

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

<b>FIREMEN’S INSURANCE COMPANY</b>	)	CIVIL ACTION NUMBER
<b>OF WASHINGTON, D.C.,</b> as subrogee	)	
of Birch Pointe Condominium Association	)	07C-06-287-JOH
	)	
Plaintiff	)	
v.	)	
	)	
<b>FIRE-FREE CHIMNEY SWEEPS, INC.</b>	)	
	)	
Defendant	)	
v.	)	
	)	
<b>RICK RATEL</b>	)	
	)	
Third-Party Defendant	)	
<b>STATE FARM MUTUAL FIRE AND</b>	)	CIVIL ACTION NUMBER
<b>CASUALTY INSURANCE COMPANY,</b>	)	
as subrogee of Joanna Herlihy,	)	08C-01-144-JEB
	)	
Plaintiff	)	
v.	)	
	)	
<b>FIRE-FREE CHIMNEY SWEEPS, INC.</b>	)	
	)	
Defendant	)	
<b>RICK BRYANT, et al.,</b>	)	CIVIL ACTION NUMBER
	)	
Plaintiff	)	08C-01-156-MMJ
v.	)	
<b>FIRE-FREE CHIMNEY SWEEPS, INC.</b>	)	
	)	
Defendant	)	

<b>NATIONWIDE INSURANCE COMPANY )</b>	<b>CIVIL ACTION NUMBER</b>
as subrogee of Judith Jester )	
)	08C-01-132-MJB
Plaintiff )	
v. )	
<b>FIRE-FREE CHIMNEY SWEEPS, INC. )</b>	
)	
<u>Defendant</u> )	

*Submitted: September 30, 2009*

*Decided: January 6, 2010*

**MEMORANDUM OPINION**

*Upon Motion of Defendant Fire-Free Chimney Sweeps, Inc.,  
for Summary Judgment - **DENIED***

***Appearances:***

Joseph Bellew, Esquire, of Cozen O'Connor, Wilmington, Delaware, and Paul R. Bartolacci, Esquire, of Cozen O'Connor, Philadelphia, Pennsylvania, attorneys for plaintiff Firemen's Insurance Company of Washington, D.C.

Jennifer R. Burbine, Esquire, of White & Williams LLP, Wilmington, Delaware, attorney for plaintiff State Farm Fire and Casualty Insurance Company

James S. Green, Esquire, of Seitz Van Ogtrop & Green, Wilmington, Delaware, attorney for plaintiffs Ricky & Donna Bryant, et al.

Saagar B. Shah, Esquire, of Aber Baker & Over, Wilmington, Delaware, attorney for plaintiff Nationwide Insurance Company

Louis J. Rizzo, Esquire, of Reger Rizzo Kavulich & Darnall, LLP, Wilmington, Delaware, attorney for defendant Fire-Free Chimney Sweeps, Inc.

Robert J. Leoni, Esquire, of Shelsby & Leoni, Stanton, Delaware, attorney for third-party defendant Ricky Ratel

HERLIHY, Judge

In January 2006, a fire started in one unit of the 294 units at the Birch Pointe Condominiums. The fire spread and caused extensive damage to a number of units. Firemen's Insurance Company ("Firemen's") is the subrogee of the Birch Pointe Condominium Association ("BPCA").<sup>1</sup> It has sued Fire-Free Chimney Sweeps, Inc. ("Fire-Free") claiming, as a fire inspection company, it had a duty to the BPCA and the unit owners to advise of certain inspection steps required by applicable State code provisions. Its failure to so advise and to then undertake an inspection incomplete under code provisions made it negligent and that negligence was a proximate cause of the fire.

Fire-Free's summary judgment motion, being considered in this decision asks this Court to find it had no duties in this situation and, if it did, they are too remote to be a proximate cause of the fire.

The Court holds the code provisions controlled Fire-Free inspections and that its failure to adhere to them were common law negligence and negligence *per se*. There remain issues, however, of foreseeability and proximate cause which must be and can only be resolved by a jury. Fire-Free's motion for summary judgment is **DENIED**.

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<sup>1</sup> Since Firemen's filed suit, several others have been filed. One is Fire-Free's cross claim against the unit owner where the fire originated. Others involve other subrogation actions: *State Farm Mutual Fire and Casualty, Inc. Co., as subrogee of Joanna Herlihy* (no relation to this judge); *Ricky Bryant, et al.*, and *Nationwide Ins. Co., as subrogee of Rick Ratel*; all against Fire-Free.

Concurrent with this decision, the Court is issuing a separate opinion involving Fire-Free's third-party action against the unit owner where the fire started.

### ***Factual Background***

Birch Pointe Condominium is a 294 unit complex located in Wilmington. As with any condominium set-up, there are common areas owned by the owners' association and portions owned by the individual unit owners. For purposes of this litigation, the common areas involved the chimneys and flues in each unit. Each owner owned the fireplace inside the unit. As part of the upkeep of the of these common areas, the BPCA contracted with Fire-Free to inspect and clean the chimneys of each individual unit. Fire-Free conducted such work in 2000. BPCA contracted with Fire-Free to do the same work again in 2004. Its invoice to BPCA stated:

Sweep & Inspect Flues W. Wirebrush (Poly)

Homeowners Are Responsible To Block Off Flue To Prevent Any Mess.

For An Additional \$40.00 Paid Cash Only At The Time Of The Cleaning,  
We Will Offer Each Home Owner (At The Same Time) A Sweep &  
Inspection of Their Firebox & Damper

10% Discount If Paid In Full Within 30 Days Of Completion of Work.<sup>2</sup>

The record shows that BPCA informed Fire-Free that it could only provide access to the flue and chimneys, but would not be able to direct individual unit owners to provide access for inspection of the owners' fireplaces. There is no evidence Fire-Free objected to this condition.

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<sup>2</sup>Fire-Free's Mot. for Summ. J., Ex. F.

BPCA accepted Fire-Free's proposal as set out in the invoice. On November 17, 2004, Fire-Free sent a letter back to BPCA stating:

We Are In Receipt Of Your Acceptance Of The Proposal To Sweep & Inspect 294 Flues.

The Work Can Be Done The Week Starting December 6, This Will Take The Entire Week.

You Will Need to Notify Homeowners Of The Following:

1. The Date(s) That Service Will Be Done.
2. They Are Responsible For Blocking Off Their Flues To Prevent Mess In The Home.
3. Any Homeowner Interested In Having Their Firebox & Damper Cleaned & Inspected At The Time Of Service Is Responsible For the Charge of \$40.00 Due That Day (Cash Only).

We Will Need To Be Notified By 11-30-04 Of Any Homeowners Interested In Item #3.

We Look Forward In Doing Business With You.

Thank You,

Michael Gasdia, Pres.  
Fire-Free Chimney Sweeps, Inc.<sup>3</sup>

As a follow-up, BPCA sent this notice to the Unit Owners:

ATTENTION BIRCH POINTE RESIDENTS

SUBJECT: CHIMNEY CLEANING

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<sup>3</sup> *Id.*

ALL CHIMNEY FLUES WILL BE CLEANED STARTING THE WEEK OF DECEMBER 6, 2004. IT IS THE RESPONSIBILITY OF EACH HOMEOWNER TO CLOSE OFF THEIR FLUE TO ENSURE SOOT & DUST DOES NOT ENTER THE UNIT. AS AN ADDED PROTECTION TO CLOSING THE FLUE A PLASTIC SHEET OR GARBAGE BAG CAN BE TAPED OR SECURELY FASTENED ACROSS THE FIREPLACE OPENING.

HOMEOWNERS ARE RESPONSIBLE FOR CLEANING ANY DEBRIS THAT HAS FALLEN ON THE TOP OF THE DAMPER, INTO FIREBOX, OR INTO UNIT.

DURING THIS WEEK THE CONTRACTED CHIMNEY SWEEP HAS OFFERED TO CLEAN & INSPECT THE FIREBOX UNIT FOR A COST OF \$40.00 PAYABLE BY CASH ONLY THE DAY OF SERVICE BY THE HOMEOWNER. IF THIS SERVICE IS DESIRED ARRANGEMENTS MUST BE MADE DIRECTLY WITH THE CONTRACTOR. PLEASE NOTE THAT THE HOMEOWNER MUST BE PRESENT IF THIS SERVICE IS TO BE PERFORMED.

CONFIRMATION IS NEEDED NO LATER THAN NOVEMBER 30, 2004

FIRE-FREE CHIMNEY SWEEPS, INC. 302-266-0843<sup>4</sup>

The record is unclear exactly how many unit owners allowed inspection of their fireplaces inside their units. What is clear is that most unit owners did not allow an interior fireplace inspection. It is also undisputed Fire-Free did not directly seek permission from each of the owners. It is undisputed that unit owner Rick Ratel did not.<sup>5</sup>

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<sup>4</sup> Defendant's Ex. E. A similar notice was sent to the unit owners in connection with Fire-Free's 2000 inspection.

<sup>5</sup> There may have been 24 owners who allowed access and inspection of their fireplaces.

When the condominiums were built, an identical Hearth and Home Systems fire place was installed in each unit. At a date, not made known to the Court, Ratel purchased a set of glass doors at Home Depot, which the record indicates he put over the front of the Hearth and Home unit. The doors were from a different manufacturer.<sup>6</sup>

On January 17, 2006, a fire started in Ratel's fireplace which spread and eventually caused an alleged one million dollars in damage. All experts retained to opine about the cause of the fire agree:

The normal operation of fireplace through the use of burning wood have been a safe event if the unit had operated as the system was installed. However, the addition of non-approved doors covering the front negated the clearance tolerances of the firebox which in turn produced a dangerously high temperature on the exterior surface of the firebox which subsequently ignited the combustible material adjacent to the firebox, causing the fire.<sup>7</sup>

Another fire expert arrived at a similar conclusion:

The glass door set installed on this fireplace is not listed for use with this fireplace and is not a listed Heatilator manufactured part (refer to the installation instructions, page 3, part # gd36bf). This door is tested and approved for masonry fireplaces only. The use of this door system restricts air-flow and results in a negative affect in the operation of the cooling system for this fireplace.<sup>8</sup>

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<sup>6</sup> There are installation instructions for Hearth and Home unit warning of using non-compatible units or brands. There is also a warning that using off-brand parts may create a hazardous situation. The record is silent if Ratel knew of these instructions.

<sup>7</sup> Fire-Free's Ex. A, Kufta Report 3.

<sup>8</sup> Firemen's Ex. E, Feb Report 2.

The National Fire Prevention Association (“NFPA”) in 2000 promulgated a series of standards relating to fire prevention. One such standard is 211, “Standard for Chimneys, Fireplaces, Vents and Solid-Fire Burning Appliances” (2000 Edition) (“Standard 211”). On April 24, 2003, the Delaware Fire Prevention Commission (“DFPC”) adopted Standard 211 as a State regulation. Title 16, *Del. C.* § 6603 confers certain power upon the DFPC:

The State Fire Prevention Commission shall have the power to promulgate, amend and repeal regulations for the safeguarding of life and property from the hazards of fire and explosion. Such regulations, amendments or repealers shall be in accordance with standard safe practice as embodied in widely recognized standards of good practice for fire prevention and fire protection and shall have the force and effect of law in the several counties, cities and political subdivisions of the State.

Standard 211, adopted by the DFPC in 2003 provides in pertinent part:

- 11-1 General. Inspection shall be conducted by a qualified agency.
- 1-5.2.69 Qualified Agency. Any individual, firm, corporation or company that either in person or through a representative, is engaged in and is responsible for the connection, venting, installation, inspection, repair or servicing of heat producing appliances and who is experienced in such work, is familiar with all precautions required, and has complied with the requirements of the authority having jurisdiction.
- 11-3 The scope of the inspection, the areas of the chimney examined, and the degree of invasiveness of the inspection shall be appropriate for the conditions given rise to the inspection.
- 11-4 Level I Inspections. A Level I inspection shall be utilized when verification of the suitability of the chimney or flue for continued service, under the same conditions and with the same or similar appliance or appliances, is needed.



11-4.1 Circumstances. A Level I Inspection shall be conducted under the following circumstances.

11-4.1. During annual inspections in accordance with Section 10-2.

11-4.2 Scope and Access. Level I inspections shall include examination of readily accessible portions of the chimney and accessible portions of the connected appliance and chimney connection.

1-5.2.1 Accessible (for Inspections). Capable of being exposed for inspection, maintenance or repair without damage to the chimney or building structure or finish, but which may require the removal of doors, panels or coverings using commonly available tools.

11-4.2.5 The connected appliances, their chimney connectors and surroundings shall all be examined for proper clearances, floor mounting and protection, damage or deterioration, and observable evidence of operating malfunction.<sup>9</sup>

The record contains samples of the documentation Fire-Free submitted to BPCA reflecting its December 2004 inspections. They are titled “Visual I Chimney Inspection.” Each document is the same containing, among other things, a checklist for chimneys and flues and a checklist for fireplaces. The “Fireplace” list includes “With Glass Doors.”<sup>10</sup> These documents also reflect various items that were checked during the December inspections, such as the condition of the flue, condition of smoke chamber, etc.

Deposition testimony has been taken. Firemen’s fire and chimney expert, Dale Feb, has opined on Fire-Free’s actions during the 2004 sweep. He opined that Fire-Free should

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<sup>9</sup>Standard 211.

<sup>10</sup> Firemen’s Ex. H.

have informed BPCA of the existence of the applicable fire code provisions in Standard 211 requiring interior and exterior access to the chimney system, which includes the fireplace, in order to meet industry inspections standards.<sup>11</sup> However, Feb has also acknowledged that Fire-Free only had a duty to inform individual unit owners, like Ratel, of potentially dangerous situations in their fireplace systems, if any were discovered.<sup>12</sup> He also agrees that Fire-Free did not have a duty to force its way into any unit owner's condominium.<sup>13</sup> Even though Feb concedes a chimney sweep inspection entity like Fire-Free would not have had the authority to *compel* a condominium association or unit owner to give complete access to the chimney system, he maintained that to meet the requirements at a Level I inspection, Fire-Free was obligated to complete a full inspection of the chimney system.<sup>14</sup> Feb concluded that Fire-Free should have refused the job if the BPCA and unit owners did not give it the required access to the full chimney system in order to conduct a Level I sweep that would fulfill Standard 211.<sup>15</sup> Feb further opined that professional fire sweeps, as a standard of care for their industry, were required to complete a Standard 211 sweep (interior and exterior access) and notify the owners of any potential

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<sup>11</sup> Defs.' Br., Ex. G, Feb Deposition, Tr. 78:4-79:2.

<sup>12</sup> *Id.* at 76:9-20.

<sup>13</sup> *Id.* at 75:9-22.

<sup>14</sup> Pl.' Br., Ex. G, Feb Deposition, Tr. 37:24-40; 42.

<sup>15</sup> *Id.* at 78:4-16.

hazard.<sup>16</sup> If it came upon a dangerous situation, Feb stated Fire-Free would have had a duty to inform and warn.<sup>17</sup> However, he conceded that warning the unit owner would have completed Fire-Free's duty under Standard 211.<sup>18</sup> Here, Feb opined that Ratel would have had a duty to rectify the potential hazard.<sup>19</sup>

Michael Gasdia, the owner of Fire-Free, has been deposed and has stated he was aware of Standard 211, but did not know that the standard had been adopted as Delaware law by the DFPC as of the time of the 2004 sweep.<sup>20</sup> He also stated that his company did its "own version of a level one visual inspection."<sup>21</sup>

### *Parties' Contentions*

Fire-Free claims it cannot be found negligent because it undertook no duty to clean or inspect the portion of Ratel's fireplace that caused the fire. It maintains its duty was confined to portions of the chimney system to which the BPCA was able to provide access

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<sup>16</sup> *Id.* at 78:17-79:2.

<sup>17</sup> Defs.' Br., Ex. G, Geb deposition, Tr. 67:17-68:13.

<sup>18</sup> *Id.* at 69:12-24.

<sup>19</sup> *Id.* To the extent that Fire-Free's actions constitute negligence *per se*, plaintiffs are not required to produce an expert opining that Fire-Free must follow the law. However, some aspects of Fire-Free's conduct are not clearly negligence *per se*. Specifically, the alleged breach that occurred when Fire-Free failed to inform the BPCA of the regulations requiring full access. That constitutes common law negligence and an expert must provide testimony regarding the appropriate standard of care.

<sup>20</sup> Pl.'s Br., Ex. F, CED Investigative Technologies Letter (April 21, 2009).

<sup>21</sup> *Id.*

to Fire-Free. Although Fire-Free would provide an interior unit cleaning and inspection of the fireplace system, it would only do so with the permission of the unit owner and an additional \$40.00 charge. Even with a duty, Fire-Free argues there is no way a jury could conclude Fire-Free's actions were a proximate cause of the fire. Fire-Free also asserts since it is not licensed by either the Fire Marshall or the DFPC it was not bound by the 2003 adoption of Standard 211.

In the alternative, if the Court finds fire-Free owed a duty, Fire-Free asks this Court to find Firemen's theory of proximate cause as too attenuated, speculative and unforeseeable, which should prompt dismissal of all claims. It argues that this Court's decision in *Patton v. Simone*<sup>22</sup> is applicable for the proposition that because Fire-Free did not do anything to increase the risk of fire, it had no duty to prevent it. In addition to its arguments about lack of negligence and proximate cause, Fire-Free contends that only Firemen's action was timely filed. All the plaintiffs in the consolidated cases, it asserts, filed more than two years after the date of loss. Those plaintiffs, of course, dispute their actions were untimely filed.

Firemen's argues that Standard 211 placed a duty upon Fire-Free to conduct a complete Level I inspection. This means Fire-Free had to inspect not only the chimneys and flues, but also the interior fireplaces. In turn, Firemen's contends, Fire-Free was

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<sup>22</sup> 1992 WL 398478 (Del. Super. Dec. 14, 1992).

compelled to tell the BPCA it needed interior access to all 294 units. If the BPCA could not do that or the unit owners refused access, Fire-Free should not have agreed to undertake the work. By not getting the full access, it was negligent. In addition, Fire-Free was negligent when it inspected each chimney without inspecting the fireplaces. It should have obtained each owner's consent for access. These acts of negligence, commission or omission were, Firemen's asserts, a proximate cause of the fire and consequent damage. It contends proximate cause is a jury issue in this case which prevents summary judgment.

### *Discussion*

"In order to prevail in a negligence action, a plaintiff must show, by a preponderance of the evidence, that a defendant's negligent act or omission breached a duty of care owed to plaintiff in a way that proximately caused the plaintiff injury."<sup>23</sup> "However, liability for negligence is limited by the scope of the legally defined duty."<sup>24</sup> Whether or not a duty exists "is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court."<sup>25</sup> When there is no duty on the part of the defendant to

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<sup>23</sup> *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. 1995).

<sup>24</sup> *Furek v. Univ. of Del.*, 594 A.2d 506, 516 (Del. 1995).

<sup>25</sup> *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002).

the plaintiff, a court may dismiss a claim of negligence through summary judgment.<sup>26</sup>

The record before this Court is fairly clear and uncontradicted. The fireplace in Ratel's unit was the originating source of the fire. More specifically, Ratel's installation of the non-conforming glass doors to his firebox did not allow for proper air flow. This led to overheating and the fire. Nor is there a dispute in the partial ownership of the chimney unit; the individual unit owners controlled the firebox and the exterior of the indoor chimney system, the BPCA owned the remainder of the chimney system.

Firemen's relies heavily upon Standard 211, adopted by the DFPC as law, to establish a duty upon Fire-Free to the BPCA which would have alerted Ratel to the dangerous condition. Fire-Free contends it had no *contractual* duty to Ratel because of the split ownership of the chimneys and interior units in the condominium. The Court agrees. However, the issue here is whether Fire-Free had a duty of care to the BCPA. The Court finds that Fire-Free had such a duty not only to the BPCA but to the unit owners.

The duty arose under Standard 211 adopted by the DFPC. To conduct a proper Level I inspection, Fire-Free needed access not only to the common area - chimney and flues - but to the interior fireboxes and interior chimneys. Specifically, Standard 11-4.1, 11-4.2 and 11-4.2.5 required Fire-Free to see the entire chimney, flue, fireplace systems.<sup>27</sup>

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<sup>26</sup> *Brown v. F.W. Baird, L.L.C.*, 956 A.2d 642, 2008 WL 324661, \*2 (Del. Supr. Feb. 7, 2008)(TABLE).

<sup>27</sup>11-4.1. During annual inspections in accordance with Section 10-2.

(continued...)

An inspection that did not fulfill all of these requirements was not a Level I inspection. These requirements, considering the safety issues involved, especially in a condominium, or apartment setting, are not to be taken lightly or ignored.

It is irrelevant that entities such as Fire-Free are not licensed by either the DFPC or the Fire Marshall.<sup>28</sup> The record, particularly Fire-Free's own inspection documents, demonstrate that it held itself out as a qualified chimney system inspection and cleaning company. It is also clear the BPCA and the public relied upon that expertise. That Fire-Free's president, Gasdia, was unaware of the DFPC adoption of Standard 211 is also irrelevant.

The duty imposed on Fire-Free resulted in it being negligent in two ways. While usually questions of negligence are left for a jury, both Fire-Free's actions or inactions are not factually disputed. Its own argument that *if* it had a duty, there was no proximate cause acknowledges negligence. In addition, its duty and negligence here are inextricably

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<sup>27</sup>(...continued)

11-4.2 Scope and Access. Level I inspections shall include examination of readily accessible portions of the chimney and accessible portions of the connected appliance and chimney connection.

11-4.2.5 The connected appliances, their chimney connectors and surroundings shall all be examined for proper clearances, floor mounting and protection, damage or deterioration, and observable evidence of operating malfunction.

<sup>28</sup> If that argument was taken to its logical extension, only licensed drivers have to obey motor vehicle laws but unlicensed drivers do not.

intertwined. There the Court finds as a matter of law that Fire-Free was negligent in two distinct ways.

The first is common law when Fire-Free failed to warn the BPCA that, under Delaware law, it required access to the interior of all the units before it could undertaking *any* cleaning or inspection. The Court finds Fire-Free had a duty to inform the BPCA that it must inspect the interior of the units. Fire-Free, based on the documentation provided, held itself out to the BPCA as an entity qualified to conduct appropriate fire systems inspections. This duty, therefore, compelled it to inform the BPCA that it had to have access to each unit before it would undertake *any* service contract. If the BPCA either could not obtain consent to such access or refused to seek it, Fire-Free was duty-bound not undertake the work.<sup>29</sup> The record shows that Fire-Free did not walk away from starting the work but contracted with the BPCA without requiring such access. Therefore, the Court holds that it failed to meet its standard of care and it was negligent as a matter of law.

The second breach of its duty occurred when Fire-Free undertook its deficient inspections. Once it undertook the inspection work, it was negligent in performing *any* inspection for any unit, such as Ratel's, where the unit owner declined to give access. The

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<sup>29</sup> Also, access to the interior of all units for fireplace inspection should have been made a condition of any contractual obligation.



Court in *Sammons v. Ridgeway*<sup>30</sup> held that regulations that have the force of law, like the one in question, can serve as the basis for negligence *per se*.<sup>31</sup> “The ruling we make here, extending the negligence *per se* doctrine to regulations of an administrative agency, is expressly limited to regulations having the statutory basis and the purpose of the regulations [to ensure safety] here involved.”<sup>32</sup> It is clear by reference to § 6603 that the General Assembly enabled the DFPC to pass regulation “for the safeguarding of life and property from the hazards of fire and explosion.”<sup>33</sup> Standard 211 is clearly a regulation to ensure safety. As a result, the Court finds that when Fire-Free violated Standard 211, such a violation constitutes negligence *per se*. Failure to gain the requisite access to fulfill its duties of inspecting the interior fireplace unit meant Fire-Free was not meeting the duty imposed on it. This deficient inspection is explicitly in contravention of Standard 211, which, as the Court explained above, requires an interior inspection. Plaintiffs have established that Fire-Free did not act in compliance with Standard 211; and, therefore, is negligent *per se* for its failure to do so.

Fire-Free invokes, in support of its position that it had no such duty to the BPCA, this Court’s opinion in *Patton v. Simone*.<sup>34</sup> That case is inapposite. The particular

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<sup>30</sup> 293 A.2d 547, 549 (Del. 1972).

<sup>31</sup> *Id.* at 550.

<sup>32</sup> *Id.*

<sup>33</sup> 16 *Del. C.* §6603.

<sup>34</sup> 1993 WL 19595 (Del. Super.).

defendant covered in that opinion was an elevator maintenance company, Keystone. It maintained an elevator in a commercial establishment. On one floor it had no gates. After each of various routine service visits, it reported to the business owners the dangers of the lack of gates. Sure enough a worker fell to his death through the unguarded opening.

As here, the claim was Keystone owed a duty not to continue servicing the elevator because of the owner's failure to rectify the lack of gates. This Court found Keystone had no such duty. It had fulfilled its duty by informing the owner of the gate's problem.

Keystone was a maintenance company, Fire-Free is more than that. It is an inspection company which, by the DFPC's adoption of Standard 211, was required to conduct its inspections in a certain way to meet the Standard. Standard 211 placed responsibilities upon Fire-Free which Keystone as a maintenance company did not have.

Further, Fire-Free, despite these obligations said nothing to the BPCA. Keystone, on the other hand mentioned the lack-of-gates issue to the owner. Keystone, by being a maintenance company, had access to the elevator. Fire-Free's duty to meet Standard 211 required it to advise the BPCA of its need to gain unit access. It did not.

This allegation or finding of negligence, of course, suggests that the BPCA *itself* was negligent for its failure to ensure each unit owner allowed access. No expert opinion has been offered to the Court in the current briefing concerning whether the BPCA had a duty to its individual owners, as a collective group, to require that Fire-Free had access in order to insure an adequate inspection. Also, the BPCA is not a party to any of the

actions filed in connection with the fire and consequent damage.

This Court finding Fire-Free negligent does not end its analysis. Fire-Free has argued that even if the Court found it had been negligent, there is no proximate cause between that negligence and the damage caused here. It presents its argument this way:

Firemen's argues that had Fire-Free refused to do the cleaning and inspection of the chimneys for any units for which the unit owners declined to have their fireplace inspected, the Association would have understood the importance of a complete inspection and thereafter more insistently urged the unit owners to have their fireplace units inspected. Once those unit owners were pressed more emphatically to have their fireplace units inspected, Mr. Ratel would have relented, under the Firemen's theory, and Fire-Free would have been granted access to the unit. Once Fire-Free was granted access to Mr. Ratel's unit, Fire-Free would have noticed the improper installation of the aftermarket doors and would have brought same to Mr. Ratel's attention. Firemen's then concludes that once Mr. Ratel had this condition brought to his attention, he would have made appropriate changes which would have avoided the fire.<sup>35</sup>

Issues of proximate cause are usually for a jury to resolve.<sup>36</sup> Within the issue of proximate cause is the one particularly pertinent to this case: foreseeability. Would it have been reasonably foreseeable that the BPCA would have insisted upon and obtained each unit owner's agreement to allow Fire-Free access? Would each unit owner have agreed to access if properly advised of the need for an interior inspection? Do the extra forty dollars each owner had to pay and/or the possible inconvenience of being home during a day-time inspection play a role here? The Court concurs that Fire-Free's proximate cause

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<sup>35</sup> Fire-Free Motion for Summary Judgment.

<sup>36</sup> *Laws v. Webb*, 658 A.2d 1000, 1007 (Del. 1995).

is attenuated. Nevertheless, proximate cause and foreseeability remain jury issues.<sup>37</sup>

### *The Claims Were Timely Filed*

Fire-Free alleges that the three consolidated cases were not timely filed. A claim must be filed within two years of the date of the injury to be timely.<sup>38</sup> After the Court reviewed the dockets in the respective cases it appears that State Farm<sup>39</sup> and Bryant<sup>40</sup> filed complaints on January 17, 2008 while Nationwide filed on January 16, 2008.<sup>41</sup> The Court must determine when the statute of limitations began to run. The State Farm and Bryant complaints were filed two years and one day after the fire. A strict reading of § 8107 would mean that the two-year limit expired January 16, 2008 and the January 17, 2008 complaints are untimely. However, Delaware courts exclude the date of the injury from the statute of limitations period.<sup>42</sup> Therefore, plaintiffs had until January 18, 2008 to file complaints and they complied with the statute. All complaints were timely filed.

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<sup>37</sup> *Patterson v. Del. Food Corp.*, 2001 WL 1586831 (Del.).

<sup>38</sup> 10 *Del. C.* § 8107.

<sup>39</sup> C.A. No. 08C-01-144-JEB.

<sup>40</sup> C.A. No. 08C-01-156-MMJ.

<sup>41</sup> C.A. No. 08C-01-132-MJB.

<sup>42</sup> *Molina v. Anchor Motor Freight, Inc.* 92 A.2d 294 (Del. Super. 1952). None of the plaintiffs cite this fifty year old, directly on point, reported decision in their response to Fire-Free's motion. More surprisingly, no plaintiffs address any statute of limitations argument made by Fire-Free other than a general denial and reference to the complaints, despite the fact that it was potentially fatal to State Farm and Bryant's complaints.

*Conclusion*

The Court finds Fire-Free has not met its burden with respect to any of its arguments for summary judgment and its motion is **DENIED**.

**IT IS SO ORDERED.**

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J.