The
JOURNAL
of
CIVIL LITIGATION

Published Quarterly by the
Virginia Association of Defense Attorneys

ARTICLES & NOTES

OPINIONS

MISCELLANY

VOL. XXX, NO. 4 WINTER 2018-2019

DEFENDING NEGLIGENCE PER SE CLAIMS UNDER VIRGINIA LAW

Michael R. Ward*
Jason R. Hodge*

The frequency with which negligence per se is invoked has been on the rise in recent years.[1] As a result, Virginia defense attorneys should familiarize themselves with the doctrine since negligence per se—while a fairly straightforward concept in theory—has occasionally generated some confusion in practice. Negligence per se permits establishing the applicable standard of care for a negligence claim by reference to an appropriate statute.[2] But it is often misinterpreted to mean that the plaintiff has proven his case as a matter of law. This important distinction should be kept in mind when litigating a matter in which negligence per se has been raised because even courts have sometimes confused these two concepts, usually to the detriment of the defendant.

This article will assist attorneys faced with a negligence per se claim by suggesting several options for defending against it. It first discusses the concept of negligence per se under Virginia law. Next, it distinguishes negligence per se from negligence as a matter of law. Last, it identifies several practical defense strategies for defending against negligence per se claims.

I. What Is Negligence Per Se?

In Virginia, negligence is "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under existing circumstances."[3] The four elements of a negligence cause of action in Virginia are (1) a legally cognizable duty, (2) breach of the duty by the defendant, (3) causation, and (4)

* Mr. Ward is a partner at McCandlish Holton, P.C. Mr. Hodge an attorney practicing in Richmond. Both are members of the Virginia Association of Defense Attorneys.

1 *See* Restatement (Third) of Torts § 14, cmt. f, at 157 ("Given the increasing frequency with which parties rely on statutory violations in seeking to show negligence, the issue of statutory purpose arises in many cases.").

2 When the term *statute* is used in this article, it is meant to comprise all forms of legislative enactment: state or federal statutes, state administrative regulations, federal administrative regulations, or local ordinances.

3 Moore v. Virginia Transit Co., 188 Va. 493, 498, 50 S.E.2d 268, 271 (1948).

damages.[4] "[T]o establish actionable negligence," the plaintiff bears the burden of pleading each of these four elements.[5]

The two readily recognizable sources for standard of care in Virginia are the common law (*i.e.*, the decisions of the Supreme Court of Virginia) and statutes.[6] When the alleged source of the standard of care is a legislative enactment, courts in Virginia often refer to this as negligence per se. The negligence per se doctrine is thus implicated when a legislative enactment articulates an applicable standard of care.[7]

This article will examine this second source of the standard of care that is found in appropriate statutes. The application of the negligence per se doctrine does not relieve the party seeking its application of the burden of proving all the remaining elements of his negligence cause of action. Rather, "[t]he doctrine of negligence per se represents the adoption of the requirements of a legislative enactment as the standard of conduct of a reasonable person," and as such, "[a] party relying on negligence per se does not need to establish common law negligence."[8] Stated another way, the standard of care for a negligence per se cause of action is determined by reference to an applicable statute and not by reference to the common-law standard of the conduct of reasonably prudent person.[9]

A. DUTY ' ' TANDARD OF CARE

One important aspect of the negligence per se doctrine is that the standard of care (*e.g.*, the conduct delineated in a particular statute) should not be equated with a legal duty that gives rise to a civil cause of action, which is a separate issue. The Supreme Court of Virginia recently addressed this distinction in *Parker v. Carilion Clinic*,[10] where the plaintiff sued a healthcare provider and two of its employees for divulging her private healthcare information. The trial court dismissed her negligence per se claims against the provider on demurrer, and the Supreme Court of Virginia affirmed.[11] The statute upon which plaintiff

---

4 *See* Steward v. Holland Family Props., LLC, 284 Va. 282, 287, 726 S.E.2d 251, 254 (2012) ("All negligence causes of action are based on allegations that a person having a duty of care to another person violated that duty of care through actions that were the proximate cause of injury to the other person.").

5 *See* Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 132, 523 S.E.2d 826, 830 (2000).

6 *Moore*, 188 Va. at 497–501, 50 S.E.2d at 270–72.

7 *See, e.g.*, Kimberlin v. PM Transp., 264 Va. 261, 563 S.E.2d 665 (2002) (administrative regulation); Butler v. Frieden, 208 Va. 360, 143 S.E.2d 881 (1965) (state statute and ordinance); Chesapeake & O.R. Co. v. American Exch. Bank, 92 Va. 495, 504, 23 S.E. 935, 937 (1896) (federal statute).

8 Evans v. Evans, 280 Va. 76, 84, 695 S.E.2d 173, 177 (2010) (quoting McGuire v. Hodges, 273 Va. 199, 206, 639 S.E.2d 284, 288 (2007) (internal quotations and brackets omitted)). Virginia's definition of negligence per se is consistent with the Restatement (Second) of Torts, which provides that the *source* of the "standard of conduct" can be found with reference to the common law, that is, established by judicial decision. RESTATEMENT (SECOND) OF TORTS § 285 (1965). Alternatively, it can be found with reference to a legislative enactment or administrative regulation. *Id.*

9 Parker v. Carilion Clinic, —- Va. —-, 2018 Va. LEXIS 158, at *32 (Nov. 1, 2018).

10 —- Va. —-, 2018 Va. LEXIS 158 (Nov. 1, 2018).

11 The Court reversed on another issue.

had based her negligence per se claim, and which she claimed defendants had violated, was the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA).[12] Taking the plaintiff's allegations as true for the purposes of the demurrer, the Supreme Court considered whether the healthcare provider's alleged HIPAA standard of care violation also constituted the violation of a legal duty, thereby giving rise to a private cause of action. The Supreme Court held that it did not and that the mere breach of a statute does not necessarily state a negligence per se cause of action. It further stated that it had never "imposed a tort duty on a healthcare provider to manage its confidential information systems so as to deter employees from willfully gaining unauthorized access to confidential medical information."[13] Thus, the alleged violation of the statutory prohibitions of HIPAA failed to state a cause of action because there was no existing legal duty of care; the existence of that duty was a legal question for the court to decide and, therefore, an issue that could be resolved on demurrer.[14]

The *Parker* decision is consistent with other decisions of the Supreme Court of Virginia, such as *Williamson v. Old Brogue, Inc.*, in which the defendant was alleged to have violated Virginia regulations concerning the sale of alcoholic beverages to intoxicated persons.[15] The Supreme Court of Virginia had never recognized a duty owed by a seller of alcoholic beverages to a customer who becomes intoxicated and injures himself or others as a result. It declined to do so in *Williamson*, stating that "the violation of a statute does not, by that very fact alone, constitute actionable negligence or make the guilty party negligent *per se*."[16] Thus, the statute at issue may provide a standard of care, but it does not create a cause of action or duty where none otherwise exists.[17]

The Supreme Court of Virginia has applied a three-part formula to determine if a statute delineates a standard of care that supports application of negligence per se in a particular case:

> First, the plaintiff must prove that the defendant violated a statute enacted for public safety. Second, the plaintiff must belong to the class of persons for whose benefit the statute was enacted and demonstrate that the harm that occurred was of the type against which the statute was designed to protect. Third, the statutory violation must be a proximate cause of plaintiff's injury.[18]

---

12 *Parker*, 2018 Va. LEXIS 158, at *3.

13 *Id.* at *32–33.

14 *Id.* at *34–35.

15 Williamson v. Old Brogue, Inc., 232 Va. 350, 355, 350 S.E.2d 621, 624 (1986).

16 *Id.*

17 *Id.*; *see also* Steward v. Holland Family Props., LLC, 284 Va. 282, 726 S.E.2d 251 (2012) (holding that absence of a tort-based duty of care precludes a cause of action based on a violation of a statute).

18 Kaltman v. All Am. Pest Control, Inc., 281 Va. 483, 496, 706 S.E.2d 864, 872 (2011) (internal citations omitted).

The first element identifies the type of statute that can be used to establish standard of care in an action for negligence. The second element requires determining whether the party seeking to invoke negligence per se is within the class of persons permitted to do so in reliance upon the specific statute in question. The first two elements are matters of law for determination by the court and not the finder of fact.[19] The final element—whether the alleged damages arose from the alleged breach of the standard prescribed by the statute in questions—is run-of-the-mill causation and a matter for the finder of fact to resolve.

In *Steward v. Holland Family Properties*, the Supreme Court further divided these requirements into a seven-part formula.

> A cause of action based on such a statutory violation is designated a negligence per se cause of action and requires a showing that the tortfeasor had a duty of care to the plaintiff, the standard of care for that duty was set by statute, the tortfeasor engaged in acts that violated the standard of care set out in the statute, the statute was enacted for public health and safety reasons, the plaintiff was a member of the class protected by the statute, the injury was of the sort intended to be covered by the statute, and the violation of the statute was a proximate cause of the injury.[20]

The Supreme Court in *Parker* appears to have found this formula useful, citing *Steward* and delineating the formula's constituent parts with seven roman numerals.[21]

> [A] negligence per se claim predicated on a statutory violation requires a showing that [i] the tortfeasor had a duty of care to the plaintiff, [ii] the standard of care for that duty was set by statute, [iii] the tortfeasor engaged in acts that violated the standard of care set out in the statute, [iv] the statute was enacted for public health and safety reasons, [v] the plaintiff was a member of the class protected by the statute, [vi] the injury was of the sort intended to be covered by the statute, and [vii] the violation of the statute was a proximate cause of the injury.[22]

Perhaps this clear recitation of the elements and usable formula will become the standard in such cases.

As discussed in detail below, the determination that such a statute is applicable to a given cause of action does not end the inquiry. To prevail on a claim involving negligence per se, the plaintiff must still prove all the other elements

---

19 *Id.* ("The first and second of these elements are issues of law to be decided by a trial court, while the third element is generally a factual issue to be decided by the trier of fact.").

20 284 Va. at 287, 726 S.E.2d at 254.

21 ___ Va. ___, 2018 Va. LEXIS 158, at *32.

22 Citing *Steward*, 284 Va. at 287, 290, and McGuire v. Hodges, 273 Va. 199, 206 (2007).

of a negligence per se claim. For example, the existence of a breach of the standard of care is still an issue, and it remains unaffected by negligence per se.[23] The reported opinions addressing negligence per se often involve cases where there is no dispute of a breach, but that is because of the particular facts in those cases. The plaintiff, even in a negligence per se case, must still prove to the fact finder that the defendant breached the statute, if it is disputed.[24] In addition, damages also remain an issue for the fact finder.[25]

B. VIRGINIA CODE SECTION 8.01-221

Plaintiffs sometimes attempt to rely on Virginia Code section 8.01-221 when advancing a negligence per se claim. Although cited occasionally in negligence per se cases, section 8.01-221 is not a straightforward codification of negligence per se doctrine but a more limited enactment. This statute states in its entirety:

> Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, even though a penalty or forfeiture for such violation be thereby imposed, unless such penalty or forfeiture be expressly mentioned to be in lieu of such damages. And the damages so sustained together with any penalty or forfeiture imposed for the violation of the statute may be recovered in a single action when the same person is entitled to both damages and penalty; but nothing herein contained shall affect the existing statutes of limitation applicable to the foregoing causes of action respectively.

In *Parker*, the plaintiff cited this statute hoping to save her negligence per se claim from dismissal on demurrer. The Supreme Court affirmed the dismissal because there was no duty incumbent upon the defendant that would support the cause of action. Addressing and rejecting plaintiff's reliance on section 8.01-221, the Supreme Court held that it did not *create* a cause of action. Rather, it had been enacted merely to prevent a party charged with negligence from raising as a defense his having already been punished under a penal statute.[26] That said, a criminal or civil statute that includes a fine can be relied upon for purposes of negligence per se. Section 8.01-221 thus means that these laws can form the basis for negligence per se, so long as the statute at issue does not expressly

---

23 Schlimmer v. Poverty Hunt Club, 268 Va. 74, 79, 597 S.E.2d 43, 46 (2004).

24 *Id.* ("[I]f the violation of the statute is in dispute, that issue is also for the trier of fact.").

25 *Cf.* Jordan v. Jordan, 220 Va. 160, 162, 257 S.E.2d 761, 762 (1979) ("Negligence, contributory negligence, proximate cause, and foreseeability are ordinarily questions for the jury . . . ."); Hamilton v. Glemming, 187 Va. 309, 316, 46 S.E.2d 438, 442 (1948) (noting that the statute in question did not change the law of negligence and that the burden was "still on the plaintiff to prove that the failure of the defendant to observe the duty imposed by the statute caused the injury").

26 *Parker*, 2018 Va. LEXIS 158, at *35–36 (quoting Vansant & Gusler, Inc. v. Washington, 245 Va. 356, 360, 429 S.E.2d 31 (1993)).

prohibit its use as such.[27] It is important to keep in mind that section 8.01-221 does not create a new right of action for plaintiffs, but rather it "preserves any existing right of action that an injured person may have against a wrongdoer who has previously been the subject of statutory penalties for his misconduct."[28]

Negligence per se is firmly established under Virginia common law. The Supreme Court of Virginia has discussed its various parameters in many contexts over the years.[29] Now, this is not to say that negligence per se is without critics. As one leading treatise notes, the underlying history and rationale for negligence per se is somewhat opaque and arguably questionable.[30] For why should a statute establish a standard of care in a negligence case if the legislature failed to explicitly state such? Professor Dobbs and his colleagues (echoing similar arguments by their predecessors in Prosser and Keeton on the Law of Torts) somewhat humorously noted:

> Although there are occasional statutes that genuinely imply that a tort claim will lie for their violation, the argument that the legislature invariably forgets what it is aiming to do, while perhaps tempting to a satirist of the political process, seems to provide no basis for a responsible development of rules by the judiciary.[31]

These concerns, however valid as they may be academically, are foreclosed by the numerous opinions by the Supreme Court of Virginia adopting and applying the negligence per se doctrine under Virginia law.

II. Distinguishing Negligence Per Se from Negligence As a Matter of Law

As the foregoing discussion makes clear, negligence per se is not negligence as a matter of law. The concepts are distinct but often confused or conflated. The existence of a standard of care set by statute does not by itself resolve whether the person charged with negligence actually breached that standard of care. There still must be evidence that the person did so. While the law in other jurisdictions may be different or more nuanced, Virginia law tries to keep these

---

27 *See* Morgan v. American Family Life Assurance Co., 559 F. Supp. 477, 484–85 (W.D. Va. 1983) ("[I]t is consistent with the idea that the provision for a statutory penalty does not foreclose a person's right to recover damages for the same statutory violation unless the statute so provides."); *see also* Evans v. Evans, 280 Va. 76, 84, 695 S.E.2d 173, 177 (2010) (finding that plaintiff could not rely on Virginia Code § 46.2-1095 in her negligence per se claim because the General Assembly clearly indicated that it was not creating a statutory standard of care through its enactment of this statute); Restatement (Second) of Torts § 287.

28 *Morgan*, 559 F. Supp. at 484; *see also* Charles E. Friend, Personal Injury Law in Virginia § 2.3.2(A), at 23 (3d ed. 2003) ("The doctrine of negligence per se does not create a cause of action where one did not exist at common law." (citing Williamson v. Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621 (1986)).

29 *See, e.g.*, Standard Oil Co. v. Roberts, 130 Va. 532, 537, 107 S.E. 838 (1921) (applying negligence per se to an ordinance).

30 Dan B. Dobbs et al., The Law of Torts § 150 (2d ed. 2011).

31 *Id.*

concepts separate, although they are still sometimes blended.[32] One leading Virginia treatise has sought to preserve the distinction and states the following:

> NOTE: Care should be taken to distinguish "negligence per se" from "negligence as a matter of law." "Negligence per se" involves the use of a statutory standard to determine negligence. However, even when the common-law "ordinary prudent person" standard is being utilized rather than a statutory standard, if reasonable minds could not differ as to the conclusion to be reached, so that the issue is taken from the jury and decided by the judge, it is "negligence as a matter of law."[33]

The issue of negligence as a matter of law often arises procedurally at the trial when one or both parties seek to strike certain claims and defenses, each asking the trial judge to decide such issues in the case "as a matter of law." This can remove issues from the jury for resolution by the trial judge. The Supreme Court has stated that negligence, contributory negligence, and proximate cause normally present fact issues for the jury to decide.[34] The trial court should decide these issues and take them from the jury only when reasonable people "could not disagree on the facts and inferences drawn therefrom."[35]

In contrast, negligence per se is a more modest concept in practice: it addresses only the source of the standard of care at issue in a negligence claim. It does not address whether there has been a breach or whether a duty owed to the plaintiff has been identified; nor does it address causation, damages, or whether negligence has been proved sufficiently to take the matter from the jury.

The concepts often appear to merge in cases where there is no factual dispute that the defendant violated the statute at issue. This may be due to an undisputed breach of the standard of care being decided "as a matter of law," despite the issues of causation and damages remaining undecided. Even the Supreme Court of Virginia has conflated the terms, although usually only in passing.[36]

Other well-regarded sources have conflated the terms and even the concepts themselves. The 2009 edition of Black's Law Dictionary makes the same mistake identified by Friend, namely, conflating negligence per se with negligence

---

32 *See generally* Hot Shot Express v. Brooks, 264 Va. 126, 134–35, 563 S.E.2d 764, 769 (2002) (stating that the defendant's violation of a statute constituted negligence per se, but concluding that trial court did not err in ruling that defendant was "negligent as a matter of law" for doing so).

33 FRIEND, PERSONAL INJURY LAW IN VIRGINIA § 2.3.2(A), at 22. Of note, the Supreme Court of Virginia positively cited this treatise in its recent decision in *Parker*. *See* 2018 Va. LEXIS 158, at *30–31.

34 Jordan v. Jordan, 220 Va. 160, 162, 257 S.E.2d 761, 762 (1979).

35 *Id.*

36 *See, e.g.*, Medlar v. Mohan, 242 Va. 162, 165, 409 S.E.2d 123, 125 (1991) (stating that "[m]ere proof that a motor vehicle skidded on a slippery highway does not establish the operator's negligence *per se*," but assuming to mean negligence as a matter of law as the Court was considering whether the defendant "was guilty of negligence as a matter of law"); *see also* Carson v. LeBlanc, 245 Va. 135, 140, 427 S.E.2d 189, 192 (1993) (describing conduct as negligence per se when discussing negligence as a matter of law). To be fair, it is unclear whether the Supreme Court was using *per se* as a term of art rather than in its commonly understood meaning.

as a matter of law by defining *negligence per se* as "[n]egligence established as a matter of law, so that the breach is not a jury question."[37] Black's 2009 definition is inconsistent not only with Virginia law, but also with an earlier edition of the same dictionary! Indeed, Black's Law Dictionary published in 1991 defined *negligence per se* as "[a] form of ordinary negligence that results from violation of a statute," a definition at least more closely aligned with Virginia law.[38]

In sum, not all cases involving negligence per se should be decided as a matter of law. There will often be factual disputes that constitute jury issues on breach, causation, and damages. It is incumbent upon a defense lawyer challenging a negligence per se claim to remind the court of the differences and to avoid the trap of merging the two concepts.

III. Practical Defense Strategies for Defending Against Negligence Per Se

A review of the case law reveals several practical strategies that defense attorneys can employ when responding to a negligence claim predicated on the alleged violation of a statute.

A. The Statute Does Not Apply to the Facts of the Accident

As simple as it may sound, whether negligence per se is an appropriate claim will often depend upon the facts of the case, and a defense attorney can argue that the statute identified by the plaintiff does not apply to the particulars of the case.

Some examples illustrate this. In *Baecher v. McFarland*, a five-year-old child approached a landowner's barbed-wire fence to look at a horse and ended up injuring herself on the fence.[39] Invoking negligence per se, the plaintiff identified two city ordinances: one prohibiting the use of barbed wire for enclosing any lot within the city of Norfolk and the other prohibiting the use of barbed-wire fencing along any public thoroughfare in the city.[40] The jury found in favor of the plaintiff, but the Supreme Court of Virginia reversed.[41] In doing so, the Court stated that it was "of the opinion that neither of the ordinances applie[d] to the situation presented."[42] Specifically, the Court found that the first ordinance did not apply because the fence was wholly on the landowner's property—a situation for which the ordinance was never meant to apply—and the

---

37 Black's Law Dictionary 1135 (9th ed. 2009). Notably, this definition remains unaltered in the 10th and most recent edition of Black's Law Dictionary.

38 Black's Law Dictionary 719 (Abridged 6th ed. 1991).

39 183 Va. 1, 3, 31 S.E.2d 279, 280 (1944).

40 *Id.* at 3–4, 31 S.E.2d at 280.

41 *Id.* at 3, 31 S.E.2d at 280.

42 *Id.* at 4, 31 S.E2d at 280.

second ordinance did not apply because the fence clearly was not situated along any public thoroughfare within the city.[43]

In *Kimberlin v. PM Transport, Inc.*, on a dark and stormy night, a truck driver pulling a tanker loaded with gasoline struck a rock in his lane in an area where rocks frequently fell onto the highway.[44] Gasoline began pouring out of the tanker.[45] The truck driver stopped the tanker on the highway. He attempted to warn an oncoming car, driven by the eventual plaintiff, who drove into the smoke created by the tanker and had her car engulfed in flames.[46] The Court considered numerous statutes and regulations identified by plaintiff and concluded that, given the facts of the case, none were appropriate for a negligence per se claim.[47]

Specifically, the Court held that Virginia Code section 46.2-888—which prohibited persons from stopping a vehicle in such a manner as to obstruct a highway except in certain situations—did not apply since the accident in that case arose out of an emergency situation, which constituted an exception under the plain language of the statute.[48] The Court also held that Virginia Code section 18.2-324—which prohibits depositing a hazardous substance on a highway—did not apply because, "[a]lthough the violation of a criminal statute may provide the basis for a wrongdoer's liability in a civil action, in the present case, the statute's violation requires proof of an intentional act and cannot provide the basis for a presumption of negligence."[49]

These two cases demonstrate situations in which a defense attorney can distinguish the facts of the case based upon the specific language of the statutes in question.

Other more specific fact patterns that look beyond the language of the applicable statute also merit mention. For example, plaintiffs sometimes invoke statutory provisions prohibiting the sale of alcohol to intoxicated persons or minors in advancing a negligence per se claim.[50] The Supreme Court of Virginia, however, has routinely held that such facts do *not* state a cause of action for negligence per se because "the sale of alcoholic beverages to a person is not a proximate cause of that person's later acts."[51] The Supreme Court of Virginia has also held that Virginia Residential Landlord and Tenant Act imposes con-

---

43 *Id.*

44 264 Va. 261, 265, 563 S.E.2d 665, 667 (2002).

45 *Id.*

46 *Id.* at 265–66, 563 S.E.2d at 667.

47 *Id.* at 267–71, 563 S.E. 2d at 668–70.

48 *Id.* at 270, 563 S.E.2d at 670–71.

49 *Id.* at 270–71, 563 S.E.2d at 671.

50 Robinson v. Matt Mary Moran, Inc., 259 Va. 412, 525 S.E.2d 559 (2000);Williamson v. Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621 (1986).

51 *Robinson*, 259 Va. at 416, 525 S.E.2d at 561–62.

tract—rather than tort—duties and thus "provides no basis for a negligence per se claim."[52]

These are but a few examples of instances where negligence per se claims were deemed inappropriate based on the facts of a case. The lesson then is that defense attorneys faced with negligence per se claims should parse the language, intent, and effect of a statute in order to be able to argue that the statute identified by the plaintiff does not apply to the facts of the case and therefore does not supply the standard of care in the negligence inquiry.

B. THE CITED STATUTE DOES NOT PROVIDE THE STANDARD OF CARE

Defense attorneys face another common challenge when the statute invoked by the plaintiff provides no standard of care. This can occur if the statute is overly broad or too general to provide guidance on what a reasonable and prudent person should do under the facts and circumstances of the case. Some argue that such a statute sufficiently defines the standard of care to allow it to be used as a benchmark in evaluating a defendant's conduct. There is little case law in Virginia either supporting or refuting this assertion, but that being said, there are some courts that find that negligence per se is unwarranted because of the broad reach of the identified statute.[53]

In *Kimberlin*, the plaintiff argued that the defendant truck driver violated federal and state administrative regulations requiring "extreme caution in the operation of a commercial motor vehicle" under hazardous conditions.[54] The Court held that whether the truck driver violated the regulation was a jury question, but regardless, the possible "violation of the regulation [did] not constitute negligence per se" because it "simply create[d] an expanded duty of care for the operation of commercial motor vehicles under the conditions stated therein."[55]

The Circuit Court for the City of Richmond found numerous legislative enactments (including a constitutional provision, a statute, and a regulation) too broad to support negligence per se in *K.I.D. v. Jones,*[56] a case against numerous defendants arising from sexual assault on a high school student. The court found

---

52 Steward v. Holland Family Props., LLC, 284 Va. 282, 289, 726 S.E.2d 251, 255 (2012).

53 Courts in Ohio, for example, have taken a similar stance in holding that general or broad statutes cannot support a negligence per se claim. *See* Eisenhuth v. Moneyhon, 161 Ohio St. 367, 375 119 N.E.2d 440, 444 (1954) ("[W]here there exists a legislative enactment expressing for the safety of others, in general or abstract terms, a rule of conduct, negligence per se has no application . . . ."); Swart v. Ohio Dep't of Rehab. & Corr., 133 Ohio App. 3d 420, 424, 728 N.E.2d 428, 430 (1999) ("[W]here the duty is defined only in abstract or general terms, leaving to the jury the ascertainment and determination of reasonableness and correctness of acts and conduct under the proven conditions and circumstances, the phrase negligence per se has no application." (internal quotations omitted)).

54 264 Va. 261, 267–68, 563 S.E.2d 665, 668 (2002).

55 *Id.* at 268, 563 S.E.2d at 668–69.

56 2016 Va. Cir. LEXIS 103 (June 8, 2016).

that each of the specific legislative enactments lacked a standard of conduct, the violation of which would support a negligence per se claim.[57]

The United States Court of Appeals for the Fourth Circuit has applied and interpreted Virginia law and identified the limitations of the negligence per se doctrine.[58] In *Talley v. Danek Medical, Inc.*, the court stated that "not all statutory provisions dictate a standard of care, and therefore not all statutory violations can provide a basis for establishing negligence per se."[59] As an example, the court noted that "[w]here a statutory provision does not define a standard of care but merely imposes an administrative requirement, such as the requirement to obtain a license or to file a report to support a regulatory scheme, violation of such requirement will not support a negligence per se claim."[60] This remains true "[e]ven if the regulatory scheme as a whole is designed to protect the public or to promote safety" because "the licensing duty itself is not a standard of care, but an administrative requirement."[61] The sensibility of this holding is evident when considering all the elements present in the synthesized, multipart tests identified by the Supreme Court of Virginia in *Parker v. Carilion Clinic*[62] and *Steward v. Holland Family Properties, LLC.*[63]

In sum, defense attorneys should be cognizant that not all statutes provide a standard of care and prepared to argue that an overly broad statute does not sufficiently define a standard of care to give rise to a negligence per se claim.

C. JUSTIFIABLE EXCUSES FOR FAILURE TO COMPLY WITH A STATUTE

A jury can find that a clear violation of a statute does not constitute a breach of the standard of care in certain situations in which the statutory violation is excused. While there are significant obstacles to making this argument successfully in Virginia, that does not mean that defense attorneys should refrain from making the attempt.

The negligence per se doctrine at common law ordinarily allowed for excuses for noncompliance with the terms of a statute. For example, the Restatement (Second) of Torts provides that negligence per se applies only to the "unexcused violation of a legislative enactment or an administrative regulation."[64] It further

---

57 *Id.* at *21–23 (finding statute generally defining certain roles and establishing criteria for the distribution of funding too broad); *id.* at *29–30 (finding that a regulation requiring that "the greatest care" be exercised in transporting children "states only an aspirational broad policy for a school board with respect to transportation of school children and does not articulate a cognizable standard of conduct the violation of which . . . would constitute negligence per se"); *id.* at *30–31 (finding that the provision in Virginia's Constitution providing a right to receive "an educational program of the highest quality" was "devoid of any specific standard of conduct which if violated would support a claim of negligence per se").

58 Talley v. Danek Med., Inc., 179 F.3d 154 (4th Cir. 1999).

59 *Id.* at 159.

60 *Id.*

61 *Id.*

62 — Va. —, 2018 Va. LEXIS 158 (Nov. 1, 2018).

63 284 Va. 282, 726 S.E.2d 251 (2012).

64 RESTATEMENT (SECOND) OF TORTS § 288B(1).

specifically identifies five situations when such a violation is excused, some of which are not uncommon.[65] For example, the incapacity of the actor is an excuse, as is the existence of an emergency[66] and the occasion when an actor "neither knows nor should know of the occasion for compliance."[67]

The example provided in the Restatement (Second) is telling. The driver of a vehicle does not know that the rear light has suddenly gone out because of a failure of the light bulb. The absence of a rear light is a violation of a statute. An accident ensues. As long as the driver did not know and did not have an opportunity to discover the problem, the driver is not negligent despite violating the strict terms of the statute by lacking a working rear light.[68] The Restatement (Second) further excuses an actor from the application of negligence per se situations when the actor "is unable after reasonable diligence or care to comply" or if "compliance would involve a greater risk of harm to the actor or to others."[69] The effect of these exemption doctrines is that the technical violation of the terms of a statute does not result in absolute or strict liability.

The description of these excuse doctrines and their effects was carried over, if not expanded, in section 15 in the Restatement (Third) of Torts. Official comment (a) to that section provides the rationale for such excuses: "The excuses recognized by this Section temper what would otherwise be the severity of negligence per se and also reintroduce a significant role for jury assessments in negligence per se cases."[70] The Restatement (Third) of Torts recognizes, for example, excusing the technical violation of a statute if the actor exercised reasonable care and attempted to comply with the statute, or if the violation of the statute was the result of its being confusing and unclear in its presentation to the public.

Whether Virginia jurisprudence recognizes excuses as a viable defense to the application of negligence per se remains unclear. On one hand, the Supreme Court has described negligence per se in terms that arguably require strict statutory compliance. For example, in *Standard Oil Co. v. Roberts*,[71] both the plaintiff and the defendant violated local ordinances. While analyzing whether defendant's desire to invoke negligence per se was supported by those violations, the Supreme Court of Virginia focused on whether the plaintiff's violation of an ordinance was more than "merely evidence tending to show such contributory negligence."[72] The Court concluded that a violation of the ordinance was conclusive proof of negligence and not merely evidence of the breach of the

---

65 *Id.* §§ 288A(2)(a) to (e).

66 *Id.*

67 *Id.*

68 *Id.* at Illustration 3.

69 *Id.* §§ 288A(2)(c) and (e).

70 RESTATEMENT (THIRD) OF TORTS § 15, cmt. a.

71 130 Va. 532, 536, 107 S.E. 838, 839 (1921).

72 *Id.*

standard of care. It stated, "The jury is not permitted to decide whether or not the violation of an ordinance under such circumstances is negligence."[73] In other words, the violation of the ordinance was negligence, and the jury should have been so instructed. The Supreme Court added that the issue of proximate cause was reserved for the jury to decide under the circumstances.[74]

On the other hand, language in *Hamilton v. Glemming* suggests that the Supreme Court would be receptive to allowing excuses as a defense to the failure to comply with the strict terms of a statute.[75] *Hamilton* involved an alleged violation of a statute requiring drivers to drive on the right half of the highway unless doing so was impracticable. Talking in general terms, the Supreme Court said in passing and without elaboration that cases may exist in which the "performance of a duty imposed by a statute [is] impracticable or excusable."[76]

Summarizing the foregoing section, the Supreme Court of Virginia has not expressly addressed whether it would adopt, in whole or in part, the concept of excused violations of statutes as found in the Restatements. In other circumstances, the Supreme Court has sometimes positively cited the Restatement (Second) of Torts as authority[77] but not always.[78] The Fourth Circuit, applying Virginia law in a negligence per se inquiry, has also positively cited the Restatement (Second) of Torts.[79]

Given the unsettled nature of the law on this issue, an attorney defending a client in a situation that could support excused violation of a statute as described in the Restatements should certainly consider advancing the argument. In doing so, a defense lawyer could rely on inferences present in *Butler v. Frieden*.[80] The defendants in *Butler* were alleged to have violated a Norfolk ordinance requiring dogs to be accompanied or leashed when in public, which the plaintiff relied upon to bring an action after being injured by defendants' unattended and unleashed dog.[81] In its decision, the Court favorably cited section 288B of the Restatement (Second) of Torts, which details the effect of "unexcused" violations of statutes, and held that the defendants had breached the standard of care identified in the Norfolk leash ordinance. By implication, then, the Court's reliance on and tacit approval of this section could give rise to the contention that situations exist where violations of statutes are excused and therefore not actionable.

---

73 *Id.* at 536–37, 107 S.E. at 839.

74 *Id.* at 537, 107 S.E. at 839.

75 187 Va. 309, 317, 46 S.E.2d 438, 442 (1948).

76 *Id.*

77 Mansfield v. Bernabei, 284 Va. 116, 125, 727 S.E.2d 69, 75 (2012) (adopting Restatement (Second) rule).

78 *See* Wright v. Webb, 234 Va. 527, 530, 362 S.E.2d 919, 921 (1987) (rejecting Restatement (Second) rule).

79 Talley v. Danek Med., Inc., 179 F.3d 154, 158 (4th Cir. 1999) ("Thus, in negligence per se cases, the courts 'adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation.'" (quoting RESTATEMENT (SECOND) OF TORTS § 286 (1965))).

80 208 Va. 352, 158 S.E.2d 121 (1967).

81 *Id.* at 355, 158 S.E.2d at 123–24.

D. USING NEGLIGENCE PER SE IN SUPPORT OF CONTRIBUTORY NEGLIGENCE

Negligence per se is not limited to primary negligence. The defendant can raise it to support a defense of contributory negligence. In an early case, *Standard Oil Co. v. Roberts*, the Supreme Court of Virginia addressed a situation in which both the plaintiff and the defendant violated a local ordinance.[82] Among the issues addressed by the Supreme Court was whether the plaintiff's violation of the applicable ordinance constituted negligence per se and thus overrode primary negligence. The Court concluded that it did not.[83] As with any other matter in which negligence per se is raised, the jury had to make a finding of proximate cause as between the two claims of negligence, determining if either were due to a party's breach of the cited ordinance.[84]

In a similar vein, the parties in *King v. Eccles* were involved in a car accident at an intersection in which the right of way was the primary issue in dispute.[85] The Court concluded that, based on a Virginia statute, the defendant had the right of way and that the plaintiff had "violated the statute and was guilty of negligence."[86] Since this decision was at odds with the finding of the trial court, the Court further found error in the trial court's refusal to instruct the jury using the defendant's proposed jury instruction. The refused instruction would have informed the jury that under the circumstances of the case, "it was the duty of the plaintiff to yield the right-of-way to the defendant, and if the plaintiff violated that duty he was negligent, and if such negligence was the sole or a contributing cause of the accident, the verdict should be for the defendant."[87] The Court also pronounced that the defendant's instruction "was a correct statement of the law."[88]

In *White v. Doe*, the plaintiff, a city policeman, sustained injuries when his motorcycle crashed during an attempt to apprehend the an unknown—and thus uninsured—motorist.[89] The crash occurred in an intersection when the plaintiff pulled up alongside the vehicle being driven by the unknown motorist, who abruptly braked and turned down the intersecting street, striking the plaintiff on his motorcycle in the process.[90]

After the jury returned a verdict for the plaintiff-policeman, the trial court set it aside because of the policeman's contributory negligence.[91] The trial court relied on Virginia Code section 46.1-190(e), which states that a person shall be

---

82 130 Va. 532, 536–37, 107 S.E. 838, 839 (1921).

83 *Id.* at 537–38, 107 S.E. at 840.

84 *Id.*

85 209 Va. 726, 726, 167 S.E.2d 349, 350 (1969).

86 *Id.* at 728, 167 S.E.2d at 351.

87 *Id.* at 729, 167 S.E.2d at 351.

88 *Id.*

89 207 Va. 276, 276–77, 148 S.E.2d 797, 798 (1966).

90 *Id.* at 277, 148 S.E.2d at 798.

91 *Id.*

guilty of reckless driving by overtaking or passing any other vehicle proceeding in the same direction at any intersection of highways.[92] On appeal, the Supreme Court of Virginia affirmed the trial court's decision because "[t]he occurrence in the dispute before us is of the very nature which [former] Code § 46.1-190(e) was purposefully designed to prevent," that "[b]y his action in overtaking the defendant's vehicle at the intersection, the plaintiff contributed directly to his own injuries," and thus it followed that "the plaintiff was guilty of contributory negligence . . . in overtaking the defendant's vehicle at the intersection and that such negligence was a proximate cause of his injuries."[93]

Clearly, in Virginia, negligence per se can be used to support the defense of contributory negligence.

E. ANOTHER STATE'S STATUTE CANNOT SUPPORT A NEGLIGENCE PER SE CLAIM

The lack of a Virginia statute on point does not always stop plaintiffs' attorneys from attempting to argue that negligence per se can be based on statutes from other states. For example, in *Norfolk & Portsmouth Belt Line Railroad Co. v. Wilson*, the plaintiff, a railroad conductor, was riding on the side of a boxcar moving down a switching track that ran parallel to a chain link fence.[94] The fence was approximately eight feet from the center of the track for most of its length, but at one point, a post was bent inward one to two feet.[95] As the train went past the bent post, the conductor was injured when his arm struck the post.[96] At trial, the railroad conductor introduced expert testimony (admitted over the defendant's objection) that none of the thirty-eight states that had statutes governing the permissible distance of a fence from the center of a track allowed that distance to be less than eight feet.[97] On appeal, the Supreme Court of Virginia found that the admission of that testimony was error warranting reversal of the trial court's decision.[98] The Court noted that it was "undisputed that Virginia has no statute regulating [these] clearances along railroad tracks" and that the statutes of the other states were inapplicable to this case. The Court concluded, "[a] statute inapplicable to the case . . . is inadmissible. Any relevance it might have would be substantially outweighed by the prejudicial effect of admitting it."[99]

---

92 *Id.* at 278, 148 S.E.2d at 798.

93 *Id.* at 280, 148 S.E.2d at 800.

94 276 Va. 739, 741, 667 S.E.2d 735, 736 (2008).

95 *Id.*

96 *Id.*

97 *Id.* at 742, 667 S.E.2d at 736.

98 *Id.* at 745, 667 S.E.2d at 738.

99 *Id.* at 743–44, 667 S.E.2d at 737–38.

Given this strong statement from the Supreme Court of Virginia, defense attorneys are well armed to dispute any attempt by a plaintiff to use the statute of another state as the basis of a negligence per se claim.

IV. Conclusion

Negligence per se is a limited doctrine. As stated by Professor Dobbs and his colleagues, "[t]he negligence per se rule simply recognizes that negligence is proved by showing the violation of [a] statute aimed at protecting the plaintiff from the kinds of harm she suffered. There are many ways to prove negligence and use [of] the negligence per se rule is one of them."[100] When properly invoked, it provides only the standard of care in a negligence action. The plaintiff still must prove the other elements of actionable negligence, namely breach, causation, and damages, to prevail on his claim. Defense attorneys should remain aware of these limitations when defending against negligence per se claims.

---

[100] Dobbs et al., The Law of Torts § 148, at 467.