

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

**SANDRA L. WYATT,
WILLIS E. WYATT, JR.,
ROBERT L. WYATT,
EVA S. GREGORY,
LEVERETTE B. GREGORY, JR.,
TERESA E. GREGORY,**

Plaintiffs,

v.

**Sussex Surry, LLC,
Synagro Central, Inc.,** individually and
formerly known as Synagro Mid-Atlantic Inc.

Defendants

Case No. 3:06CV00835

**PLAINTIFFS'
REBUTTAL BRIEF
IN SUPPORT OF
MOTION TO REMAND
TO STATE COURT**

Hearing Date: _____

Time: _____

Location: _____

Judge: Henry E. Hudson

**REBUTTAL MEMORANDUM IN RESPONSE TO DEFENDANT SUSSEX-SURRY'S
OPPOSITION TO REMAND**

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I. INTRODUCTION

Defendant Sussex Surry (“Sussex”) filed a Memorandum in Opposition to Plaintiffs’ Motion to Remand (“Opposition”) on January 30, 2007. While the issues and arguments raised by Sussex are similar to those raised in Synagro’s Brief, Plaintiffs did not consider arguments made by Sussex in their response and therefore submit this Memorandum. Sussex begins its Opposition in a similar fashion as Synagro, extolling the virtues of the use of sewage sludge as fertilizer. *See* Opposition at 2-4. Sussex also creates the impression that Synagro’s sewage disposal activities are highly monitored and thoroughly regulated. *Id.* at 3-4. Apparently this effort, as well as that by Synagro, was made in an attempt to convince this Court that there is nothing wrong with what Synagro is doing, that it is not capable of injury, and that those injuries would not otherwise have been foreseeable. As Plaintiffs pointed out in their Rebuttal to Synagro’s Opposition to Remand (“Rebuttal”), mere legality through compliance and permitting does not prevent a finding of liability. Rebuttal at 9. Because this permit does not absolve Synagro of common law liability, it also cannot, under the standards provided by both Plaintiffs and Defendants, absolve Sussex of liability *as a matter of law*.

While creating a picture of a highly regulated and monitored operation, neither Defendant mentions the finding that monitoring and regulation of sludge application in Virginia is woefully inadequate with only 19 inspections taking place on the over 1,100 application sites, as found by the investigative branch of the Virginia General Assembly. Nor does either defendant address the activities alleged in the complaint that also contribute to Plaintiffs’ injuries for which Synagro does not have a permit, such as the disposal of untreated hog waste. This, however, is not the proper forum for a debate about the nature of sewage sludge generally, or specifically the

nature of Synagro's disposal activities at the Site in Surry County. *See* Rebuttal at 4, 9 (citations omitted).

Sussex relies on the same mischaracterization of Plaintiffs' allegations and the legal basis supporting a finding of liability of Sussex. This results in the inapplicable discussion and analysis of vicarious liability that parallels the discussion put forward by Defendant Synagro. However, Sussex's liability in this lawsuit rests on its own acts and omissions leading to the disruption of the comfortable use and enjoyment of Plaintiffs' property, in addition to other injuries detailed in Plaintiffs' Complaint. Sussex's involvement in the actions that caused Plaintiffs' injuries lead to a reasonable possibility that they are liable to Plaintiffs and are therefore proper defendants in this action.

II. ARGUMENT

A. Sussex's Control of Property Where Sludge is Stored, Disposed, and Maintained Creates Liability for Sussex

In making the analogy to an independent contractor, Sussex claims that it is simply a passive landowner and has no liability in this matter. Opposition at 7-10. However, as discussed in Plaintiffs' Rebuttal, Sussex is not a passive landowner nor has it given up its custody and control of the land. Rebuttal at 5-6, 11-13. Sussex's analogy to vicarious liability for acts of an independent contractor fails for the number of reasons fully discussed in Plaintiffs' Rebuttal; Sussex's liability is not based on acts of Synagro, but on its *own* acts and omissions, the case law discussing unforeseeable and discrete tortious acts by an independent contractor are not representative nor applicable to the facts in this case, Sussex's knowledge of the injuries suffered by Plaintiffs' due to its authorization and the continued grant of that authorization for its own gain create liability, vicarious or otherwise. *See* Rebuttal at 4-13. Plaintiffs' claims are not

based on vicarious liability, but on Sussex's own acts and omissions, and the standards applicable to vicarious liability do not apply.

Sussex also points to case law involving landlord and tenant relationships. Opposition at n.3. However, as the cases quoted point out, the analysis under these cases does not apply to the question of Sussex's liability when it *maintains custody and control of the property*. See e.g. *Wells v. Whitaker*, 207 Va. 616, 630 (1966) ("Ordinarily, a landlord *who retains no control over premises* is not liable to an adjoining landowner resulting solely from the negligence of the tenant.") (emphasis added). Again, Sussex is not a landlord leasing to a tenant that occupies and controls the land, but Sussex has retained total control of its land. Surely the facts in this case are distinguishable from those of an absentee landlord, or even a local landlord that has no control over the use of its property under the terms of its lease.

When a party such as Sussex retains control over the use of its property, it is liable for its acts in creating the nuisance and for its omissions in failing to abate such nuisance. Discussion by the Supreme Court of New Jersey in a case involving liability of the lessor when the lessee creates a nuisance on the property provides insight into the basis for landowner liability. See *Bd. of Chosen Freeholders v. Woodcliffe Land Imp. Co.*, 65 A. 844 (N.J. Sup. Ct. 1907). The court points out that, contrary to when a nuisance exists during the lease term where the landlord has limited control of the property, it is settled that where a nuisance exists at the end of a lease, an action lies against the landowner. *Id.* at 846 (citations omitted). This is due to the return of control to the lessor. See *id.* Liability for the nuisance does not lie for unforeseen actions of an independent contractor over which the principle has no control, or for a landlord with a nuisance maintained on his property but over which she has given up control, however there is liability when, as in this case, the landowner maintains continuous control of the land. As evidenced by

the New Jersey Supreme Court's discussion, when a defendant has the ability to maintain or to abate a nuisance, they are liable as if they had created the nuisance.

Furthermore, as discussed in Plaintiffs' Rebuttal, the negligent maintenance of its land, the nuisance, and the trespass resulting from the sludge, abandoned by Synagro and now owned by Sussex, continued even when Syangro had stopped its own operations at the Site. *See* Rebuttal at 5, 10. The sludge, disposed on Sussex's land for Sussex's benefit, becomes Sussex's responsibility. After Synagro ceased its operations, temporarily or permanently, Sussex's duty to abate the nuisance, to exercise reasonable care to prevent injury to Plaintiffs, and to prevent the continued trespass from its property onto that of Plaintiffs, imposes liability on Sussex. This is clearly independent of any acts or omissions by Synagro. This is why Plaintiffs did not originally address the question of vicarious liability and why it remains misplaced here.

B. Sussex's Knowledge Reinforces the Existing Bases for its Liability

Even under the inappropriate, heightened standard required for finding vicarious liability proposed by Defendants in this matter, Sussex is liable, or at least potentially liable. As Defendants point out, in the situation where injury is a likely result of the activities authorized by the landowner, the landowner may be held liable. *See* Synagro Opposition at 13, Sussex Opposition at 11-12. Prior to being served in this lawsuit, Sussex was aware of the injury, disruption, and offense to the senses that the use of its property had caused. *See* Plaintiffs' Rebuttal at 12-13. As discussed therein, this knowledge meets and exceeds the requirement for finding vicarious liability for a party authorizing activity that would "likely," "probably," or "in the normal course of events" leads to injury. The acts and omissions of Sussex, in light of its awareness of the nature of the use of its property and the injuries caused to Plaintiffs were unlawful, and create a basis for its liability.

Defendant supports its arguments with conclusions that can only be properly made after the appropriate fact finding in the case. *See* Opposition at 13 (“Synagro’s land application of biosolids, as actually performed ‘in the natural course of things,’ *is not inherently dangerous, nor does it require special precautions to be taken.*”) (emphasis added); Declaration of Sidney J. Brandon, Jr. at ¶ 4 (“Sussex Surry *has no duty* or ability to supervise Synagro’s work”) (emphasis added). These conclusory statements do not support Defendant’s arguments; rather stand in stark contrast to Plaintiffs’ allegations emphasizing the need for full discovery and testimony to be heard in this case.

III. CONCLUSION

The arguments raised by Sussex parrot those raised by Synagro. Case law cited by both Defendants in support of their argument does not apply when Sussex maintains custody and control of its property, acts, or fails to act, proximately causing injury to Plaintiffs or when Sussex has ongoing, advance knowledge of the injury that its acts and omissions, and those taken by others for its benefit, have had and continue to have. Under the facts as Plaintiffs know them to be, prior to further discovery, traditional common law principles create the potential for Sussex's liability. Neither Sussex nor Synagro have met the significant burden of showing the lack of any possibility of liability on the part of Sussex, and therefore Sussex is a proper party to this action.

Respectfully submitted,

DATED: February 7, 2007

H. BISHOP DANSBY

By:



H. BISHOP DANSBY
CHRISTOPHER T. NIDEL

Attorneys for Plaintiffs