IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

THE CITY OF BRISTOL, TENNESSEE,	)	
Plaintiff,	)	
v.	)	**Case No. 1:22CV00023**
THE CITY OF BRISTOL, VIRGINIA,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S PARTIAL MOTION TO DISMISS

Plaintiff, the City of Bristol, Tennessee ("Bristol TN" or "Plaintiff"), by and through counsel, hereby submits this memorandum in opposition to Defendant, the City of Bristol, Virginia's ("Defendant" or "Bristol VA") Partial Motion to Dismiss (ECF Nos. 21-22, hereinafter "Motion").

INTRODUCTION

Defendant acknowledges that there has been an increase in odor emanating from its Landfill since the fall of 2020. *See* Motion at 1. It suggests that because "Bristol VA has publicly committed to address odor concerns and to cease waste disposal," "both municipalities would be better served by a cooperative effort to eliminate the odor problem." *Id.* at 1-2. What Defendant fails to acknowledge is that, despite this purported "public commitment," Defendant has taken minimal action over the past two years to address the odor issues. This is despite repeated notices of violation ("NOV") from the Virginia Department of Environmental Quality ("DEQ"), and a Virginia-funded expert panel that made concrete recommendations for addressing the odor problem. Even the simplest steps, such as placing a soil cover over the waste at the Landfill, have

yet to be completed. What is more, on August 26, 2022, DEQ sent Defendant another NOV regarding the Landfill, this time because Defendant apparently failed to monitor stormwater discharge from the Landfill between January 1, 2022 and June 30, 2022.[1] This is the latest example of many showing that Defendant is "all talk, no action" when it comes to fixing the "monumental disaster" it has created.

Bristol TN is the only entity that has stepped forward and taken action to mitigate the impacts of the noxious stench emanating from the Landfill. As Bristol TN stated in its Complaint, it has expended funds and resources to address odor-related impacts to its fire fighters, teachers, elementary school-aged children, senior citizens and lower income residents. Bristol TN seeks, through its nuisance claim, to be made whole.

Defendant seeks dismissal of Bristol TN's nuisance claim, arguing that it is abrogated by the Virginia Waste Management Act, 14 Va. Code § 10.1-1400, *et seq*. (the "VWMA"). Defendant, however, cites no language in the VWMA expressly abrogating common law claims. Rather, Defendant relies primarily on a case – *Campbell County v. Royal*, 283 Va. 4 (2012) – that does not even discuss abrogation of common law claims or involve a nuisance claim. Based on the plain language of the VWMA, as well as case law that actually applies to Defendant's argument, it is clear that the VWMA does not abrogate Bristol TN's nuisance claim. Indeed, nothing precludes Bristol TN from recouping its expenditures taken to protect its resources and citizens from the public nuisance created through Defendant's negligent maintenance and operation of the Landfill.

[1] *See* David McGee, *City is in Hot Water with DEQ over Landfill – Again*, available at https://heraldcourier.com/news/city-is-in-hot-water-with-deq-over-landfill---again/article_579d7cf8-27d9-11ed-a8e6-9f17220889a3.html#tracking-source=home-top-story

LEGAL STANDARD

"A motion filed under Rule 12(b)(6) challenges the legal sufficiency of a complaint," which is "measured by whether it meets the standards for a pleading stated in Rule 8 (providing general rules of pleading) . . . and Rule 12(b)(6) (requiring that a complaint state a claim upon which relief can be granted)." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). The United States Supreme Court has held that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard requires a plaintiff to demonstrate more than "a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* When ruling on a motion to dismiss, the court must accept "as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff." *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

ARGUMENT

I. The VWMA does not abrogate Bristol TN's common law public nuisance claim.

A. The standard for showing a statutory abrogation of the common law is exceptionally high.

The standard for showing that a Virginia statute abrogates the common law is well established and is exceptionally high. Under Virginia Code § 1-200:

> The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

"These words are simple and clear. They mean what they say. They apply with full force to all of the courts of this Commonwealth. Law-making by the courts in the face of this language would be an unconstitutional assumption of legislative power." *Brown v. Brown*, 183 Va. 353, 358 (1944). Accordingly, "'when the Virginia General Assembly wishes that a statute abrogate a common law right of action, such as one for breach of contract, ***it must say so expressly***.'" *First Am. Title Ins. Co. v. W. Sur. Co.*, 283 Va. 389, 398 (2012) (quoting *First Am. Title Ins. Co. v. W. Sur. Co.*, No. 1:09-cv-403, 2009 U.S. Dist. LEXIS 44231, at *9 (E.D. Va. May 27, 2009) (emphasis added)). As the Virginia Supreme Court explained in *Wicks v. City of Charlottesville*:

> [The General Assembly] is presumed to have known and to have had the common law in mind in the enactment of a statute. The statute must therefore be read along with the provisions of the common law, and the latter will be read into the statute unless it clearly appears from express language or by necessary implication that the purpose of the statute was to change the common law.

215 Va. 274, 276 (1974). "A statutory provision will not be held to change the common law unless the legislative intent to do so is plainly manifested." *Herndon v. St. Mary's Hosp., Inc.*, 266 Va. 472, 476 (2003).

"A statutory change in the common law is limited to that which is expressly stated in the statute or necessarily implied by its language because there is a presumption that no change was intended." *Mitchem v. Counts*, 259 Va. 179, 186 (2000). "Statutes are to be read 'in conjunction with the common law, giving effect to both unless it clearly appears from express language or by necessary implication that the purpose of [a statute] was to change the common law.'" *Cherry v. Lawson Realty Corp.*, 295 Va. 369, 377 (2018) (quoting *Jenkins v. Mehra*, 281 Va. 37, 44 (2011)).

The Virginia Supreme Court has repeatedly demonstrated that abrogation of common law claims must be explicitly stated. *See, e.g., First Am. Title*, 283 Va. at 398 (finding that Virginia's Consumer Real Estate Settlement Protection Act did not abrogate common law breach of contract

claims "[b]ecause CRESPA contains no abrogation clause"). When the General Assembly intends to abrogate the common law, it expressly does so with its statutory language. For example, in *Doss v. Jamco, Inc.*, 254 Va. 362 (1997), the Virginia Supreme Court held that the General Assembly abrogated an employee's common law gender discrimination claim when it passed Va. Code § 2.1-725, which stated: "Causes of action based upon the public policies reflected in this chapter ***shall be exclusively limited*** to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances." *Id*. at 372 (emphasis added). *See also Polyzos v. Cotrupi*, 264 Va. 116, 122 (2002) ("[I]n adopting statutory guidelines for the conduct of realtors, the General Assembly has provided that '[t]he common law of agency relative to brokerage relationships in real estate transactions to the extent inconsistent with this article ***shall be expressly abrogated***.'") (quoting Va. Code § 54.1-2144) (emphasis added).

B. The plain language of the VWMA shows that the General Assembly did not intend to abrogate nuisance claims.

Tellingly, Defendant does not cite to a single provision of the VWMA stating that it abrogates the common law. And Defendant ignores the language in the VWMA demonstrating that the General Assembly ***did not intend*** to abrogate the common law. Under the VWMA, a party must obtain a permit from the Virginia Department of Environmental Quality ("DEQ") to operate a landfill in Virginia. *See* Va. Code § 10.1-1408.1(A). However, the General Assembly made clear that:

> The issuance of a permit shall not convey or establish any property rights or any exclusive privilege, *nor shall it authorize any injury to private property or any invasion of personal rights* or any infringement of federal, state, or local law or regulation.

Va. Code § 10.1-1408.1(F) (emphasis added).[2] The VWMA's implementing regulations – the Solid Waste Management Regulations ("SWMR") – contain an analogous provision. *See* 9VAC20-81-490(F) ("The issuance of a permit *does not authorize any injury to persons or property or invasion of other private rights. . .*") (emphasis added). In other words, the VWMA does not immunize permittees like Defendant from liability under the common law relating to the operation of landfills. Therefore, based on the plain language of the VWMA and its implementing regulations, the General Assembly did not intend to abrogate the common law. Indeed, the Virginia Supreme Court has already held that the VWMA does not preempt the application of other laws to the operation of landfills. In *Resource Conservation Management Inc. v. Board of Supervisors*, 238 Va. 15 (1989), the Court rejected an argument that with the VWMA, "the General Assembly has provided 'a comprehensive statutory scheme to regulate all aspects of solid waste management.'" *Id*. at 21. Rather, the Court held that "the VWMA displays legislative intent to permit active local involvement in the field of waste management regulation." *Id*. at 22. *See also Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 175 (1991) (same).

C. The regulatory scheme created under the VWMA does not show the abrogation of common law.

Defendant asserts that the General Assembly must have intended to abrogate common law claims relating to the operation of landfills because it granted the Virginia Waste Management Board (the "Board") the power to promulgate and enforce regulations relating to the operation of landfills. *See* Motion at 6-7. Defendant, however, cites to no authority supporting its assertion,

[2] The VWMA is not unique among Virginia's environmental laws in its explicit intent to protect private property rights. As Defendant points out, both the State Water Control Law and the Air Pollution Control Law have nearly identical provisions. *See* Va. Code § 62.1-44.15:79 ("The provisions of [the State Water Control Law] shall not affect vested rights of any landowner under existing law."); Va. Code § 10.1-1320 ("Nothing in [the Air Pollution Control Law] shall be construed to abridge, limit, impair, create, enlarge or otherwise affect substantively or procedurally the right of any person to damages or other relief on account of injury to persons or property.")

and in fact, the assertion is inconsistent with applicable case law. The mere fact that the General Assembly has extensively regulated the permitting, operation, and maintenance of landfills is insufficient to prove abrogation of the common law. *See, e.g.*, *Crosby v. ALG Trustee, LLC*, 296 Va. 561, 570 (2018) ("The mere fact that the General Assembly has extensively regulated certain aspects of a trustee's duties does not translate to a broad abrogation of the trustee's fiduciary duties imposed under the common law.").

Moreover, the regulations themselves do not demonstrate an intent to eliminate common law claims for nuisance. As Defendant points out, the regulations require that odors be "effectively controlled." Motion at p. 6 (citing 9 VAC § 20-81-140.A.10). But this provision does not suggest that where, as here, odors are not being effectively controlled, there is no common law cause of action available. Similarly, the fact that the Board can "abate hazards and nuisances," (Motion at p. 5 citing Va. Code § 10.1-1402(21)), does not preclude a common law claim seeking damages caused by that nuisance condition. Finally, the mere fact that the Board has directed DEQ to "investigate all citizen complaints," (Motion at p. 6, citing 9 VAC § 29-81-70.D), in no way suggests that parties have been deprived of their ability to bring common law claims against a negligent landfill operator for damages caused by their actions. Nothing in the VWMA explicitly or implicitly suggests that common law claims have been abrogated.

The decision in *Wyatt v. Sussex Surry, LLC*, 74 Va. Cir. 302 (Surry County 2007), is instructive. In *Wyatt*, the defendants argued, *inter alia*, that the Virginia laws and regulations relating to the disposal of biosolids abrogated the plaintiff's common law claims of negligence, nuisance, and trespass based on the defendants' release of hog waste material onto the plaintiff's property in violation of the defendants' permit issued by the Virginia Department of Health. The plaintiff alleged "the onset of various health problems as a result of exposure to noxious odors,

particulates, and dust from the sludge including coughing/respiratory problems, pneumonia, increased anxiety, and emotional distress." *Id*. at 303. The defendants cited to regulations (a) granting the State Board of Health the right to enforce the biosolid regulations; (b) granting the plaintiff the right to submit complaints to the State Board of Health; (c) granting the Department of Health the right to "investigate complaints and seek fines, injunctive relief, or criminal penalties against offenders"; and (d) granting the Department of Health the right to "revoke the permit if the disposal affects public health." *Id*. at 305. The court, however, held that "[t]he defendants have not pointed to a clearly manifested intent to abrogate the common law claims through regulation of biosolid disposal." *Id*. It further held that "[d]efendants have also not demonstrated that the regulations encompass the field to the exclusion of common law claims, or a direct or irreconcilable conflict between the regulations and common law claims." *Id*. at 305-306.

As held in *Wyatt*, the mere fact that the VWMA and its implementing regulations extensively regulate landfills and provide enforcement powers to state agencies does not show that the General Assembly plainly manifested an intent to abrogate common law claims based on the wrongful operation of landfills. Further, the Board's regulatory powers are not inconsistent with allowing a party to recover damages under common law due to a nuisance created by the negligent operation of a landfill.

D. The *Campbell* decision is inapplicable and does not support Defendant's position.

Defendant relies heavily on the Virginia Supreme Court's decision in *Campbell County v. Royal*, 283 Va. 4 (2012). *Campbell*, however, has no application here. The Court did not address the abrogation of common law in *Campbell*. In fact, the word "abrogation" cannot be found in its decision. Defendant concedes – albeit in a footnote – that *Campbell* does not involve a nuisance claim either. *See* Motion at 8, n. 3.

In *Campbell*, the plaintiff sought to recover damages under Virginia's State Water Control Law, Va. Code §§ 62.1-44.2 through 44.34:28 (the "Water Control Law"), and specifically, § 62.1-44.34:18(C) (the "Oil Discharge Law"), "for the contamination of groundwater by leachate and landfill gas." *Id*. at 8. The trial court granted summary judgment to the plaintiff, holding that the defendant was liable for damages under the Oil Discharge Law. On appeal, the "dispositive issue" was whether the trial court "erred by holding that the contamination of groundwater beneath Phase II by the passive, gradual seepage of leachate and landfill gas and the subsequent migration of that contaminated groundwater onto the [plaintiff's] property subjected the County to liability under [the Oil Discharge Law]." *Id*. at 15. In analyzing this issue, the Court determined "whether the contamination of groundwater by the passive, gradual seepage of leachate and landfill gas falls within the purview of the Oil Discharge Law or is governed solely by the VWMA." *Id*. at 24.

The Virginia Supreme Court reversed the trial court's decision, holding that the VWMA applies; the Oil Discharge Law does not "appl[y] to the specific groundwater contamination in this case." *Id*. at 23. "Simply put, the Oil Discharge Law does not contemplate the passive, gradual seepage of leachate and landfill gas into groundwater beneath a solid waste disposal facility." *Id*. Rather, the Court found that the contamination at issue "fall[s] squarely within the ambit of the [VWMA] and SWMR." *Id*. at 22. The Court found "most striking" "the contrast between the extensive regulations under the [VWMA] governing a solid waste disposal facility's groundwater monitoring and leachate control and the lack of any regulations under the Oil Discharge Law that are applicable to a such a facility." *Id*. at 23-24.

The Virginia Supreme Court's analysis makes clear that abrogation of common law claims was not at issue in *Campbell*. Rather, the Court compared the provisions of the Oil

Discharge Law with the provisions of the VWMA and determined that the Oil Discharge Law was not the applicable statutory scheme. Bristol TN, however, is not seeking to recover damages under either the Oil Discharge Law or the VWMA. Put simply, *Campbell* is inapplicable here.

The other cases to which Defendant cites do not provide support for its argument either. Like *Campbell, Vansant & Gusler, Inc. v. Washington*, 429 S.E.2d 31 (Va. 1993), does not even mention abrogation. Rather, the sole question in that case is "is whether a private right of action for damages exists as the result of an alleged violation of Code § 43-13, a criminal statute codified among the mechanics' lien laws." *Id*. at 32. Whether a private right of action exists under a statute is a separate question from whether a statute abrogates the common law.

Concerned Taxpayers of Brunswick Cty. v. Cty. Of Brunswick, 455 S.E.2d 712 (Va. 1995), does not mention abrogation either. While the case does discuss the VWMA, the relevant issue decided by the Virginia Supreme Court was whether the defendant board of supervisors' approval of a conditional use permit sought by a landfill operator violated the VWMA. The Court held that the VWMA "does not require a local governing body to determine whether a use is in compliance with the VWMA's provisions." *Id*. at 716.[3]

The Virginia Supreme Court did address abrogation in *Isbell v. Comm. Inv. Assocs., Inc.*, 644 S.E.2d 72 (Va. 2007). In that case, the plaintiff contended that the Virginia Residential Landlord and Tenant ("VRLTA") "abrogated the common law and provided a statutory cause of action in tort" allowing a tenant to recover damages for personal injuries sustained as a result of the landlord's failure to repair premises under the tenant's possession and control. *Id*. at 74.

[3] *Concerned Taxpayers* also involved a question as to whether the plaintiffs had standing to sue for violations of Virginia's Public Procurement Act. *Id*. at 717. In ruling that the plaintiffs lacked standing, the Virginia Supreme Court held that the "rights and obligations" under the Public Procurement Act "did not exist in the common law and were created through the statutory scheme of the Procurement Act." *Id*. at 718. Hence, the Court was not analyzing a party's right to assert common law claims.

Relying on the exacting standard governing abrogation, the Court held that the VRLTA did not "abrogate the common law rule that a landlord is not liable in tort for a tenant's personal injuries sustained as a result of the landlord's failure to repair premises under the tenant's possession and control." *Id*. at 76. "Instead, the [VRLTA] provides a comprehensive scheme of landlords' and tenants' contractual rights and remedies." *Id*. at 78.

In *Schlegel v. Bank of Am.*, 628 S.E.2d 362 (Va. 2006), the Virginia Supreme Court held that Virginia Code § 8.4A-204 preempted the plaintiff's common law claims based on the defendant bank's acceptance of unauthorized payment orders. *Id*. at 368 ("to allow Schlegel to proceed on his common law claims with regard to the unauthorized payment orders would 'create rights, duties and liabilities inconsistent with those stated in' Code § 8.4A-204(a)"). *Schlegel* is inapplicable here because in that case, the statute at issue provided specific remedies – to the plaintiff – for the same conduct on which some of the plaintiff's common law claims were based. Here, the VWMA does not provide Bristol TN any right to recover the damage it has incurred as a result of the nuisance created by Defendant. Rather, the VWMA provides remedies ***for the Board*** in the form of the imposition of civil penalties and requiring permittees like Defendant to comply with the VWMA, its implementing regulations, and permits issued thereunder. *See* Va. Code § 10.1-1455. Therefore, allowing Bristol TN to proceed under Virginia common law to recover its damages caused by Defendant's admittedly wrongful conduct is not inconsistent with the rights, duties and liabilities created by the VWMA.

CONCLUSION

For the reasons stated herein, the Court should reject Defendant's invitation to create new law in Virginia and to hold that the VWMA abrogates Bristol TN's nuisance claim. Defendant's argument finds no support in the language of the VWMA or applicable case law. Because

Defendant cannot satisfy the exceptionally high burden of showing that the General Assembly manifestly intended to abrogate Bristol TN's nuisance claim, the Motion should be denied.

September 2, 2022

Respectfully submitted,

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