Cockey v. Covanta Fairfax, Inc.

Circuit Court of Fairfax County, Virginia

August 4, 2021, Decided

Case No. CL-2019-0001502, Case No. CL-2019-0001504

Reporter
2021 Va. Cir. LEXIS 165 *

Jeffley W. Cockey vs. Covanta Fairfax, Inc.Andrew J. Neuhaus vs. Covanta Fairfax, Inc.

Counsel: [*1] For Plaintiff: Michael Finney, Gentry Locke, Roanoke, Virginia.

For Defendant: John D. McGavin, Bancroft, McGavin, Horvath & Judkins, P.C., Fairfax, Virginia.

Judges: Daniel E. Ortiz, Circuit Court Judge.

Opinion by: Daniel E. Ortiz

Opinion

This matter is before this Court on Defendant Covanta Fairfax, Inc.'s (Covanta) Demurrers to Plaintiffs Jeffrey W. Cockey (Cockey) and Andrew J. Neuhaus's (Neuhaus) Amended Complaints[1] for negligence, gross negligence, and willful and wanton conduct for injuries resulting from a trash fire at Covanta's Lorton trash incineration facility. The questions before this Court are:

> 1. Whether Cockey and Neuhaus sufficiently pleaded facts to demonstrate that their negligence claims against Covanta are exempt from the application of the fireman's rule at this stage of the case.
>
> 2. Whether the fireman's rule bars gross negligence claims.
>
> 3. Whether Cockey and Neuhaus alleged adequate facts to support their claims for gross negligence, willful and wanton conduct, and punitive damages.

After considering the pleadings and oral arguments presented by Counsel, this Court finds that Cockey and Neuhaus sufficiently alleged facts to avoid the application of the fireman's rule to their negligence claims. [*2] Further, the fireman's rule does not bar their gross negligence claims. Lastly, the Amended Complaints contain sufficient facts to support their other claims. Therefore, Covanta's demurrers to Cockey and Neuhaus's Amended Complaints are overruled.

I. BACKGROUND

On February 2, 2017, a trash fire broke out on the floor of a trash disposal area (tipping floor) at Covanta's trash incineration facility in Lorton, Virginia (Facility).[2] Am. Compl. ¶¶ 81-82. During that time, Plaintiffs Cockey and Neuhaus (the Firefighters, collectively) served as firefighters for the Fairfax County Fire Department (Fire Department) and responded to the fire at various times while it burned. Cockey Am. Compl. ¶ 8; Neuhaus Am. Compl. ¶ 8.

While small fires occurred at the facility, the events leading up to the fire resulted in catastrophe. Am. Compl. ¶ 102. Surveillance video captured the fire igniting just before 8:30 p.m., but Covanta employees did not notice the fire for almost seven minutes. *Id.* ¶¶ 85-86. The delay in identifying the ignition resulted, in part, from Covanta's failure to staff an employee whose only duty was to watch for fires, even though Covanta was under an Order of Fire Watch[3] at the time. [*3] *Id.* ¶¶ 3, 59-61, 74, 83. In contravention to Covanta's policies and the Order of Fire Watch, Covanta employees delayed contacting the Fire Department for anywhere from ten to thirty minutes after discovering the

[1] Cockey and Neuhaus filed nearly identical Amended Complaints. For purposes of this opinion, paragraph citations to the Amended Complaints refer to both Amended Complaints unless otherwise noted.

[2] This opinion will recite the facts as outlined in the Amended Complaints, taken as true for purposes of demurrer.

[3] The Fairfax County Office of the Fire Marshall issues Orders of Fire Watch when a fire protection system or any part of that system is out of service. Am. Compl. ¶ 60. In certain circumstances, companies under an Order of Fire Watch are required to staff an employee whose sole responsibility is to watch for fires. *Id.* ¶ 3.

fire. *Id.* ¶¶ 59-61, 86-90, 100. Instead, they unsuccessfully attempted to suppress the fire themselves.[4] *Id.* ¶¶ 86-90. Several firefighters arrived on scene about five minutes after the call. *Id.* ¶ 100.

Neuhaus was one of the first firefighters dispatched to the scene. Am. Compl. ¶ 103. From his station roughly three miles away, Neuhaus could see the fire's glow in the night sky. *Id.* When he arrived at the facility, he confronted the facility engulfed in flames and massive heaps of burning trash extending from one side of the tipping floor to the other, violating Covanta's permitted fire load. *Id* ¶ 81. Various firefighters noted that the waste pit and tipping floor were at capacity. *Id.* ¶ 122.

As Neuhaus attempted to engage his portable mercury monitor to fight the fire, he waded into the chest-deep "toxic-stew" that had collected on the tipping floor due to inadequate drainage. Am. Compl. ¶ 125; Neuhaus Am. Compl. ¶¶ 167-69. When Cockey arrived on scene the next day, he also [*4] attempted to make the water cannons operational in knee-deep "trash-filled water." Cockey Am. Compl. ¶¶ 166-69. Over the next several days, the Fire Department would learn from personal experience and Covanta staff that the water cannons were either inoperable or inaccessible. Am. Compl. ¶¶ 95, 134; Cockey Am. Compl. ¶ 168.

In addition to Covanta's delayed decision to contact the Fire Department, several of Covanta's other decisions further complicated the Fire Department's response to the blaze. As part of its responsibility in managing the facility, Covanta was required to maintain, inspect, and test its fire protection system regularly. Am. Compl. ¶ 51. However, its fire pump had previously failed a flow test and was out of service at the time of the fire. *Id.* ¶¶ 72-73. Further, even though Covanta's facility, fire load, and operations had changed, Covanta had not updated its fire protection system. *Id.* ¶ 35. Many of Covanta's actions violated Virginia's fire code. *Id.* ¶ 159.

Covanta and its personnel further compounded the chaos at the scene by telling a fire captain that its fire pump, fire protection system, and water cannons worked. Am. Compl. ¶¶ 111-18. When firefighters struggled [*5] to get the equipment functioning, Covanta employees stated that the pump merely lacked fuel or battery power. *Id.* In reality, the fire pump was inoperable from the start of the fire, never functioned during the fire, and possibly had not operated since 2016. *Id.* ¶¶ 93, 111-14. This caused the Fire Department to experience significant water supply issues. *Id.* ¶¶ 106-07. Covanta personnel also told the Fire Department that the trash contained "ordinary household waste that was not hazardous." *Id.* ¶ 137. Yet, Covanta normally processed industrial and commercial waste. *Id* ¶¶ 137-38. In fact, on the day of the fire, it had received supplemental waste that included medicinal waste and industrial waste with rubber scrap. *Id.*

While fighting the fire, multiple firefighters noticed unusual circumstances surrounding the fire. Neuhaus saw dead birds outside the facility, where he and other firefighters were staged for hours, and watched rats float around him as he tried to fight the fire on the tipping floor. Neuhaus Am. Compl. ¶¶ 105, 127, 170. A Fire Department captain noticed that his boot zipper rapidly corroded and broke off shortly after the fire. Am. Compl. ¶ 126. In a Fire Department first, [*6] the firetrucks and equipment had to be specially decontaminated, a process which took several days. *Id.* ¶ 128.

After the Covanta fire was controlled, many firefighters became ill. Am. Compl. ¶ 136. As a result, the Fire Department took steps to monitor firefighters, even following up with firefighters over a year later. *Id.* ¶¶ 140-43. However, both Cockey and Neuhaus left the fire thinking they had not been injured. Cockey Am. Compl. ¶ 171; Neuhaus Am. Compl. ¶ 172. Unlike smoke inhalation symptoms which occur quickly, the Firefighters' symptoms did not manifest until later, Cockey's symptoms presenting months later and Neuhaus's at least a week later. Cockey Am. Compl. ¶ 172; Neuhaus Am. Compl. ¶ 173. Both Firefighters experienced symptoms that atypically progressed. Cockey Am. Compl. ¶ 172; Neuhaus Am. Compl. ¶ 173. Cockey's symptoms began with a mild cough, which developed into labored breathing until he suffered a dramatic loss of pulmonary function, while Neuhaus's symptoms began with a sore throat and subsequently worsened. Cockey Am. Compl. ¶ 172; Neuhaus Am. Compl. ¶ 173.

Since the initial fire, the Firefighters have suffered injuries and been diagnosed with a plethora of respiratory, [*7] pulmonary, cardiovascular, and neurological conditions including asthmatic bronchitis, alveoli (lung) damage, chronic cough and vocal cord dysfunction, and hyperlipidemia, among others. Cockey Am. Compl. ¶ 172; Neuhaus Am. Compl. ¶ 173. Both have experience permanent injuries and disabilities.

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[4] Covanta reported it waited about 10 minutes before contacting the Fire Department, but the dispatcher was not contacted until 9:09. Am. Compl. ¶¶ 91, 100.

Cockey Am. Compl. ¶ 173: Neuhaus Am. Compl. ¶ 174.

The Firefighters filed their individual suits on February 1, 2019, alleging willful and wanton conduct, gross negligence, and negligence counts against Covanta, and requesting various damages, including punitive damages. Cockey Compl. ¶¶ 154-74; Neuhaus Compl. ¶¶ 154-74.

On June 26, 2020, the Court heard Covanta's Demurrers to the Firefighters' Complaints. It overruled the demurrers to the gross negligence and willful and wanton conduct claims but sustained the demurrers to the negligence claims with leave to amend.

Subsequently, the Firefighters filed Amended Complaints to which Covanta again demurred to all counts. This Court heard Covanta's Demurrers to the Amended Complaints on May 21, 2021, and took the matters under advisement.

II. ARGUMENTS

A. Covanta's Demurrers

Covanta argues that the fireman's rule bars the Firefighters' negligence and gross [*8] negligence claims because the Firefighters' injuries arose from foreseeable and inherent risks in their normal line of work. Exposure to smoke and emissions are inherent risks in firefighting.

Moreover, the Virginia Supreme Court has only identified five exceptions to the fireman's rule and none of the exceptions apply. Further, though the General Assembly amended the fireman's rule statute in 2017 to exclude gross negligence from the fireman's rule, the incident occurred before the statutory amendment. This statutory amendment was in derogation to Virginia common law, and thus, the fireman's rule bars the Firefighters' gross negligence claims. Moreover, the Firefighters have failed to allege the requisite "utter disregard of prudence" to plead gross negligence.

Finally, the willful and wanton conduct claims fail because the Amended Complaints do not allege facts sufficient to meet the extraordinarily high bar for willful and wanton conduct claims and are based on conjecture and speculation. As a result of the Firefighters' failure to sufficiently allege willful and wanton conduct, punitive damages are unavailable.

B. The Firefighters' Responses

In opposition, the Firefighters contend [*9] that the fireman's rule does not apply because the facts alleged in the Amended Complaints demonstrate that Covanta's negligence exposed the Firefighters to atypical risks resulting in unusual injuries. Further, the fireman's rule is a narrow liability exception, limited to ordinary negligence and not to a party's gross negligence or subsequent negligence. The 2017 statutory amendment confirmed that the fireman's rule does not apply to gross negligence because the General Assembly only changes the common law by expressly stating or necessarily implying the change in statutory language. The General Assembly did not make an express or implied change to the common law.

As to the factual allegations supporting the willful and wanton conduct and gross negligence claims, the Amended Complaints adequately set forth facts of actual or constructive conscious conduct and/or grossly negligent behavior.

III. STANDARD OF REVIEW

A demurrer tests whether the pleadings have stated a cause of action upon which the requested relief may be granted. Va. Code Ann. § 8.01-273(A) (2020); *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 712, 636 S.E.2d 447 (2006). "A demurrer admits the truth of all properly pleaded facts to which it is addressed, as well as any facts that may be reasonably and fairly implied [*10] and inferred from those allegations." *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 489, 706 S.E.2d 864 (2011). Thus, a court must analyze both the stated and implied facts in the light most favorable to the complaining party and determine the sufficiency of those facts rather than their strength of proof. *See Doe v. Baker*, 857 S.E.2d 573, 581 (Va. 2021); *Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589 (2003).

IV. ANALYSIS

As a preliminary matter, Covanta generally states in its demurrers that the Firefighters have failed to state negligence claims but do not point this Court to how the Firefighters have failed to allege negligence. Instead, its memorandum in support focuses on whether the fireman's rule bars the negligence claims. As such, this opinion will not address whether the Firefighters have properly pleaded negligence.

The three issues remaining before this Court are (1)

whether the Firefighters pleaded facts sufficient to exempt their negligence claims from the fireman's rule, (2) whether the fireman's rule applies to the Firefighters' gross negligence claims, and (3) whether the Firefighters have properly pleaded gross negligence, willful and wanton conduct, and punitive damages.

A. The Fireman's Rule as a Bar to Negligence

The fireman's rule limits liability for negligent conduct that injures firefighters. It arises out of the theory that firefighters [*11] assume the "usual" risks of their employment. *Goodwin v. Hare*, 246 Va. 402, 403, 436 S.E.2d 605, 10 Va. Law Rep. 515 (1993); *Benefiel v. Walker*, 244 Va. 488, 491, 422 S.E.2d 773, 9 Va. Law Rep. 505 (1992) (noting that injury or death from burns is a usual hazard of firefighting) *but cf. Philip Morris, Inc. v. Emerson*, 235 Va. 380, 405, 368 S.E.2d 268, 4 Va. Law Rep. 2568 (1988) (holding that the accidental release of a "supertoxic" chemical was not a usual or foreseeable risk encountered by firefighters). Courts analyzing a party's culpability for injuries to a firefighter do not focus on the party's negligence in starting the fire, but rather, emphasize the "fault in creating undue risks of injury," that is "risks not inevitable or inherent in fighting the fire of that kind and extent." *Benefiel*, 244 Va. at 492 (quoting *Chesapeake & Ohio Ry. Co. v. Crouch*, 208 Va. 602, 607, 159 S.E.2d 650 (1968)) (internal quotation marks omitted). The Virginia Supreme Court has "applied the fireman's rule only in cases arising from ordinary negligence." *Goodwin*, 246 Va. at 403-04.

Besides its limited application to ordinary negligence, the Supreme Court has also recognized multiple exceptions to the fireman's rule. First, it does not apply in cases of willful and wanton conduct, intentional torts, third-party injuries, or where a defendant violated a statutory duty. *Goodwin*, 246 Va, at 404-05; *Benefiel*, 244 Va. at 496. Further, it does not bar a negligence claim when a property owner fails to make a condition safe or warn a firefighter of a danger when the owner knows or should know (1) of the dangerous condition, [*12] (2) that the firefighter is on the premises, and (3) that the firefighter is unaware of the danger. *See* Va. Code Ann. § 8.01-226(A) (2020); *Pearson v. Canada Contracting Co.*, 232 Va. 177, 185, 349 S.E.2d 106, 3 Va. Law Rep. 892 (1986). Additionally, Title 8.01, section 226(A) of the Code of Virginia codified the exceptions outlined in *Goodwin* and *Pearson* and included two more exceptions: subsequent negligence that did not arise from the acts causing the emergency[5] and gross negligence. Though the *Goodwin* exceptions were not noted in the language in effect at the time of the incident, the statute emphasized that property owners owe firefighters an ordinary duty of care. Va. Code Ann. § 8.01-226 (2000).

Lastly, while the application of the fireman's rule is a legal question, a firefighter's assumption of risk becomes a factual question when the defendant's negligence exposes a firefighter to a risk that is "not inherently involved in the normal pursuit of his duties." *See Commonwealth v. Millsaps*, 232 Va. 502, 510, 352 S.E.2d 311, 3 Va. Law Rep. 1691 (1987).

Given the current law, this Court must look at whether the Covanta fire conditions were beyond the ordinary risks associated with firefighting and whether an exception to the fireman's rule applies.

As to the question of ordinary risk, certainly, firefighters expect exposure to smoke, water, and flames as part of their normal duties. Yet, the [*13] Supreme Court of Virginia in *Philip Morris, Inc. v. Emerson* acknowledged that exposure to an extremely hazardous chemical was "highly unusual" and barred the application of the fireman's rule in that circumstance. 235 Va. at 405.

The Firefighters allege that they have been diagnosed with various diseases and ailments that progressed atypically, including respiratory, pulmonary, cardiovascular, and neurological conditions. Cockey Am. Compl. ¶ 172; Neuhaus Am. Compl. ¶ 173. These "atypical" injuries were caused by exposure to toxic fumes and hazardous runoff, including knee and chest-deep water filled with trash and smoke from "radioactive, biological, and other uncommon byproducts." Cockey Am. Compl. ¶¶ 6, 26, 30, 169; Neuhaus Am. Compl. ¶ 169. Moreover, the drains either were not working or did not exist, causing the water level to rise and requiring firefighters to fight the fire in a "toxic stew" which at times was chest-deep. Am. Compl. ¶ 125. The corrosive and/or toxic composition of the water and smoke corroded metal clasps on boots, killed birds around the facility, and so contaminated fire trucks and equipment that the Fire Department sent the trucks and equipment for special decontamination [*14] — a first for the Department. Am. Compl. ¶¶ 126-128. Additionally, on the day the fire began, Covanta

[5] The *Benefiel* Court recognized subsequent negligence as an exception to the fireman's rule in a footnote, quoting W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 61 at 431 (5th ed. 1984). 244 Va. at 493 n.3.

accepted 171 tons of waste which included cold and flu medications, deodorants, sleep aids, electronic media, and industrial blend waste containing rubber scrap. Am. Compl. ¶ 138.

The facts discussed above serve as a striking distinction between ordinary fires and the unusual and atypical fire the Firefighters encountered at the facility, despite Covanta's arguments to the contrary. Covanta credibly contends that the Amended Complaints lay out the facts that Covanta trash fires commonly occurred and that firefighters were familiar with the fires and types of waste burned at the facility. Am. Compl. ¶¶ 1, 16, 26, 102. Additionally, the present case factually resides somewhere between ordinary exposure to fire hazards and the unique factual circumstances of *Philip Morris, Inc.* Yet, the Amended Complaints allege that the Firefighters suffered uncommon symptom progressions and numerous ailments, and experienced once-in-a-career circumstances like metal that quickly corroded and special decontamination procedures. While it was foreseeable that the trash fire could expose the Firefighters [*15] to toxic fumes, the facts as pleaded in and fairly inferred from the Amended Complaints identify risks and injuries that had not previously occurred in Covanta fires or in fires of "that kind and extent." *Benefiel*, 244 Va. at 492. Thus, the Amended Complaints contain sufficient facts indicating that the Covanta fire presented risks not inherent in firefighting.

As added support to this Court's decision to overrule the demurrers to the negligence counts, the Firefighters sufficiently pleaded facts to fall into two other exceptions to the fireman's rule. First, as alleged, Covanta at a minimum committed a subsequent act of negligence separate and apart from the initial negligence giving rise to the emergency by telling the Fire Department that the fire system was fully operable and that the burning waste was household rather than industrial waste. Am. Compl. ¶¶ 16, 111-18, 137-38. Relatedly, the Firefighters claim and imply that Covanta knew or should have known about the dangerous conditions of the institutional waste and blocked drains, knew or should have known that the Firefighters were on the premises after Covanta called them, and knew or should have known that the Firefighters did not know about the type [*16] of waste that was burning. Thus, the Amended Complaints outline facts to demonstrate that Covanta's negligence did not fall under the fireman's rule.

Therefore, this Court overrules Covanta's demurrers to the negligence claims.

B. Gross Negligence

Covanta attacks the Firefighters' gross negligence counts on two fronts: (1) the fireman's rule bars gross negligence claims and (2) the Firefighters failed to allege facts sufficient to support their gross negligence claims. This Court will address both in turn.

1. The Fireman's Rule as a Bar to Gross Negligence

The Virginia Supreme Court has not directly addressed whether the fireman's rule bars gross negligence claims. After review of the caselaw and its reasoning, this Court finds that the fireman's rule does not bar the Firefighters' claims at this point in the proceedings.

One federal court and two circuit courts have determined that the fireman's rule acts as a bar to gross negligence claims. *Johnson v. Teal*, 769 F. Supp. 947 (E.D. Va. 1991) (reasoning that the fireman's rule applies to gross negligence because "'undue risk' does not refer to the level or degree of negligence, but rather to the nature of the risk"); *Irby v. Doe*, 46 Va. Cir. 323, 324 (City of Norfolk 1998) (determining that the rule barred gross negligence claims despite noting [*17] that the question before it dealt solely with willful and wanton negligence); *Stafford v. Hodges*, 25 Va. Cir. 234, 242 (Fairfax County 1991) (concluding that the fireman's rule could apply to a gross negligence count because the rule is essentially an assumption of risk defense, but letting the issue go to the jury). However, the timing and reasoning of these cases are unpersuasive, especially given the procedural posture of this case.

Both *Johnson* and *Stafford* were decided before the Virginia Supreme Court issued its decision in *Goodwin v. Hare. Goodwin* clarified that the Supreme Court has applied the fireman's rule only in cases of ordinary negligence. 246 Va. 402, 403-04, 436 S.E.2d 605, 10 Va. Law Rep. 515 (1993). Further, the *Irby* Court's brief discussion of gross negligence was dicta. *Stafford* also relied on a Virginia Supreme Court case where the question of gross negligence and assumption of risk was presented to jurors after the parties presented all their evidence. Thus, the few persuasive cases addressing the question do not compel this Court to apply the fireman's rule to the Firefighters' gross negligence claims at this time.

Additionally, Section 8.01-266(A) establishes that the fireman's rule does not apply to gross negligence claims. Despite the fact that the statutory amendment went into effect after the Covanta [*18] fire, this Court

presumes that the General Assembly did not intend the enacted statute to change or abrogate the common law unless clearly indicated by the statute. *Jenkins v. Mehra*, 281 Va. 37, 44, 704 S.E.2d 577 (2011). Because the statute does not evince any intent to change the common law, this Court concludes that the fireman's rule does not bar gross negligence claims arising from events occurring before the statutory enactment.

Moreover, this Court finds unavailing Covanta's argument that the Virginia Supreme Court's silence on whether the fireman's rule applies to gross negligence means that the fireman's rule bars gross negligence claims. The Virginia Supreme Court has often taken careful measures to avoid deciding matters not brought before it. *See* Va. Sup. Ct. R. 5:17(c)(4); *Thrasher v. Thrasher*, 210 Va. 624, 628-29, 172 S.E.2d 771 (1970) (refraining from addressing a question not raised in the lower court or by assignment of error). Neither *Goodwin* nor *Benefiel* raise issues of gross negligence. Thus, the Supreme Court's restraint in addressing the fireman's rule does not speak to whether the fireman's rule applies to gross negligence.

Finally, this Court must address Covanta's argument that the fireman's rule applies to gross negligence because the rule's applicability depends on whether the party creates an undue [*19] risk, rather than the degree of negligence. This Court disagrees for two reasons.

First, willful and wanton conduct, which is exempt from the fireman's rule, is a degree of negligence. *Doe v. Baker*, 857 S.E.2d 573, 587 (Va. 2021) (noting that the Supreme Court's decisions have recognized three levels of negligence: ordinary, gross, and willful and wanton). Therefore, it must be accepted that the degree of negligence plays some role in the applicability of the fireman's rule where the Supreme Court excepts willful and wanton negligence. Second, as explained in the negligence section of this opinion, the Firefighters have sufficiently alleged an undue risk not inherent to firefighting.

As a result, the fireman's rule does not bar gross negligence claims for the purpose of these demurrers.[6]

2. *The Firefighters' Factual Support for their Gross Negligence Claims*

Gross negligence is "a degree of negligence showing indifference to another and an utter disregard of prudence" that essentially completely neglects another's safety. *Elliott v. Carter*, 292 Va. 618, 622, 791 S.E.2d 730 (2016). Negligent acts that individually do not equate gross negligence may have a cumulative effect showing gross negligence. *Chapman v. City of Virginia Beach*, 252 Va. 186, 190-91, 475 S.E.2d 798 (1996) (finding gross negligence when a city deliberately chose not to repair a dangerous gate). [*20] Further, courts consider deliberate conduct as important evidence of whether gross negligence occurred. *Elliott*, 292 Va. at 622 (quoting *Chapman*, 252 Va. at 190). However, where a defendant exercises some degree of care, a gross negligence claim must fail as a matter of law. *Id* Otherwise, the question of gross negligence is ordinarily left to the fact finder. *Id*

Although Covanta has a fire suppression system, the Firefighters allege Covanta failed to exercise even slight care in maintaining and/or repairing the system. Am. Compl. ¶¶ 51, 72-73, 111-18. The Amended Complaints repeatedly state that Covanta knew or should have known of the problems with, and unlawful status of, its fire protection system, including its out-of-service and malfunctioning fire pump and blocked hydrants, its fire load limits, and its protocols for fire response. *Id.* ¶¶ 33-35, 53-61, 71-78, 81, 92-94, 145-164. Further, Covanta misrepresented to the Fire Department the operating status of its closed-loop system, other fire conditions, and the trash's contents. *Id.* ¶¶ 101, 104, 106-19, 137-38.

The Amended Complaints also allege that the fire hydrants and fire department connections (FDC) were inaccessible to firefighters. Am. Compl. ¶ 77. One FDC was covered [*21] by a shack. *Id.* ¶ 78. The water cannons were in disrepair and inoperable, even though they would have likely been one of the most efficient ways to fight trash fires. *Id*, ¶¶ 45, 97, 135. Moreover, Covanta did not appoint fire watch personnel, and the fire likely burned for five to seven minutes unnoticed. *Id.* ¶¶ 83, 86. Even after it was noticed, Covanta personnel waited ten to thirty minutes to contact the Fire Department, even though they were required to immediately report the fire. *Id.* ¶¶ 61, 69, 88-91, 100.

Coupled with the misrepresentations to the Fire

[6] This is not to say that the fireman's rule could not bar gross negligence upon further evidentiary development, revealing more than a tacit assumption of the risks of an uncommon tire. *See Stoner v. Robertson*, 207 Va, 633, 636-37, 639, 151 S.E.2d 363 (1996) (holding that properly alleged gross negligence can be contradicted by evidence that the complaining party "fully appreciated and voluntarily assumed a known hazard" caused by the defendant's gross negligence).

Department, the Amended Complaints' allegations state a cause of action for Covanta's gross negligence by detailing the cumulative effect of Covanta's action and/or inaction. Am. Compl. ¶¶ 106-19. Moreover, the poor state of the fire protection system, which required weekly, monthly, and yearly checks fairly implies a deliberate decision by Covanta not to act. In sum, the facts as alleged amount to Covanta's complete neglect of the safety of other persons.

Notably, Covanta argues that the Firefighters have failed to state sufficient facts to support both gross negligence and willful and wanton conduct claims because the facts are [*22] speculative and based on rumors. However, because this Court takes as true facts pleaded in a complaint, this argument is unpersuasive. *Cox Cable Hampton Rds., Inc. v. City of Norfolk*, 242 Va. 394, 397, 410 S.E.2d 652, 8 Va. Law Rep. 1330 (1991).

Thus, the gross negligence claims should be submitted to the fact finder after proper discovery.

Because the fireman's rule does not bar gross negligence claims and the Firefighters pleaded facts sufficient to support claims for gross negligence, this Court overrules the demurrers as to the gross negligence counts.

C. Willful and Wanton Conduct

The Firefighters stated claims for willful and wanton conduct supported by facts alleged in the Amended Complaints. This Court will overrule the demurrers to the willful and wanton conduct claims without further discussion.

D. Punitive Damages

Given that the Firefighters properly pleaded willful and wanton conduct, the claims for punitive damages in Count 1 are appropriate. "[P]unitive damages are warranted . . . by *'negligence* which is so willful or wanton as to evince a conscious disregard of the rights of others." *Infant C. v. Boy Scouts of America, Inc.*, 239 Va. 572, 580, 391 S.E.2d 322, 6 Va. Law Rep. 2137 (1990) (emphasis in original) (quoting *Booth v. Robertson*, 236 Va. 269, 273, 374 S.E.2d 1, 5 Va. Law Rep. 867 (1988)). The demurrers to punitive damages are overruled.

V. CONCLUSION

Generally, firefighters undertake enormous but accepted risks when they fight fires. Yet, this undertaking [*23] does not force them to assume risks beyond those inherent to their responsibilities. On demurrer, the atypical and unusual events surrounding the fire, including the progression of the Firefighters' illnesses, special decontamination process, and corroded equipment, and Covanta's reckless and/or knowing conduct adequately support the Firefighters' claims against Covanta.

For the foregoing reasons, Covanta's demurrers to Cockey and Neuhaus's Amended Complaints are OVERRULED without prejudice to Covanta raising the fireman's rule at future stages of the proceedings. Covanta has 21 days from the entry of this Order to file answers to the Amended Complaints.

Sincerely,

/s/ Daniel E. Ortiz

Daniel E. Ortiz

Circuit Court Judge

ORDER

THIS CAUSE came to be heard on May 21, 2021, on Defendant's Demurrer to Amended Complaint.

IT APPEARING that for the reasons set forth in the Court's Opinion Letter dated August 4, 2021, the Plaintiff has sufficiently alleged negligence, gross negligence, and willful and wanton conduct; it is therefore

ORDERED that the Demurrer to Amended Complaint is OVERRULED without prejudice to Covanta raising the fireman's rule at future stages of the proceedings. Defendant has 21 [*24] days from the entry of this Order to file an answer to the Amended Complaint.

ENTERED this 4th day of August 2021.

/s/ Daniel E. Ortiz

Judge Daniel E. Ortiz