To: Senior Partner

From: Phillip Imanlihen

Date: June 26, 2016

Re: Ima Plaintiff's Premise Liability Case.
Common Law Negligence; Negligence Per Se

Statement of Facts

Ima Plaintiff came into our office seeking assistance in bringing action against Surfside Rental and its owner, Sandy Beach. Our investigation determined that Surfside Rental, a Limited Liability Company (L.L.C.), is on the verge of bankruptcy, thus, you have determined that the firm will pursue actions surrounding *Negligence* and *Negligence per se.* These actions will be against Ms. Beach in her individual capacity as sole member of the L.L.C. You have asked whether we will be successful in such action and for a recommendation on whether the firm should take Mrs. Plaintiffs case.

The wedding ceremony for Mrs. Plaintiff's daughter, was scheduled on October 12, 2014. Prior to the wedding, the bride and groom, as any other couple preparing for marriage, diligently hunted for their reception venue. During their search, the soon-to-be newlyweds came across a property on 2576 Softshell Lane. The property was advertised by Surfside Rental L.L.C which was owned by Ms. Sandy Beach. This property is located on the oceanfront in the Sandbridge area of Virginia Beach. The advertising material for this property indicated that "a property evaluation is completed prior to each rental" and "trained professionals are used to identify unsafe conditions and to affect appropriate repair." Upon the couple expressing interest in the property on Softshell Lane, Karen Taylor, who was listed in Surfside Rental's advertising material as a former assistant building inspector, made contact with the couple. Soon after, the

couple entered into an agreement with Surfside Rental to use Surfside's property for their Oct. 12th reception. The mother of the bride, a resident of Chesapeake, our client, was excited to see her daughter reach the milestone of marriage.

What was supposed to be the best day of Mrs. Plaintiff's life began with the oceanfront wedding ceremony for Mrs. Plaintiff's daughter and her new son-in-law. Over seventy guests were invited to be part of this special day. Before their wedding, the bride, groom, and both of their parents met with Karen Taylor, a representative of Surfside Rental, to finalize the reservation. As part of the finalization process, Karen Taylor performed a walk-through with the wedding party. Knowing that they invited over seventy guests, the couple inquired if the property, specifically, the third-floor deck would accommodate all their guests. Karen Taylor, on behalf of Surfside Rental, indicated that the property deck was suitable for the number of anticipated guests. When Mrs. Plaintiff's daughter, the bride, noticed a wobbling stair leading to the third-floor deck, the bride specifically questioned Karen Taylor about the safety of the stairs and the deck. Karen Taylor, a former building inspector, reassured the couple that the stairs were intentionally designed that way. In finalizing the agreement, the couple noticed a provision within the lease, indicating that "any necessary repairs would be made as soon as possible." This provision comforted the couple and they proceeded with their dream day.

As part of the schedule of events at the reception, the best man would offer his toast and the couple would cut their cake. Forty guests, including Mrs. Plaintiff and her husband, gathered on the third-floor deck to watch the festivities. Other guests mingled around the pool and on the beach but no one used the second-floor deck since the third-floor deck gave the best view. As the best man prepared to give his well-rehearsed speech, the third-floor deck collapsed in two stages; with the deck closest to the house dropping about a foot eventually collapsing. Mrs. Plaintiff fell

about ten feet onto the second floor-deck and landed on her husband, who, as a result of the deck collapsing, suffered a concussion, a fractured vertebra, and a ruptured colon. When Mrs. Plaintiff fell on her husband, both were struck by falling glass plates, a plastic banquet table and a stereo speaker. To add to the nightmare, when Mrs. Plaintiff looked up she noticed that her daughter and her new son-in-law were in the pool. Mrs. Plaintiff later learned that her daughter suffered a broken wrist after being trapped underwater by the debris from the deck. Mrs. Plaintiff also noticed that the whole backboard of the deck had pulled away from the house and that the nails were rusted. It was later determined that the nails did not meet the then-applicable building code.

In the aftermath of the collapse, paramedics and police on the scene arranged for twenty-four people to be taken to the hospital including the newlyweds. At this time, due to her husband's injuries, Mrs. Plaintiff declined medical attention; instead, Mrs. Plaintiff focused on the health of her daughter and her husband. After experiencing pain in her neck and numbness in her left arm, Mrs. Plaintiff sought out her primary doctor. Due to this unfortunate event and the injuries sustained as a result of the deck collapsing, Mrs. Plaintiff missed five weeks of work as a mortgage banker. Had Mrs. Plaintiff worked during those five weeks, she would have earned about $14,000, but, instead, Mrs. Plaintiff incurred about $2,500 out-of-pocket medical expenses.

Ms. Sandy Beach, a degreed structural engineer is the founder, owner and managing partner of Surfside Rental and Shore Construction Inc. Shore is a construction company also owned by Ms. Beach at the time that the property in question was built, constructed the deck on 2576 Softshell Ln. in the year 2010. Ms. Beach briefly occupied the property as her primary residence. Later, it was determined that the building inspector never exited his truck and just signed the paperwork during the construction of the property in question. Additionally, the stairs

and deck footing used during the construction were the kind readily available at home improvement stores.

There is nothing in the record that indicates if Surfside Rental or Ms. Beach applied to have the occupancy classification for the property changed from a residential to an assembly classification per the Virginia Uniform Statewide Building Code. Additionally, the record is silent as to what type of agreement was signed between the parties, particularly, whether the couple signed a rental agreement or a lease that only permitted them to use the venue.

Questions Presented

I. Under Virginia's interpretation of common law negligence, is a landowner who also happens to be the constructer of a structure that violated the Uniform Statewide Building Code, be held liable for injuries sustained to a guest when the landowner (1) mutually benefits from the visit of the guest (2) failed to exercise due care to ensure to safety of the guest and; (3) the failure resulted in significant physical and economical injury?

II. Under Virginia's *Negligence per se* doctrine, can a homeowner, who owns the building contractor company that constructed the home, be held liable for injuries sustained to a guest on his premises as a result of a collapsed deck when (1) the guest is a resident of Chesapeake, VA and a member of the class of people the Uniform Statewide Building Code (USBC) was enacted to benefit; (2) the property in question fails to comply with building standards set by Virginia statutes, particularly, the USBC; (3) the type of deck collapse that happened in the property is the kind that the USBC was designed to protect against; (4) the violation of the USBC is the direct and proximate cause of guests injury?

Brief Answer

I. Probably so. Under Virginia's interpretation of common law negligence, if a guest is classified as an invitee, a landowner is likely liable for injuries inflicted on a guest due to the landowner's failure to use ordinary care if the landlord's failure is the proximate cause of an injury resulting in damages.

II. Probably so. A court should determine that the USBC was enacted to protect residents of the Commonwealth from injuries such as one sustained from a collapsed deck and the failure to comply with the USBC was the proximate cause of the injuries to the guest.

Discussion

I. Negligence/Premises liability

Negligence is a common law tort that requires the showing of "a legal duty, a breach of the duty, and proximate causation resulting in damages." Autrium Unit Owner Ass'n v. King, 266 Va. 288, 293 (2003). Only when "there has been failure to perform some legal duty which the defendant owes to the party injured" does a negligence claim becomes actionable. Balderson v. Robertson, 203 Va. 484, 487-88 (1962). Whether a legal duty in tort exists is a pure question of law." Volpe v. City of Lexington, 281 Va. 630, 636 (2011).

A. Status

In a premises liability case, Virginia courts consider the status of the plaintiff in determining the duty owed to the injured party. Guests that come upon the permanent premises

of another are classified as either invitees or licensees. Pettyjohn & Son v. Bashman, 126 Va. 72, 77 (1919). In the Commonwealth of Virginia, "a licensee is one who enters for his own convenience or benefit with the knowledge and consent, express or implied, of the owner or occupier." Pearson v. Canada Contracting Co., 232 Va. 177, 182-83, (1986). An individual gains invitee status to a premises "where there is a common interest or mutual advantage" between the visiting individual and the land owner. Bennett v. R.R. Co., 102 U.S. 577, 585 (1880).

A guest is an invitee in one of two situations. First, a guest can be an invitee "[w]here there is an express invitation to the visitor." Richmond v. Gizzard, 205 Va. 298, 302 (1964). Second, "where the status depends upon an implied situation the visitor is an invitee, if the premise [is] thrown open to the public and the visitor enters in pursuant to the purpose for which they are open." Id. When it is established that the plaintiff had a "special relationship" with the defendant as an invited guest, for the purpose of doing business, a court grants that plaintiff *invitee* status. *See* Yuzefovsky v. St. John's Wood Apts., 261 Va. 97, 107, (2001), Wright v. Webb, 234 Va. 527, 530 (1987). On the contrary, social invitees or a social guest is an "invitee who is not an invitee." Bradshaw v. Minter, 206 Va. 450, 452-53 (1965). In Virginia, "a social guest, however cordially he may have been invited and urged to come, is not in law an invitee, but is nothing more than a licensee." Id. The court in Richmond held that guests invited to a premises by one who leases such premises is an invitee as long as the person invited comes for the purpose of the lease and the lease permitted the use of the area in question.

In Richmond, a fire extinguisher fell off the wall at a church injuring a sixteen-year-old boy. The City of Richmond had title to the property in question. The city came to an agreement that they would purchase the property from the church but allow the church the "right to use and occupy" the property for "religious worship and other purposes." Richmond v.

Gizzard, 205 Va. 298, 300 (1964). The City also agreed to "maintain the annex in reasonably good order and repair" and to make all repairs "for the purpose set out in the aforesaid lease." Id. In finding that the boy was an invitee, the court relied on the facts that the lessor (the city), "knew the building was open" to guest that desired to attend church and that the church "was entailed to such spaces for the purpose of is religious activities, and for the purpose of receiving any person who me it chose to admit." Id. at 301. The court concluded that since the church was "thrown open to the public and the [boy] enter[ed] pursuant to the purpose for which they are open" the boy is an invitee of the City of Richmond. Id. at 302. In other words, since the City's invitation to the church extended to the use of the place where the plaintiff was injured, and the church was allowed to invite whoever they desired and invited the plaintiff, the plaintiff is an "invitee."

In contrast, the court in Pettyjohn & Sons found the plaintiff was a mere licensee when the use of the structure in question was not "for the common interest and mutual benefit of both parties." Pettyjohn & Sons v. Bashman, 126 Va. 72, 80 (1919). The plaintiff in Pettyjohn & Sons was an employee of a subcontractor contacted to build an addition to a hotel in the City of Roanoke who was injured when he fell from the scaffolding at the construction site. Although the scaffolding was "built for use in doing work on the face of the gable" the plaintiff was using it to access the roof. The Virginia Supreme Court held that since the plaintiffs use of the scaffolding was "simply convenient" for him, and there was no work related reasons for the plaintiff to use the scaffolding, "the use of it was as a licensee and not as an invitee." Id.

Mrs. Ima Plaintiff should be classified as an invitee because "there is common interest and mutual advantage" between Ima Plaintiff and Ms. Sandy beach. Bennett v. R.R. Co., 102 U.S. 577, 585 (1880). Mrs. Plaintiff's daughter paid Ms. Sandy Beach to use her premises for her

wedding. The monetary payment is an "advantage" to Ms. Beach while use of the property was to be the advantage to Mrs. Plaintiff. Thus, the landowner, Ms. Beach, and the injured party, Mrs. Plaintiff, had "common interest" and "mutual advantage" for the visit. Similar to the Richmond case discussed above, Ms. Beach gave Mrs. Plaintiff an express "right to use and occupy" the third-floor deck when she permitted the newlyweds to use her premises for their reception in exchange for money. Ms. Beach knew the third floor deck was thrown open and that guests were entitled to use such spaces.

B. Duty and Breach

Ms. Sandy Beach had a duty to use reasonable care in maintaining the deck and to make reasonable inspections in order to determine if repairs were needed. Additionally, Ms. Sandy Beach had a duty to make repairs within a reasonable time and not allow invitees on the property until repairs were completed. In the least, Ms. Sandy Beach owed her invitees the duty to warn them of dangers on the premises. "An owner must use ordinary care to keep his premises reasonably safe for an invitee." RGR, LLC v. Settle, 288 Va. 260, 306 (2014). Additionally, "unless a dangerous condition is open and obvious, the invitee has the right to assume that the premises" are in safe condition. Roll 'R' Way Rinks, Inc. v. Smith, 218 Va. 321, 327 (1977). Before a court will hold a landowner liable for injuries sustained by an invitee due to the unsafe condition of the premises, "it must be shown that the owner had knowledge of the alleged unsafe condition." Id.

In Roll 'R' Ways Rink, Inc., the court held that a landowner owed an invitee a duty to warn, when the invitee is unaware of unsafe condition. Id. The court reasoned that because "no warning was issued" about a known defect on the premises, a negligence claim is actionable. Id.

at 329. In Roll 'R' Ways Rink, Inc., the plaintiff "rented defendants rink for approximately two hours" and while attempting to use a ramp at the rink, plaintiff fell and injured his right knee. Id. at 324. The court held that because the "defendant periodically discovered and replaced loose screws and installed additional screws" the defendant "recognized the hazardous potential of the defect" and could have warned or promptly repaired the danger to the ramp. Id. at 328.

On the other hand, the court in Tate, held that when a danger is obvious to the invitee, as it would be to the landowner, a landowner does not violate their duty by not warning or immediately repairing the dangerous condition. Tate v. Rice, 227 Va. 341, 346 (1984). In Tate, the Plaintiff was an egg delivery invitee of the defendant that "fell fracturing his wrist" at the defendant premises when he slipped on accumulated snow. Id. In finding that the landowners were not negligent, the court held that "the duty of the owner . . . of a private residence to maintain his premises in a condition which is reasonably safe for an invitee does not extend to warning of, or removing a danger that is open and obvious." Id. at 348.

Thus, because the agreement between Ms. Beach and Mrs. Plaintiff's daughter, expressly included the use of the third-floor deck, Mrs. Plaintiff is an invitee of Ms. Beach. Mrs. Plaintiff's daughter invited her mother to use the deck that Ms. Beach rented for profit, thus Ms. Beach owed Ima Plaintiff the duty "to use ordinary care to keep the premises reasonably safe for an invitee." RGR, LLC v. Settle, 288 Va. 260, 306 (2014).

Alternatively, even if Ms. Plaintiff were to be considered a licensee, she falls within an exemption to the general rule for licensees and Ms. Beach breached her duty to warn or use reasonable car even to her social guest licensee. The duty generally owed to a licensee is for the property owner to refrain from "any willful or wanton" conduct. Bradshaw v. Minter, 206 Va. 450, 453 (1965).

There are two exceptions that "permit recovery upon a showing of less than wi[l]lful or wanton injury." Reagan v. Perez, 215 Va. 325, 326, (1974). The first exemption is the active negligence exception where "a possessor of land is subject to liability to licensees, . . ., for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless the licensee knows or from facts known to them, should know of the possessor's activities and of the risk involved therein." Id. The second exemption, also known as the passive negligence exemption, dictates that a landowner is liable to a licensee when "the licensee is needlessly exposed to peril through the failure of the owner or occupant to warn him of danger" or failure of the landowner to "remove defects which the landlord knows are likely to cause harm to guest, and which he has reason to believe the guest is not likely to discover." Busch v. Gaglio, 207 Va. 343, 347-48 (1966). Regan v. Perez further held that either of the two exceptions discussed above "permit recovery upon a showing of less than wi[l]lful or wanton injury." Reagan v. Perez, 215 Va. 325, 326, (1974).

In holding that the plaintiff fell under the second exemption, the court in Busch reasoned that by "permitting social guests" to come on his premises without giving "any warning" of the presence of danger, the landowner was liable to the licensee for injuries caused by the condition on the land. Busch v. Gaglio, 207 Va. 343, 349 (1966). In Busch, the landowner drove a sharp edge of a pipe into his lawn to prevent people from parking automobiles on the lawn. The plaintiff was a licensee and sustained injuries on the landowner's premises when her leg struck and became impaled upon the sharp pipe driven into the lawn. The court held that because the plaintiff "did not know, nor [had] reason to know, of conditions on the land and the risk involved" the landowner breached the duty afforded to the plaintiff as a social guest or licensee. Id.

Conversely, in holding that the plaintiff in Reagan did not fall under either of the exemptions to the general rule for licensees, the court reasoned that because the record made no reference to "what caused the structure to fall," the landowner could not be liable for negligence. Reagan v. Perez, 215 Va. 325, 326, (1974). In Reagan, a minor child "attended a birthday party at the home of the defendant" and used a "hammock which was attached at one end to a tree and at the other end to a brick chimney." Id. at 325. While swinging on the hammock the chimney fell and the falling debris injured the minor child. The court reasoned that it would be *res ipsa loquitur* "to accept [the] basic proposition that it was negligence, in and of itself to attach the hammock to the chimney." Id. at 326.

Therefore, if Ms. Beach argues that Ima Plaintiff can be nothing but a mere social guest and thus only gets the duty of avoiding willful and wanton conduct or gross negligence, such an argument can easily be defeated by Bradshaw, which held that showing "ordinary negligence or lack of ordinary care" suffices under either of the exemptions. Bradshaw v. Minter, 206 Va. 450, 453 (1965). In other words, even if a court classifies Mrs. Plaintiff as a licensee or a social guest, there is still an exception that allows Mrs. Plaintiff to recover. Essentially, even though a social guest is considered a licensee, the landowner cannot be affirmatively negligent or needlessly expose the plaintiff to known peril without warning the plaintiff. So regardless of whether a court finds Mrs. Plaintiff's status to be an invitee or a licensee, Mrs. Beach will likely still owe Mrs. Beach a duty of ordinary care.

Ms. Beach breached the duty owed to Mrs. Plaintiff when Ms. Beach did not make the third-floor deck reasonably safe for the purpose for which the deck was to be used or warn her invitees of the danger that the deck could collapse. The fact that the couple noticed and asked about the wobbling deck, combined with the fact that Ms. Beach is a structural engineer, shows

that Ms. Beach, as landowner, should have known or be reasonably expected to know of this peril on her property. Additionally, Ms. Beach violated her legal obligation to use ordinary care by not warning Mrs. Plaintiff or other guest of the known danger. Instead, Ms. Beach's agent informed Mrs. Plaintiff that the wobbliness of the deck "was intentionally designed that way." Finally, Ms. Beach, in her agreement with Mrs. Beach's daughter, provided that "any necessary repairs would be made as soon as possible" a duty that she clearly breached.

C. Proximate Cause/Damages

The Virginia Supreme Court described "proximate cause" as "an act or omission which, in natural and continues sequence, unbroken by an efficient intervening cause, produce[s] an event and "without which that event would not have occurred. Ford Motor Co. v. Boomer, 285 Va. 484, 487 (1962). If there is "no evidence to show a causal connection between the accident" and Mrs. Plaintiff's injuries, there is no evidence to show that Ms. Beach's negligence is the proximate cause of the injuries sustained by Mrs. Plaintiff. Roll 'R' Way Rinks, Inc. v. Smith, 218 Va. 321, 327 (1977).

Ms. Beach's breach was the actual and proximate cause of Mrs. Plaintiffs injury. Had it not been for Ms. Beach's failure to reasonably keep the third-floor deck safe, the deck would not have collapsed injuring Mrs. Plaintiff. Also, had Ms. Beach performed her duty to use ordinary care and informed Mrs. Plaintiff of the faultily installed deck or repaired the deck as promised, Mrs. Plaintiff and the other guests would not have been injured. As a result of these injuries, Mrs. Plaintiff has been damaged with medical cost, lost wages, and mental and emotional anguish.

D. Defenses.

In Virginia, "contributory negligence is an affirmative defense" that if proven, can completely bar a plaintiff from recovery. RGR, LLC v. Settle, 288 Va. 260, 284 (2014). The question a court must answer when making a determination as to whether the plaintiffs contributory negligence bars the plaintiff from recovery is whether from "an objective standard [did] plaintiff fail to act as a reasonable person would have acted for his own safety under the circumstances?" Id. If the court answers in the affirmative, the plaintiff would be found to be contributory negligent and thus not allowed to recover. In other words, if the defendant can "establish a prima facie" case that the plaintiff's negligence is "the proximate cause of the accident," the plaintiff is bared from recovering for the defendants' negligence. Id.

In RGR, LLC, the plaintiff brought a wrongful death action against a private railroad crossing and was awarded $2.5 million for the death of her husband, who was killed when his dump truck collided with a train. On appeal, the defendant claimed that the deceased husband "was contributory negligent for failing to look and listen for the train." Id at 283. The court held that because "it was impossible for the plaintiff to have seen or heard the train" the defendants claim of contributory negligence was unsubstantiated. Id. at 285.

An individual's "voluntary assumption of the risk of injury from a known danger operates as a complete bar to recovery for a defendant's alleged negligence in causing that injury." Arndt v. Russillo, 231 Va. 328, 332(1986). A jury uses "a subjective standard, which addresses whether a particular plaintiff fully understood the nature and extent of a known danger and voluntarily exposed herself to that danger" to determine if the defendant's *assumption of risk* defense is sustainable. Thurmond v. Prince William Prof'l Baseball Club, 265 Va. 59, 64 (2003). In Pettyjohn & Sons, the court found that subcontractor "took upon himself the risk of the

scaffold as he found it" when he voluntarily used the scaffold, without an invite from the landowner to do so. Pettyjohn & Sons v. Bashman, 126 Va. 72, 79 (1919).

The defenses of contributory negligence or assumption of risk should not be available to Ms. Beach. Mrs. Plaintiff was beyond reasonable to use the deck. As a matter of fact, Mrs. Plaintiff and her party went out of their way to inquire about the safety of the deck in question. The use of the deck was not just "simply convenient" to Mrs. Plaintiff as the use of the scaffold was to the plaintiff in Pettyjohn & Sons. A court should be unable to answer, in the affirmative, the question did "plaintiff fail to act as a reasonable person would have acted . . . under the circumstances?" Again, similar to Pettyjohn & Son, "it was impossible" for Mrs. Plaintiff to have known that the deck would collapse. Mrs. Plaintiff did not know the nails used to attach the deck to the structure and she went out of her way to even inquire whether there was a risk in using the deck only to be assured that use of the deck came with no risk. Thus, contributory negligee or assumption of risk are not affirmative defenses Ms. Beach should be able to successfully raise.

Ms. Beach is likely negligent due to the breach of the duty owed to Mrs. Plaintiff. Ms. Beach had a duty to use reasonable care in maintaining the deck. Ms. Beach had actual or constructive knowledge of the unsafe condition of the deck and failed to warn Mrs. Plaintiff of the unsafe condition. As a direct and proximate result of the breach, Mrs. Plaintiff was injured. Sandy Beach failed to exercise ordinary care to keep her premises reasonably safe in order to avoid the injury that was inflicted on Ima Plaintiff and should therefore be found liable for her negligence.

Ms. Beach owed Mrs. Plaintiff the legal duty of ordinary care if Mrs. Ima Plaintiff is considered Ms. Beach's invitee. Even if Ms. Beach were to argue that Ima Plaintiff was just a

mere licensee or social guest, Ima Plaintiff would fall under the exception established by Busch v. Gaglio. Therefore, Mrs. Plaintiff would be allowed to show less than willful or wanton conduct, the reduced duty afforded to licensees. Ms. Beach's breach of her duty was the proximate cause of the injury that caused Mrs. Plaintiff serious damages. Thus a negligence claim is actionable.

II. Negligence Per se

The Uniform Statewide Building Code (USBC) was developed for the purpose of "regulating the construction and maintenance of building and structures." Part I, USBC, Construction Code, Chapter 3, § 103.3. (2012). Virginia has also incorporated the International Residential Code (hereinafter IRC) by reference. The IRC are set of standards adapted by the International Code Council (ICC), a "nationally recognized organization" dedicated to developing model codes for safe structures. Id. The USBC incorporates the IRC by reference when it mandates that the *board* must give "the standards of the International Code Council" due diligence "in formulating the Code provisions." Id. at § 36-99(B).

The Virginia Supreme Court has held that "the doctrine of negligence per se represents the adoption of the requirements of the legislative enactment as the standard of conduct of a reasonable person." Evan v. Evan, 280 Va, 76, 84 (2010). Although a mere violation of the USBC will not necessarily lead to recovery based on *negligence per se*, violation of the USBC "like the violation of any statute enact to protect health, safety, a welfare is *negligence per se*. Macvoy v. Colony House Builders, Inc., 239 Va. 64,69 (1990).

To prevail in a negligence per se claim, the plaintiff must establish that (1) they "belong to the class of persons for whose benefit the statute was enacted," (2) the harm was "the type

against which the statute was designed to protect" and (3) "the statutory violation was the proximate cause" of the injury to plaintiff. Halterman v. Radisson Hotel Corp., 259 Va. 171, 176 (2000). The purpose of the Uniform Statewide Building Code is to "protects the public from personal injury." Moskowitz v. Renaissance at Windsong Creek, Inc., 52 Va. Cir. 459, 232460 (Cir. Ct. 2000). Violation of statutes enacted for public safety only shows that the defendant had a duty and breached that duty, thus, a plaintiff must "also proves that the failure to adhere to the statutory requirement was a proximate cause of injury" to have an actionable *negligence per se* case. Id.

A. Member of Class.

The first element, class of person for whose benefit the statute was enacted, can usually easily be disposed by looking at the statute in question. The Supreme Court of Virginia, in Williamson v. Old Brogue, Inc., 232 Va. 350 (1986), held that "because the act was not public safety" a *negligence per se* claim is unsustainable. In Williamson, the plaintiff relied on a Virginia statute that provided that "a seller of intoxicants who dispenses alcoholic beverages to an intoxicated person is guilty of a misdemeanor." Id. at 352. The court reasoned that because the statute was "passed in the wake of the repeal of Prohibition" and promoted "public morality" the statute was "not a public safety measure" thus, the Plaintiff "is not a member of the class for whose benefit the statutory provision in question was enacted." Id. at 355.

B. Violation

Similar to the first element, the second element, type of harm against which the statute was meant to prevent, may easily be disposed by looking at the statute in question. For example,

in Halterman v. Radisson Hotel Corp., 259 Va. 171, the court held that because the "the plain language of th[e] provision" did not require the defendant to act, the plaintiff could not sustain a *negligence per* se action. In Halterman, the plaintiff alleged that "by failing in all respects to provide information to him," a violation of a Federal statute, the defendant was negligent per se." Id. at 174. The statute provided that Radisson, the defendant, "was responsible for providing information about its hazard communications program" to "employers of other employees working at the same work site." Id. at 177. The court concluded that Radisson was compliant with the statute because they fulfilled their obligation of providing information to Halterman, thus, not violating the type of harm the statute was meant to prevent.

C. Proximate Cause

The third element of proximate cause is generally a factual issue to be decided by the trial court. In Virginia, the proximate cause of an event "is the act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces that event." Ford Motor Co. v. Boomer, 285 Va. 141, 150 (2013). In other words, had event A not occurred, event B or the event in question "would not have occurred. When resolving a question of proximate cause "each case necessarily must be decided upon its own facts and circumstances." RGR, LLC v. Settle, 288 Va. 260, 293 (2014). The proximate cause element of *negligence per se* was at issue in McGuire.

McGuire v. Hodges, 273 Va. 199 was a case that involved the drowning of a child. The McGuire's were invited Hodges Botetourt County, Virginia house that had a swimming pool in the backyard. After the locks to the gate went missing, "Hodges wrapped the chain around the gate and the gatepost to secure the gate." On the day of the incident, Hodges son invited the child

and the child father over to work on cars. After the car work hit a stall, the child's father discovered his son "floating in the backyard pool." Id. at 204. The child died at a local hospital two days later and the McGuires' brought an action for wrongful death against the Hodges. The jury found for McGuire but the judge set aside the jury verdict because "the evidence at trial failed to establish that the Building Code Violation relied upon by McGuire were a proximate cause of [child] death." Id. at 205.

The building code required that pool latches be self-latching and the latch itself must be 48 inches high. The Hodges did not have a self-latching gate and the latch was only 32 inches from the ground. It is no debate as to whether the Hodges violated the building code, the issue was whether the violation of the building code was the proximate cause of the child's death. Hodges argued that McGuire did not show that the child accessed the pool thru the gate that was in violation of the building code. The case turned on whether there was an alternative way to access the pool without using the gate that violated the building code. The Supreme Court of Virginia held that "it is sufficient to prove Mrs. Hodges' casual negligence if the jury could reasonably infer" that a violation of the building code caused the child's death.

Analysis.

There is no dispute that statute was enacted to benefit residents of Virginia. A person who lives in Chesapeake, Virginia will be a member of the class "whose benefit the statute was enacted." Id. Mrs. Plaintiff is a resident of the Chesapeake, thus, per the language of the code, "a resident of the Commonwealth." And a member of the class whose benefit the statue was enacted. Id. Similarly, there is no dispute that Ms. Beach violated the USBC.

First, Ms. Beach violated the requirement that when decks are "supported by attachment to an exterior wall, decks shall be positively anchored to the primary structure and designed for both vertical and lateral loads as applicable." This requirement is set by the International Residential Code (IRC), particularly, § 502.2.2. The section adds that "such attachment shall not be accomplished by the use of toenails or nails subject to withdrawal." It is apparent that the deck was not "positively anchored" and was "subject to withdrawal" primarily due to the use of "toenails."

Second, Ms. Beach violated § 502.2.2.1 of the IRC which provides that "placement of lag screw or bolts shall be placed [two] inches in from the bottom or top of the deck ledger and [two] inches from the ends." The rule additionally provides that "lag screws or bolts shall be staggered from top to the bottom along the horizontal run of the deck ledger." The lag screw or bolt for the deck in question were not placed two inches from the end, instead they were placed six inches from the ends of the deck ledger. Ms. Beach also failed to properly use staggered bolts and screws along he horizontal run of the deck ledger.

Third, Ms. Beach violated § 403.1.4 of the IRC which sets out the standards for deck footings and the rule that called for flashing to be used to "protect the fasteners from rain, moisture, and salt spray." A simple browse at the *Building Bulletin* on decks, provided by the City of Virginia Beach, pamphlet shows that the kind of footing sold at home improvement stores do not meet the code requirement. Ms. Beach violated this rule by using footing bought from a home improvement store.

Just as the court in McGuire found that the improper latch on the gate was the proximate cause of the minor's death, a court should find that the deck not being positively anchored and subject to withdrawal is the proximate cause of Mrs. Plaintiffs injury. A jury should easily be

able to reasonably infer that the violation of the building code caused the injury to Mrs. Plaintiff. In other words, there were no intervening circumstances between the collapse of the deck and Mrs. Plaintiff's injuries.

A court should find that Ms. Beach was *negligent per se* and that negligence was the proximate cause of Mrs. Plaintiff injuries. The deck was not attached directly to the structural component of the house, instead, the structure was simply nailed through non structural sidings with nails that were in blatant violation of the International Residential Code (IRC). Since the Uniform Statewide Building Code (USBC) was enacted to "protect the health, safety, and welfare of the residents of the Commonwealth," and the IRC has been incorporated by reference in the USBC, a violation of the building code is a violation of a statute enacted for public safety. Va. Code § 36-99(a). Also, since the building code was enacted to protect the public from personal injury, and Mrs. Plaintiff suffered a personal injury, the harm in this instant case is the type against which the building code was designed to protect against. Finally, the violation of the statute was the proximate cause of Mrs. Plaintiffs injury.

Conclusion.

Mrs. Plaintiff has an actionable claim of negligence and *negligence per se* against Sandy Beach and it is recommended that our firm takes Mrs. Plaintiff's case. First, Ms. Beach breached the duty owed to Mrs. Plaintiff as an invitee or licensee of her premises. Second, Mrs. Plaintiff is a member of the class the USBC was enacted to protect and the kind of injury sustained by Mrs. Plaintiff is the kind that the USBC was enacted to avoid and Mrs. Beach's violation of the USBC was the proximate cause of the injury caused to Mrs. Plaintiff.