BOCA code, and specific legislation protective of minor tenants who are exposed to lead-based paint, and should do so by taking into the account the realities of modern-day landlord-tenant relationships. In light of the decisions in *Isbell* and *Wohlford*, further clarification is needed as to how those decisions square with the concept of negligence per se as articulated in cases such as *McGuire v. Hodges*.

I. THE TRIAL COURT ERRED IN DISMISSING THE TENANT'S CLAIM BASED ON NEGLIGENCE PER SE BECAUSE THE HUNTS (THE LANDLORDS) WERE RESPONSIBLE FOR COMPLYING WITH BUILDING AND HOUSING CODES PERTAINING TO THE ABATEMENT OF OR WARNING ABOUT LEAD-BASED PAINT HAZARDS ON THE RENTAL PREMISES.

In the present case, Eveline Benjamin, a young single mother with a small child, Ronesha Benjamin, paid the Hunt defendants money every month for the privilege of living in a house with illegal and harmful levels of lead, levels that the Hunts knew were dangerous and knew they were required to correct or warn about. Nevertheless, the Hunts did absolutely nothing to correct or warn about the health hazard, and Ronesha Benjamin suffered serious, permanent injuries as a result. Based on Virginia's doctrine of negligence per se, as articulated by *McGuire v. Hodges* and any number of other authorities, it cannot be doubted that the statutory scheme regarding lead-based paint, even in the face of this Court's analysis in *Isbell* and *Wohlford,* establishes that the Hunts may be held liable in personal injury damages based on the violation of that statutory scheme.

As noted in the Appellant's brief in this matter, the Hunts were responsible for all maintenance, repair, and compliance with building and housing codes under the lease in this case and under the terms of the

VRLTA (even if there had been no lease). Indeed, Ronald Hunt has admitted that it was his (the landlord's) responsibility to make all repairs, abate the hazardous lead condition, and to bring the properties purchased from the Beckstoffers into compliance with relevant building and housing codes. (Appellant's Brief at 27). Moreover, Hunt has admitted that, upon his receipt of the Richmond Health Department's notice of the building and housing code violations, Hunt did not provide Eveline Benjamin with the notice. (Appellant's Brief at 28). Instead, Hunt personally responded to the notice, and he acknowledged that it was his sole responsibility to take steps necessary to comply with the code requirements. *Id.* Nevertheless, he did nothing further to attempt to repair or warn about the health hazard. In short, the record in this matter establishes that *at least* fact questions existed at the trial court level as to (1) whether the Hunt defendants had responsibility for complying with the building and housing safety and health codes, (2) whether the Hunts reserved sufficient possession and control of the rental premises to inspect, assess, and make repairs in accord with the requirements of the codes, and (3) whether the Hunts' failure to comply with the code requirements proximately caused injury to Ronesha Benjamin.

It could not possibly have been the intent of the legislature in enacting the VRLTA or the Virginia Uniform Statewide Building Code, Va. Code Ann. §§ 36-97 et seq. (VUSBC or BOCA), that the young, tenant-mother in this case (who was paying rent money to the landlord every month for the privilege of living in his unsafe premises) would be responsible for bringing the house into compliance with applicable building and safety codes. Under the plain, unambiguous terms of the VRLTA, such building code compliance is the responsibility of the landlord. V.C.A. § 55-248.13(A)(1) and (2). Under the VRLTA, the *only* requirement on the part of a residential tenant pertaining to compliance with building or safety codes is found in V.C.A. § 55-248.16(A)(1), which provides that a tenant shall "[c]omply with all obligations *primarily imposed upon tenants* by applicable provisions of building and housing codes." (emphasis added). Thus, there would have to be a specific building or housing code provision that imposes a particular duty *primarily upon a tenant* before her responsibility for compliance would arise. There is no indication of such a specific building code provision applying to the tenant in the instant case. Responsibility for the structure, and particularly with regard to the abatement of lead-based paint hazards, lies squarely and *primarily* with the

owner or landlord of the premises. In fact, the Hunt defendants have admitted such in this litigation.

Furthermore, of course, Virginia has a long line of cases which hold that a violation of a building or safety code by a defendant charged with responsibility of complying with the code amounts to negligence per se, and liability may be imposed against that defendant where the injured person was within the class of persons intended to be protected, and the violation was a proximate cause of the injury. *See McGuire v. Hodges*, 639 S.E.2d at 288 (most recent negligence per se case; evidence was sufficient to support jury's finding that homeowner's violation of building code regarding fence and gate surrounding pool was the proximate cause of the a child's drowning; violation of the code constituted negligence per se). *See also MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 69, 387 S.E.2d 760, 763 (1990); and *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 79, 597 S.E.2d 43, 46 (2004).

Thus, in the *McGuire* case, this Court explained the doctrine of 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*." *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 293, 585 S.E.2d 545, 548 (2003); *see also Fox v. Custis*, 236 Va. 69, 73, 372 S.E.2d 373, 375, 5 Va. Law

> Rep. 507 (1988); *Trimyer v. Norfolk Tallow Co., Inc.*, 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951). By alleging the violation of the Building Code, McGuire presented a claim of negligence per se. *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 69, 387 S.E.2d 760, 763, 6 Va. Law Rep. 1005 (1990); *see also Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 79, 597 S.E.2d 43, 46 (2004).
>
> 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]." *Butler v. Frieden*, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967). *A party relying on negligence per se does not need to establish common law negligence provided the proponent produces evidence supporting a determination that the opposing party violated a statute enacted for public safety*, 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 that the statutory violation was a proximate cause of the injury.

639 S.E.2d at 288 (emphasis added).

The duty breached by the defendant need not be a "common law" duty in order for the doctrine of negligence per se to give rise to liability against the defendant under the "duty, breach, and proximate cause of damages" analysis applied to negligence cases in Virginia. The duty, breach, and proximate cause elements of the cause of action for negligence are supplied under the negligence per se doctrine where the injured party can establish: (1) that the defendant violated a statute enacted for public safety, (2) that the plaintiff is in the class of persons intended to be protected by the statue, (3) that the harm suffered was the

type the statute was intended to protect against, and (4) that the statutory violation was a proximate cause of the injury. *McGuire v. Hodges*, 639 S.E.2d at 288. Thus, the *McGuire* court further explained:

> While *violation of such a statute provides the elements of a duty and breach, a plaintiff has not proved actionable negligence unless the plaintiff also proves that the failure to adhere to the statutory requirement was a proximate cause of the injury.* "[A] mere breach of a particular duty imposed by statute does not make the violator guilty of actionable negligence, which will support a recovery for damages unless such violation was the proximate cause of the injury." *Hamilton v. Glemming*, 187 Va. 309, 317, 46 S.E.2d 438, 442 (1948).
>
> *Whether the statutory violation was a proximate cause of the injury is generally a factual issue to be decided by the trier of fact. Schlimmer*, 268 Va. at 79, 597 S.E.2d at 46. *Thomas v. Settle*, 247 Va. 15, 20, 439 S.E.2d 360, 363, 10 Va. Law Rep. 702 (1994). Similarly, *if the violation of the statute is in dispute, that issue is also for the trier of fact. Schlimmer*, 268 Va. at 79, 597 S.E.2d at 46. *Kimberlin v. PM Transp., Inc.*, 264 Va. 261, 268, 563 S.E.2d 665, 668 (2002).

639 S.E.2d at 288 (emphasis added).

As thoroughly set forth in Appellant's Brief in this matter, it is apparent that the *primary* responsibility for compliance with the relevant building, safety, and health codes pertaining to abatement or warning about lead-based paint hazards lies with the landlords in this case, not with the occupying tenant. (Appellant's Brief at 15, n. 14; 17, n. 15). Therefore, a breach of duty for purposes of imposing liability under the doctrine of negligence per se is established by a showing that the landlords violated

the statutes and ordinances concerning lead-based paint. Moreover, the question of whether the violation of the statutory scheme proximately caused the child's injuries in this case is a factual issue to be decided by the jury, and certainly should have not been decided on summary judgment based on the record in this matter.

In arguing that the Hunt defendants somehow were *not* responsible in tort for personal injury damages arising out of their complete failure to carry out their statutory responsibility, they rely on the common law notion that 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." *Paytan v. Rowland*, 208 Va. 24, 26, 155 S.E.2d 36, 37 (1967). The fundamental flaw in this argument, of course, is that the VRLTA, pertinent provisions of the BOCA code, and specific legislation pertaining to the abatement or warning about lead-based paint hazards *do* impose a duty on the part of the landlord to maintain the demised premises "in a safe condition" – at least to the extent *safety* is measured, defined, and imposed under the specific building and health codes with which the landlord was required to comply.

In further support of their position of "no-duty" and no liability, the Defendants also rely on *Isbell v. Commercial Investment Associates, Inc.*, 644 S.E.2d at 74; and *Wohlford v. Quesenberry*, 523 S.E.2d at 822. The

Appellant's Brief in this case makes clear the ways in which *Isbell* and *Wohlford* may be distinguished from the present factual situation and the governing statutory schemes. Clearly, the cases are distinguishable from the present case.

Isbell, for example, specifically limited the issue before the Court in that case to "whether the circuit court erred in holding the Act [VRLTA] 'could not be relied upon by [Isbell] in support of a private cause of action for damages'" and noted that "the circuit court did not decide whether a landlord's breach of the statutory duties imposed by the Act can form the basis of a common law claim for negligence per se, nor is that issue before us in the appeal." *Isbell*, 644 S.E.2d at 73-74, n. 2. In the present case, however, the Court is essentially called upon to decide whether the statutory duties imposed on the landlords by a combination of the VRLTA, the BOCA code, and specific city ordinance provisions requiring abatement or warning about lead-based paint hazards can form the basis of a claim for negligence per se against these landlords.

And in the *Wohlford* case, the Court concluded that, under the particular circumstances of the case before it, "none of the [BOCA] code sections relied upon created a liability upon the landlord for the damages and injuries alleged [by the tenant] in the counterclaim." 523 S.E.2d at

822. *Wohlford* involved an action by a landlord for failure to pay rent, and a counterclaim by the tenant for injuries allegedly caused by the landlord's failure to comply with certain BOCA and maintenance code requirements regarding a leaky roof and fumes from a malfunctioning furnace. The tenant claimed that the landlord was guilty of negligence per se for violating the code provisions.

The *Wohlford* case involved a month to month tenancy of a house that was *not* governed by the VRLTA, and the lease arrangement between the parties had not specified who, as between landlord and tenant, would have responsibility for complying with maintenance and safety requirements under the BOCA and maintenance code. 523 S.E.2d at 822. Therefore, the landlord relied on V.C.A. § 36-97 and its definition of "owner" in arguing that the *tenant* was the "owner" for purposes of complying with the building and maintenance codes because she was a "lessee in control of a building or structure." § 36-97; *see Wohlford*, 523 S.E.2d at 822. The Supreme Court agreed with the landlord in *Wohlford*, noting: "As we stated earlier, the BOCA and Maintenance codes impose responsibilities on the 'owner' of the premises as defined in Code § 36-97 and the BOCA Code. Because the tenant was the person in control of the premises, not the landlord, *the tenant is defined 'owner' under the facts of*

this case, and the tenant has the maintenance and repair responsibilities claimed." *Id.* (emphasis added).

Unlike the tenant in the *Wohlford* case, the infant Plaintiff and her mother, Eveline Benjamin, as tenants under a residential lease arrangement (whether written or not written) which is governed by the VRLTA, cannot reasonably be held to be "owners" for purposes of complying with the building and safety requirements pertaining to abatement or warning about lead-based paint hazards. The responsibility for complying with those safety and health requirements falls primarily and squarely on the landlords in this case, either under a disputed written lease (Appellant's Brief at 21-23), or clearly under the terms of the VRLTA, with or without a written lease. (Appellant's Brief at 24-26). Contrary to the *Wohlford* situation, the present matter *is* governed both by the terms of the VRLTA and by the specific safety and health code requirements governing lead-based paint. And, in a residential tenancy governed by the VRLTA, the plain, unambiguous terms of the Act provide that such building and safety code compliance is the responsibility of the *landlord*. V.C.A. § 55-248.13(A)(1) and (2). Under the VRLTA, the *only* requirement on the part of a residential tenant pertaining to compliance with building or safety codes is found in V.C.A. § 55-248.16(A)(1), which provides that a tenant

shall "[c]omply with all obligations *primarily imposed upon tenants* by applicable provisions of building and housing codes." (emphasis added). Here, there is nothing in any of the building or safety code provisions which would place on a residential tenant the *primary* obligation of abating or warning about lead-based paint hazards within the rented premises. Such responsibility lies primarily with the landlord, as the statutory scheme makes clear and as has been admitted by the Defendant Ronald Hunt in this matter. (Appellant's Brief at 27-28).

Under such circumstances then, the qualifying language of V.C.A. § 36-97 concerning the definition of "owner" for purposes of compliance with building and safety codes would come into play, wherein it states: "As used in this chapter, *unless the context or the subject matter requires otherwise*, the following words or terms shall have the meaning herein ascribed to them . . . ." (emphasis added). In the *context* of a residential tenant whose young child is exposed to harmful lead-based paint within the demised premises, and where the tenancy is governed by the requirements of both the VRLTA and specific building and safety code provisions, no reasonable application of the statutory scheme or the common law duties pertaining to landlords and tenants can place the duty of complying with the safety statutes anywhere but on the shoulders of the

Hunt landlords in this case. And, to the extent the Hunts were in violation of the building, safety and health provisions governing the abatement or warning about lead-based paint hazards, they were guilty of negligence per se and may have liability imposed against them based on the negligence per se doctrine under Virginia law. *See McGuire v. Hodges*, 639 S.E.2d at 288.[1]

Furthermore, in the event the landlords continue to rely on *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344, 347 (1998), as somehow supporting the proposition in this case that the infant plaintiff cannot recover because "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract," *id.*, such authority is simply inapplicable under the facts and circumstances of this case. Under

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[1] It should be noted that the landlords herein have attempted to distinguish *McGuire v. Hodges* from the present situation by arguing that in *McGuire* "the plaintiff was an invitee upon the premises owned *and occupied* by the defendant." (Appellee's Corrected Brief in Opposition to Petition for Appeal at 7) (emphasis in text). First, there is nothing in the *McGuire* opinion to suggest that the child visitor on the residential premises was considered an "invitee" for purposes of the common law duties that are owed by a premises owner to "invitees." Moreover, there is nothing in the opinion to suggest that the "invitee" status of the child or the fact that the owner of the home also "occupied" it were important in any way to the Court's analysis of whether the homeowner could be held liable based on negligence per se for violation of a safety statute intended to protect persons such as the child in that case.

the doctrine of negligence per se, there is nothing to suggest that the duty breached must be a "common law" duty. Indeed, as noted by the Court in *McGuire*, under the doctrine of negligence per se, "violation of such a [safety] statute provides the elements of a duty and breach." 639 S.E.2d at 288. And it is clear that the Plaintiff child in this case is not basing her claim on a duty that exists "solely by virtue of the contract." The landlord's duty to comply with the building and safety code provisions, thus forming the basis of an action for negligence per se, is not based merely on contract, but is based on an agreement, on the VRLTA governing landlord duties toward residential tenants (with or without an agreement), and on the entire safety and health statutory scheme regarding the abatement or warning about lead-based paint hazards. It would be disingenuous for the landlords to say that Plaintiff's claim for tort damages here is based merely on an alleged breach of contract. Therefore, cases such as *Richmond Metropolitan Authority* are simply inapplicable.

Finally, further support for Plaintiff's position here – that personal injury liability may be imposed against the landlords for their failure to comply with the statutory requirements pertaining to the abatement or warning about lead-based paint hazards within the demised premises – can be found in the "owner and agent compliance" statute that was

enacted in 2000, even though it would not specifically govern this action for injuries that took place before 2000. *See* Va. Code Ann. § 8.01-226.7 (2008). The statute provides immunity from personal injury liability for premises owners or their agents in situations where they can demonstrate compliance with various notification requirements pertaining to residential lead hazards. The statute provides in pertinent part:

> C. *An owner of a residential dwelling*, or agent responsible for the lead-based paint maintenance of a residential dwelling, who has complied with the requirements of the United States Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. § 4851 et seq.) shall not be liable for civil damages in a personal injury or wrongful death action for lead poisoning arising from the condition of the residential dwelling, *provided that before* the purchaser signs any contract to purchase the residential dwelling, or *the tenant signs any lease for an initial term to rent the residential dwelling*:
>
> 1. An EPA-approved lead hazard information pamphlet was *provided to the purchaser or lessee;*
>
> 2. The owner or agent responsible for the lead-based paint maintenance of a residential dwelling *disclosed to the lessee the presence of any known lead-based paint and/or lead-based paint hazards* and any additional information or reports about which the owner or such agent had of their own actual knowledge concerning the known lead-based paint or lead-based paint hazards;
>
> 3. The purchaser *or tenant* signed a written statement acknowledging the disclosure and receipt of the literature;
>
> 4. With regards to lead-based paint and lead-based paint hazards, the painted surfaces of the residential dwelling were maintained in compliance with the International Property

Maintenance Code of the Uniform Statewide Building Code; and

5. The disclosure requirements in subsection C *shall continue during the term of the tenancy* for any new information in the possession of the owner or about which the owner has actual knowledge concerning the presence of lead-based paint or lead-based paint hazards.

V.C.A. § 8.01-226.7 (emphasis added).

As the emphasized portions of the statute demonstrate, it is apparent that the state legislature in 2000 was under the impression that personal injury liability *could* be imposed against *landlords* for injuries to *residential tenants* based on violations of statutes pertaining to the abatement of or warning about lead-based paint hazards within the demised premises. Otherwise, there would be no need for the specific immunity provisions built into § 8.01-226.7. If landlords had no statutory or common law duty to abate or disclose concerning such lead-based paint hazards prior to 2000, there would be no need to address such immunity in the statute. Thus, the implication of the 2000 enactment is clear – that landlords did and do have potential personal injury liability to tenants for violation of the statutes pertaining to lead-based paint, limited to a certain extent as of 2000 by the immunity provisions of § 8.01-226.7 based on appropriate disclosures.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S COMMON LAW NEGLIGENCE CLAIMS FOR NEGLIGENT REPAIR AND FAILURE TO WARN ABOUT LATENT DEFECTS; MATERIAL QUESTIONS OF FACT EXISTED AS TO THE THOSE CLAIMS, PRECLUDING SUMMARY JUDGMENT.

The Appellant's Brief cogently addresses the reasons why the trial court was in error in dismissing Plaintiff's common law negligence claims for negligent repair by the landlords and for failure to warn about latent defects. (Appellant's Brief at 29-34). The pleadings, the summary judgment facts, and the law support the conclusion here that summary judgment was inappropriate, especially where there are specific allegations in the Complaint that the landlords failed to use due care in making repairs to the premises, and that they failed to warn the tenant-plaintiffs about latent defects (the lead-paint hazards) which the landlord was aware of but the tenant was not. (Appellant's Brief at 32).

Indeed, the Hunt defendants have specifically acknowledged that a landlord does have a duty to use ordinary care when making repairs, but then takes the rather remarkable position that they owed no duty under a theory of negligence liability because they did not voluntarily undertake to make repairs on the premises. (App. at 21). For instance, as part of the landlords' arguments in opposition to the Petition for Appeal, the landlords state: "After the Hunts purchased the property, neither the Hunts nor any

employee of Genesis Properties, Inc., ever[] came upon the property to do any maintenance or repairs and there were no communications between the Benjamins and the Hunts other than the Benjamins simply sending in their monthly rent check." (Corrected Brief in Opposition to Petition for Appeal at 3). In other words, despite record evidence and admissions establishing that the Hunts had actual knowledge that the properties they purchased from the Beckstoffers were in poor condition and were in violation of the lead-based paint safety legislation, and despite acknowledging that it was the landlords' (the Hunts') responsibility to eradicate or warn about the lead-based paint hazards, the landlords essentially claim that they simply chose to ignore the problems and do nothing.

In essence then, the landlord defendants in this case attempt to rely on a common law notion of "non-liability" on the part of a landlord where the tenant occupies a free-standing dwelling that the landlord knows to be unhealthy and dangerous to children occupants by taking the rather cynical position that they could *choose to ignore* the problems and *choose not to warn* the inhabitants, with impunity, even though there are clear and specific statutory mandates that required them to do otherwise. Such a "hands off" attitude and blatant disregard for the health and safety of

residential tenants are some of the very reasons why specific legislation in the form of the VRLTA, the BOCA code, and particular statutes regarding lead-based paint have been adopted – to impose a duty to act on the part of landlords and to protect children tenants. As suggested in the "Introduction" to these Arguments, above, such an unjust result could not reasonably have been the intention of the legislature or the City of Richmond in adopting the protective measures, and it is hoped that such was not the intention of this Court in its rulings in cases such as *Isbell* and *Wohlford*.

And finally, as the Appellant's Brief articulates well, important issues of material fact existed in this case concerning the landlords' failure to warn about the lead-based hazards within the demised premises, and whether the mother of the child Plaintiff had sufficient knowledge about the hazards so as to obviate a common law duty to warn about such latent defects. It is clear that factual issues existed as to whether the landlords violated *statutory duties* which proximately caused injuries to the child. Likewise, factual issues existed as to the landlords' common law duties to warn about latent defects and whether that failure can be considered at least a proximate cause of the child's injuries. (*See* Appellant's Brief at 34).

CONCLUSION

Based on the foregoing points and authorities, the Amicus supports the positions set forth by the Appellant in this matter: that the trial court erred in dismissing Plaintiff's claim based on negligence per se because the landlord defendants were responsible for complying with building and housing codes pertaining to the abatement of or warnings about lead-based paint hazards within the demised premises; and that the trial court erred in dismissing Plaintiff's claim based on common law negligence in failing to use due care in repairing the premises and in failing to use due care in warning about latent hazards within the demised premises. Material fact issues existed and exist on these issues which made summary judgment in favor of the Defendant landlords wholly inappropriate under the circumstances of this case. This matter should be reversed and remanded to the trial court for a trial on the merits of Plaintiff's claims.

Respectfully submitted,
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CERTIFICATE PURSUANT TO RULE 5:26(d)

I hereby certify that, pursuant to Rule 5:26(d), twelve paper copies of the foregoing Brief Amicus Curiae, along with one electronic copy on disc, have been hand-filed with the Clerk of the Supreme Court of Virginia, and three paper copies of the same have been mailed, postage prepaid this the 1st day of December, 2008, to the following:

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