SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

SANDRA BARKLEY, As Parent and Next Friend of A.S., Plaintiff, v. DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, Defendant.	Civil Action No. 2013 CA 003811 B Hon. Judge Frederick H. Weisberg Next Event: 1/13/2016 Opposition to motions *in limine* due
KAREN THIESFELD, As Parent and Next Friend of T. T-J., Plaintiff, v. DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, Defendant.	Civil Action No. 2013 CA 003813 B Hon. Judge Frederick H. Weisberg Next Event: 1/13/2016 Opposition to motions *in limine* due
JOHN PARKHURST, As Parent and Next Friend of J.D.P., and J.T.P., Plaintiff, v. DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, Defendant.	Civil Action No. 2013 CA 003814 B Hon. Judge Frederick H. Weisberg Next Event: 1/13/2016 Opposition to motions *in limine* due

JOHN AND JANE DOE, As Parent and Next Friend of A. Doe. and B. Doe., Plaintiff, v. DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, Defendant.	)	Civil Action No. 2013 CA 003855 B Hon. Judge Frederick H. Weisberg Next Event: 1/13/2016 Opposition to motions *in limine* due

ORDER GRANTING IN PART AND DENYING IN PART WASA'S MOTION FOR SUMMARY JUDGMENT ON LEGAL GROUNDS

This matter is before the court on the motion of Defendant District of Columbia Water and Sewer Authority ("WASA") for judgment as a matter of law on four grounds. WASA contends that (1) Plaintiffs' claims–or at least the claims sounding in tort–are barred by the "public duty doctrine"; (2) WASA is entitled to "derivative discretionary function immunity" because the minor plaintiffs' alleged injuries were caused by decisions of dictated by decisions of the Environmental Protection Agency ("EPA") and the Army Corps of Engineers, over which WASA had no control and for which those federal agencies have discretionary function sovereign immunity; (3) Plaintiffs' product liability claims are subject to federal conflict preemption because the decision to use chloramine to disinfect the water at the Washington Aqueduct conformed to EPA Rules enacted pursuant to federal law, and local law claims based on injuries resulting from that decision are preempted; and (4) Plaintiffs are without a remedy under the D.C. Consumer Protection Procedures Act ("CPPA") because at all relevant times WASA was not a "merchant" covered by the CPPA and because, in any event, the CPPA does

not provide a remedy for personal injury based on tort. Plaintiffs oppose WASA's motion on all grounds.

I. Background

Defendant WASA provides water and sewer services to District of Columbia residents. Until 1996, distribution of water to District of Columbia households was the responsibility of the Water and Sewer Utility Administration, which was part of the District's Department of Public Works. Largely because the District government was facing dire financial conditions in the mid 1990's and because the infrastructure for the distribution of drinking water was sorely in need of capital for required upgrades, the D. C. Council created WASA as an independent authority within the District of Columbia government and gave it the power to issue bonds and borrow money. Committee on Public Works and the Environment, *Report on an Amendment in the Nature of a Substitute to Bill 11-102, the "Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1995*, 4-5 (1995) (*hereinafter* "WASA Report"). WASA then stepped into the shoes of the Water and Sewer Utility Administration and became the sole governmental entity responsible for the distribution of water to District of Columbia homes.

WASA purchases its water exclusively from the Washington Aqueduct, which is operated by the U.S. Army Corps of Engineers. The Corps of Engineers is solely responsible for treatment of the water it sells to WASA and must comply with EPA regulations in choosing agents to disinfect the water before the water leaves the Aqueduct. In 2000, in response to concerns about the possible carcinogenicity of chlorine, which had been used as the disinfectant

up to that time, the EPA authorized the use of choramine to treat the water as a substitute for chlorine, and the Corps of Engineers changed its disinfectant from chlorine to chloramine.[1]

It is alleged in this case that chloramine is more caustic than chlorine and that it had the unintended consequence of causing lead to leach into the drinking water from lead pipes used in many older houses and buildings in the District of Columbia. As a result, the water WASA distributed in 2000 and 2001 had elevated lead levels, which allegedly caused injuries to Plaintiffs' minor children, for which they seek compensation in these four unconsolidated civil actions.

Under the EPA Lead and Copper Rule, WASA is required to test for lead in water it distributes to the homes of D.C. residents. 40 C.F.R. §§ 141.80 *et seq.* If more than 10% of the samples tested contain a lead level of more than 15 parts per billion, WASA is required to take remedial action by conducting additional testing, informing the public of the presence and harmful effects of lead in the water, and replacing lead pipes. 40 C.F.R. §§ 141.84(b), 141.85, 141.86(d).

Plaintiffs claim that WASA violated its duty under the EPA Lead and Copper Rule in several ways: (1) in June 2001, it allegedly concealed the elevated lead levels from the public by improperly excluding from the sample the non-compliant test results from several homes, skewing the average lead level downward to make it appear compliant; (2) by June 2001, WASA was required to take remedial action under the Lead and Copper Rule, but did not do so; and (3) even when WASA did inform the public about lead in the water, its educational material was misleading and deceptive. Plaintiffs allege that, as a result of WASA's failure to take the

[1] Plaintiffs claim that WASA "participated in" the Corps of Engineers' decision to switch from chlorine to chloramine to treat the water at the Aqueduct. Based on the discovery record to date, the court is not persuaded that this is a "genuine" issue of material fact in dispute. Whether or not WASA was "in the room," it does not appear to be genuinely disputed that WASA had no control over the decision.

required remedial actions, Plaintiffs' minor children consumed water with elevated lead levels, which caused developmental and intellectual disabilities. Plaintiffs assert claims for negligence, fraudulent misrepresentation, breach of warranty, strict liability, and violations of the D.C. Consumer Protection Procedures Act ("CPPA").

II. Standard of Review

To prevail on a motion for summary judgment, the moving party must demonstrate, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact in dispute and that the moving party is entitled to judgment as a matter of law. *Grant v. May Department Stores Co*., 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56(c). A trial court considering a motion for summary judgment must view the pleadings, discovery materials, and other evidentiary submissions in the light most favorable to the non-moving party, and it may grant the motion only if the evidence, viewed in that light, would require a verdict for the moving party as a matter of law. *Grant*, 786 A.2d at 583 (citing *Nader v. De Toledano*, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d 812, 816 (D.C. 1995). If the moving party makes a sufficient showing of no genuine issue of material fact in dispute, the party opposing the motion must set forth "specific facts showing that there is a genuine issue for trial." Super. Ct. Civ. R. 56(e). Mere allegations or conclusory denials of the moving party's facts are insufficient to defeat a well-grounded motion for summary judgment. *See Grant*, 786 A.2d at 593 (citing *O'Donnell v. Associated Gen. Contractors of America, Inc.*, 645 A.2d 1084, 1086 (D.C. 1994)). Rather, the opposing party must show by affidavit or other competent evidence that a genuine dispute exists for trial and that the moving party is not entitled to judgment as a matter of law. *See Night And Day Mgt.,*

LLC v. Butler, 101 A.3d 1033, 1037 (D.C. 2014); *Logan v. LaSalle Bank Nat'l Ass'n*., 80 A.3d 1015, 1019 (D.C. 2013).

III. Analysis

A. The Public Duty Doctrine

Under the "public duty doctrine," the District and its agents "owe no duty to provide public services to particular citizens as individuals." *Hines v. District of Columbia*, 580 A.2d 133, 136 (D.C. 1990). "If the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution." *Powell v. District of Columbia*, 602 A.2d 1123, 1127 (D.C. 1992). Stated another way, absent a special relationship between the District and an individual citizen creating a specific duty of care owed to that individual, the duty to all is a duty to no one. *See Nealon v. District of Columbia*, 669 A.2d 685, 691 (D.C. 1995) (citing 18 E. McQilllin, Municipal Corporations § 53.04.25 at 165 (3d ed. 1984)).

WASA argues that all of Plaintiffs' claims are barred under the public duty doctrine because its duty to provide safe water and to warn of unsafe water is owed to the public at large. Although Plaintiffs do not dispute the general applicability of the public duty doctrine in this jurisdiction, they argue that the doctrine is inapplicable here because it bars only claims against the District of Columbia, and WASA is not the District of Columbia.

When the Water and Sewer Utility Administration was in charge of water and sewer operations, the public duty doctrine precluded liability against the District for negligence in the distribution of water or the maintenance of the water distribution system. *Nealon*, 669 A.2d at 691-92. In *Nealon*, the plaintiffs alleged that their houses burned down because the District had failed to maintain adequate water pressure in the fire hydrants. The Court of Appeals affirmed

the trial court's dismissal of the complaints based on the public duty doctrine, holding that the plaintiffs could not prove the District owed them a duty greater than or different from the duty it owed to the general public. *Id.* at 693.

Since the creation of WASA, no decision of the Court of Appeals has held that WASA enjoys the same protection under the public duty doctrine as its predecessor.[2] Nonetheless, all of the policy reasons for not imposing liability on the District for breach of a duty owed to the general public apply with equal force to WASA, which the District established for the express purpose of providing water and sewer services for the general public with the financial independence to do a better job than its municipal predecessor.

WASA is "an independent authority of the District government" with "a separate legal existence *within* the District government," D.C. Code § 34.2202.02(a), "to improve the financial and bonding capacity" of its predecessor, the Water and Sewer Utility Administration. WASA Report at 4-5 (emphasis added). As Defendant points out in its brief, establishing WASA within the District of Columbia government structure was necessary because, under the Home Rule Act, Congress delegated to the District only the limited authority to "create, abolish, or organize any office, agency, department, or instrumentality of the government of the District [of Columbia]." D.C. Code § 1-204.04(b). In order to grant WASA financial independence, the Council delegated to WASA the authority "to issue revenue bonds to finance, refinance, or assist in the financing or refinancing of any undertakings of the Authority pursuant to this chapter." D.C. Code § 34.2202.08; WASA Report at 3. Although WASA was given financial independence, it was created as a governmental entity to serve a quintessential "public purpose,"–*i.e.*, "to plan, design, construct, operate, maintain, regulate, finance, repair, modernize, and improve water

[2] The issue was presented in *Odemns v. District of Columbia*, but the Court decided the case on other grounds. 930 A.2d 137, 144 n.11 (D.C. 2007).

distribution and sewage collection, treatment, and disposal systems and services, and to encourage conservation." D.C. Code § 34.2202.02(c); *see also* WASA Report at 5 (rejecting the idea of privatizing WASA).

As a necessary part of WASA's separate legal existence, it was given the power to sue and be sued and to enter into contracts, including contracts with the District. D.C. Code § 34-2202.03(1), (10). Plaintiffs, pointing out the obvious that the District cannot contract with itself, cite these provisions in support of their argument that WASA is separate from the District and therefore not entitled to the protection afforded under the public duty doctrine. Given the legislative history of WASA's enabling legislation, it seems clear that the power to sue and be sued and to enter into contracts, including contracts with the District, were necessary to enhance WASA's financial independence, but were not intended to separate WASA from the District government in such a way as to strip it of its protection under the public duty doctrine.

The purpose of the public duty doctrine is to protect against the drain on the treasury from suits for damages against public officials arising out of their performance of duties owed to the general public, and to preserve the separation of powers by preventing judges and juries from scrutinizing the acts of every public official in the performance of his or her public duties. *See Woods v. District of Columbia*, 63 A.3d 551, 553 n.1 (D.C. 2013). Those purposes apply with full force to WASA as a governmental entity, as they did when the District itself performed the public functions it later delegated to WASA. Ensuring solvency for water and sewer operations is the very reason the Council and Congress created WASA as a separate entity. WASA Report at 1-5. If the Council intended to expose the new authority to individual tort liability for breach of a public duty, it could have done so. The fact that WASA is *sui juris*–just as the District itself is *sui juris*–does not remove the protection of the public duty doctrine or render inapplicable the

policy reasons for its existence. Applying the public duty doctrine to WASA is consistent with the Council's legislative intent by ensuring that litigation by individuals alleging breach of a public duty will not undermine the financial stability of the governmental entity responsible for the delivery of water and sewer services to *all* of the citizens of the District.

Dingwall v. Dist. of Columbia Water and Sewer Auth., 766 A.2d 974 (D.C. 2001), *aff'd en banc*, 800 A.2d 686 (D.C. 2002), on which Plaintiffs rely, is not to the contrary. In *Dingwall*, the trial court dismissed the plaintiff's suit against WASA because the plaintiff failed to comply with the mandatory notice provisions of D.C. Code § 12-309. That section states:

> *An action against the District of Columbia* for unliquidated damages to person or property unless within six months after the injury or damage was sustained, the Claimant, his agent, or attorney has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage. [emphasis added].

The Court of Appeals reversed, holding that an action against WASA was not "an action against the District of Columbia" under section 12-309 because WASA was given a statutory power to sue and be sued in its own name. *Dingwall*, 766 A.2d at 978. In reaching this conclusion, the Court noted that "the legislature could readily have included a provision comparable to § 12-309 in the WASA statute, or it could have written § 12-309 to require pre-suit notice not only in suits against the District, but also in actions against all or some of the *sui juris* agencies or instrumentalities affiliated with the District." *Id.* at 979. Nothing in *Dingwall's* straightforward construction of section 12-309 addresses the question presented here–whether an action against WASA alleging breach of a duty owed to the general public is barred by the public duty doctrine.

Dist. of Columbia Water and Sewer Auth. v. Delon Hampton & Assocs., 851 A.2d 410 (D.C. 2004), also cited by Plaintiffs, is similarly inapposite. In *Delon Hampton & Associates*, WASA sued a contractor in 2001 regarding a dispute related to a 1987 construction project at the

Blue Plains Wastewater Treatment Plant. Under the three-year statute of limitations applicable to contract claims, the action was time barred; but WASA claimed protection from the statute of limitations under D.C. Code § 12-301, which exempts the "District of Columbia government" from the statute of limitations based on the doctrine of *nullum tempus.* Observing that *nullum tempus* applies only to suits by the government "to enforce public rights," the Court held that the 1987 construction project and the contract claim arising from it were "proprietary" rather than public or governmental functions, and therefore WASA was not entitled to the statutory exemption from the statute of limitations enjoyed by "the District of Columbia government." *Id.* at 414-16.

In contrast to *nullum tempus*, "[w]hether the District acts in a uniquely governmental capacity or as one of several business competitors does not bear on the underlying policy of the public duty doctrine to protect the government from interference in its 'legislative or administrative determinations concerning allocation of limited public resources.'" *Auto World, Inc. v. District of Columbia*, 627 A.2d 11, 13 (D.C. 1993) (quoting *Johnson v. District of Columbia*, 580 A.2d 140, 141 n.1 (D.C 1990)) (quoting *Warren v. District of Columbia*, 444 A.2d 1, 4 (D.C. 1981)) (*en banc*). The Court of Appeals has routinely barred suits against the District under the public duty doctrine even though the plaintiffs alleged a breach of a public duty arising from their use of a fee-based service. *See Powell*, 602 A.2d at 1131-32 (holding the District liable only because Bureau of Motor Vehicles had established a special relationship with the plaintiff by issuing tags and vehicle registration, which belonged to the plaintiff personally); *Wanzer v. District of Columbia*, 580 A.2d 127, 131 (D.C. 1990) (rejecting plaintiff's argument that the ambulance user fee created a special relationship between the District and her deceased father). For all of the foregoing reasons, the court concludes that the public duty doctrine applies

to these cases to the same extent it would apply if the District itself were still responsible for the water and sewer services now performed by WASA.[3]

Having concluded that the public duty doctrine applies to claims against WASA, just as it would to claims against the District itself, it follows that Plaintiffs' negligence claims are barred. But what about Plaintiffs' other claims? The essence of the public duty doctrine is to shield the government from claims based on the negligence of its public officials. *See Powell*, 602 A.2d at 1126-27. Plaintiffs' claims of fraudulent misrepresentation are almost certainly outside the scope of the doctrine, as are Plaintiffs' claims under the CPPA, assuming that statute were otherwise applicable.[4] Plaintiffs breach of warranty and strict liability claims present a closer question. In this jurisdiction, theories of strict liability and breach of implied warranty of merchantability are considered a single cause of action. *Bowler v. Stewart-Warner Corp.*, 563 A.2d 344, 347 (D.C. 1989) (noting that "the two theories (*i.e.*, strict liability and implied warranty of merchantability) represent but one tort"). It is at least arguable that the same policy principles that protect the government from tort suits based on negligence should also apply to protect the government from strict liability tort claims. The parties have not fully briefed that issue, however, and the court declines to reach it at this time.

B. Derivative Discretionary Function Immunity

WASA argues that it is entitled to summary judgment based on "derivative discretionary function immunity." According to WASA, the minor plaintiffs' injuries were caused by the

[3] The District of Columbia Court of Appeals is currently considering the scope and contours of the public duty doctrine in *Allen v. District of Columbia*, 100 A.3d 63 (D.C. 2014), opinion vacated and *pet. for reh'g. en banc granted* October 29, 2015. Last year, when the Court was considering the same issues in another case, the D.C. Council filed an *amicus* pleading asking the Court not to abrogate the public duty doctrine because the issues were better dealt with as a matter of legislative policy and because the doctrine serves the important governmental interest in fiscal stability. *Id*. at 65 n.1. Unless the Court of Appeals were to overturn the public duty doctrine altogether (in which case the Council would likely step in), it does not appear that the issues that are before the Court in the *Allen* case will have any direct bearing on this court's ruling in the present cases.

[4] *See* discussion *infra* at pp. 18-22.

discretionary decision of the Army Corps of Engineers, pursuant to EPA guidance, to switch the disinfectant used at the Aqueduct from chlorine to chloramine. Because the federal government entities have discretionary function sovereign immunity from suits based on these types of decisions, and because WASA had no control over the treatment of the water it purchased at the Aqueduct and distributed to the Plaintiffs, WASA argues that it has "derivative discretionary function immunity."

While the federal government has waived sovereign immunity for certain types of claims, it retains its immunity for acts and decisions involving the exercise of judgment and discretion. 28 U.S.C § 2680(a); *see Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). Various courts have extended this discretionary function immunity to protect non-federal actors from liability when their actions giving rise to the claim were taken at the direction and under the control of the United States. This derivative immunity has been applied to government contractors acting at the direction of the federal government. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940). The same immunity protects states and local municipalities acting at the direction of the federal government when implementing programs for which the federal government enjoys sovereign immunity. *See McCue v. City of New York,* 521 F.3d 169,197 (2d Cir. 2008); *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512, 539-40 (M.D.N.C. 2008); *see also Jenkins v. WMATA*, 895 F. Supp. 2d 48, 73 (D.D.C. 2012). Derivative discretionary function immunity applies where (1) the federal government, acting with discretionary function immunity, mandated reasonably precise specifications or directives; and (2) the non-federal actor merely implemented those specifications or directives in taking the actions that allegedly caused harm to the plaintiff. However, derivative immunity does not bar recovery where the non-federal actor

could have complied with state law while still conforming to the federal agency's specifications. *See McCue*, 521 F.3d at 197.

With regard to the first factor, "reasonably precise specifications" means that "the discretion over significant details and all critical design choices will be exercised by the government" and that the federal government does not merely "rubber stamp" the non-federal actor's actions or decisions. *See Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1481 (5th Cir. 1989); *see also Oliver v. Oshkosh Truck Corp*, 96 F.3d 992, 998 (7th Cir. 1996) (noting that "it is this salient fact of governmental participation in the various stages of the [equipment's] development that establishes the military contractor defense"). In this case, it cannot seriously be argued that WASA made the decision to switch from chlorine to chloramine and that the Army Corps of Engineers and the EPA simply "rubber stamped" WASA's decision.[5]

If, as WASA contends, Plaintiffs' claims were based solely on the federal discretionary decision to switch from chlorine to chloramine as the disinfectant used to treat water at the Aqueduct, WASA's derivative discretionary function immunity argument would have more persuasive force. Plaintiffs' claims, however, are based on alleged independent actions of WASA *after* purchasing water at the Aqueduct. Plaintiffs do not argue that the water leaving the Aqueduct was inherently dangerous, nor do they seek to hold WASA liable for the federal government's discretionary decision to switch from chlorine to chloramine. Instead, Plaintiff's contend that the causticity of the chloramine stripped lead from the pipes maintained by WASA, causing the water WASA delivered to Plaintiff's homes to contain unsafe levels of lead. Putting aside the public duty doctrine, if, as Plaintiffs allege, WASA negligently failed to discover dangerously elevated lead levels in the water it distributed to Plaintiffs, or discovered the elevated lead levels and negligently or intentionally failed to take required corrective actions and

[5] *See supra*, note 1.

continued to distribute what it knew, or should have known, was an inherently dangerous product, derivative discretionary function immunity would not insulate WASA from liability for its own conduct.

Moreover, derivative immunity will protect a non-federal actor only where the federal government directs and significantly controls the actions of the non-federal actor. *See Pettiford*, 556 F. Supp. 2d at 540 (citing *Boyle v. United Technologies Corp*., 487 U.S. 500, 509 (1988)). Here, the Corps of Engineers decided, with EPA guidance, to treat water with chloramine at the Aqueduct and sold the treated water to WASA, but it exercised no control over what WASA did with the water it purchased. Indeed, to the extent there was any federal control over what WASA did with the water, it was exercised through the EPA Lead and Copper Rule, which Plaintiffs claim WASA violated. For these reasons, and because the facts surrounding these issues are very much in dispute, Defendant's motion for judgment as a matter of law based on derivative discretionary function immunity must be denied. [6]

C. Federal Preemption

WASA argues that Plaintiffs' claims are implicitly preempted by federal law because to hold WASA liable for the minor plaintiffs' injuries would conflict with decisions based on the EPA's Disinfectants and Disinfection Byproducts ("DDBP") Rule implementing the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*. ("SDWA"). In response, Plaintiffs argue that their suit is not based on the DDBP Rule or the decision to use chloramine pursuant to that Rule, but on WASA's decision to distribute water with elevated lead levels and failure to remediate the problem in violation of the EPA's Lead and Copper Rule.

[6] Because the court concludes that WASA is not entitled to derivative immunity as a matter of law, it is unnecessary to decide whether, as Plaintiffs contend, the doctrine includes as an essential third element that the non-federal actor "warned the United States about the dangers in the [product] that were known to the [non-federal actor] but not to the United States." *Boyle*, 487 U.S. at 512.

The Supremacy Clause of the United States Constitution states that the "Constitution, and the Laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. Art. VI., Cl. 2. Pursuant to the Supremacy Clause, federal law may displace District law either explicitly or implicitly. *In re Couse*, 850 A.2d 304, 308 (D.C. 2004). "Conflict preemption" is a type of implicit preemption. *Murray v. Motorola, Inc.*, 982 A.2d 764, 771 (D.C. 2009). For purposes of preemption, federal law includes federal regulations, *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985), and state law includes application of state common law as a basis for judgment in state court tort suits. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-24 (2008); *Murray*, 982 A.2d at 772 n.10. In determining whether federal law has displaced state law, courts start "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

This case involves two federal EPA regulations, the DDBP Rule and the Lead and Copper Rule. The EPA promulgated these regulations pursuant to the 1986 amendments to the SDWA. 42 U.S.C. 300f *et seq.* (1986). Under the SDWA, the EPA regulates the level of chemicals found in drinking water that could have adverse affects on human health. 42 U.S.C. 300g-1(b)(1)(A) (1986). For each chemical, the EPA publishes a maximum contaminant level goal (MCLG) and promulgates by rule national primary drinking water regulations (NPDWR). 42 U.S.C. § 300g-1(b)(1)(E) (1986). An MCLG is set "at the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." 42 U.S.C. § 300g-1(b)(4)(A) (1986). NPDWR are to be set as close to the MCLG as

feasible. 42 U.S.C. § 300g-1(b)(4)(B) (1986). The EPA may enforce NPDWRs in federal court. 42 U.S.C. §§ 300g-1(b), 300g-3(b) (1986).

The EPA set the MCLG level for lead at zero. 56 Fed. Reg. 26,460, 26,460 (June 7, 1991). The NPDWR for lead, also known as the Lead and Copper Rule, does not set a maximum level for lead in water, but it does require water utilities such as WASA to monitor lead water levels at customers' taps and report the results to the EPA. 40 C.F.R. §§ 141.80, 141.86, 141.90 (1991). If more than 10% of samples are above .015 mg/L (15 parts per billion), the water utility must: (1) replace 7% of lead service lines in its distribution system annually; (2) provide specified information to customers about lead in the water supply, and the adverse health effects of ingesting lead; and (3) conduct more frequent testing of customer tap water using a larger sample of taps. 40 C.F.R. §§ 141.84(b), 141.85, 141.86(d)(4)(vi)(B) (1991).

Pursuant to the SWDA, the EPA set maximum residual disinfectant levels (MRDL) for chlorine and chloramine at 4 mg/L (4,000 parts per billion). 40 C.F.R. § 141.65 (1998). In setting the disinfectant levels for chlorine and chloramine, the EPA found that "these substances have beneficial disinfection properties" and sought "to avoid situations in which treatment plant operators are reluctant to apply disinfectant dosages above the [specified maximum level] during short periods of time to control for microbial risk." 63 Fed. Reg. 69,390, 69,398 (Dec. 16, 1998).

The DDBP Rule permitted the Washington Aqueduct to treat water with either chlorine or chloramine. Plaintiffs' claims, however, do not rest on the decision to use chloramine. Rather, Plaintiffs allege injury resulting from WASA's distribution of water with elevated lead levels, which were unreasonably dangerous for human consumption. The question is whether Plaintiffs may pursue state common law claims for injuries allegedly caused by elevated lead

levels in federally-treated water WASA funneled through the lead pipes in its water distribution system.

This court concludes that Plaintiffs' claims are not preempted. Although the EPA, through the Lead and Copper Rule, regulated lead in drinking water, the SDWA has a savings clause permitting individuals to seek relief in state court for violations of the SDWA. 42 U.S.C. § 300j-8(e) (1986) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under [the SWDA] or to seek any other relief."). The Supreme Court has explicitly acknowledged that state common law suits may proceed under section 300j-8. *City of Milwaukee*, 451 U.S. at 328 n.21 (noting that environmental statutes, including the SDWA, have citizen-suit provisions permitting state common law claims similar to the one at issue in *City of Milwaukee*). The decisions of the lower federal courts are to the same effect. *See Batten v. Ga. Gulf*, 261 F. Supp. 2d 575, 597-98 (M.D. La. 2003) (discussing state law claims alleging violations of the SDWA); *Grimes v. Placid Refining Co.*, 753 F. Supp. 622, 624 (M.D. La. 1990) (remanding plaintiffs' state law claims to state court because "[t]he defendants may be liable under state law even if they did not violate the federal regulations"). In addition, the SDWA explicitly directs states to adopt "drinking water regulations that are *no less stringent* than the national primary drinking water regulations promulgated" by the EPA. 42 U.S.C. § 300g-2(a) (1986) (emphasis added).

Murray v. Motorola, Inc., cited by WASA, does not dictate a different result. In *Murray*, the plaintiffs alleged injuries caused by cell phone radiation, including cell phones which indisputably complied with FCC regulations promulgated under the Telecommunications Act of 1996. 982 A.2d at 769. The Court held that the FCC regulations preempted the plaintiffs'

claims to the extent they were based on injuries from cell phones that met or exceeded the standards set by the FCC regulations. *Id.* at 777. The FCC regulations at issue in *Murray* were intended to "provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *Id.* at 776.

Unlike the FCC regulations at issue in *Murray*, which set maximum levels of RF radiation and created a safe harbor for cell phones emitting RF radiation below the established threshold, the SDWA explicitly directs states to adopt regulations for chemicals in drinking water that are "no less stringent" than the regulations promulgated by the EPA. 42 U.S.C. § 300g-2(a) (1986). The command to regulate at a level "no less stringent" necessarily implies the authority to regulate at a level even more stringent. In such an enforcement regime, there can be no conflict based on overregulation by the state, including state regulation in the form of state common law tort remedies for dangerous or defective products based on safety standards that are more stringent than federal law requires. There being no conflict, there is no implicit federal preemption.

D. D.C. Consumer Protection Procedures Act ("CPPA")

WASA moves for summary judgment on Plaintiffs' CPPA claims, arguing that (1) WASA was not a "merchant" under CPPA when the alleged violations of the CPPA occurred and (2) Plaintiffs' "damages for personal injury of a tortious nature" are not recoverable under CPPA.

WASA is correct on both counts. WASA was not a "merchant" under CPPA when the claims in this case arose. The CPPA "was designed to police trade practices arising only out of consumer-merchant relationships." *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 709 (D.C.

1981). The minor plaintiffs in this case were allegedly injured between 2001 and 2004. At that time, the CPPA defined "merchant" as a "person who does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services or a person who does or would supply the goods or services which are or would be the subject matter of a trade practice." D.C. Code § 28-3901(3)(2001).

In *Save Immaculata/Dunblane, Inc. v. Immaculata Preparatory Sch.*, 514 A.2d 1152 (D.C. 1986), the Court held that "a nonprofit educational institution is not a 'merchant' within the context of the Consumer Protection Procedures Act." *Id.* at 1159 (citing *Bd. of Regents of the Univ. of Wisc. v. Mussallem*, 289 N.W.2d 801, 807 (Wisc. 1980)).[7] The Court of Appeals later expanded its holding in *Save Immaculata* to include all institutions that are "maintained for a nonprofit purpose." *Schiff v. Amer. Assoc. of Retired Persons*, 697 A.2d 1193, 1196-97 (D.C. 1997) (concluding that AARP was not a merchant when selling insurance plans to members); *see also Kozup v. Georgetown Univ.*, 663 F. Supp. 1048, 1060-61 (D.D.C. 1987) (holding that the American Red Cross was not a merchant when providing blood for a fee). In a more recent case, the Court held that the District was not a "merchant" under the CPPA because it was not engaged in a "commercial enterprise" when it contracted through the MPD to tow the plaintiffs' illegally parked vehicles for a fee. *Snowder v. District of Columbia*, 949 A.2d 590, 599-600 (D.C. 2008).

The court in *Schiff* recognized that non-profits often charge a fee for services, but that the charging of a fee does not transform the non-profit into a merchant under CPPA. *Schiff*, 697 A.2d at 1197. In reaching this conclusion, the Court stated that "[m]any if not all non-profit

[7] The Council subsequently amended the CPPA in 2007 to include non-profit organizations in the definition of merchant. D.C. Code § 28-3901(3) (2015). Plaintiffs do not argue that the amended statute is controlling, and there is no evidence of the Council's "unequivocal intent" that the amendment should be applied retroactively. *See Childs v. Purll*, 882 A.2d 227, 238 (D.C. 2005); *see also Mayo v. District of Columbia*, 738 A.2d 807, 811 (D.C. 1999) ("[A] retrospective operation will not be given to a statute . . . unless such be the unequivocal and inflexible import of the terms.").

entities are organized and run with traditional principles of sound business management . . . not to turn a profit, but to survive and continue to perform whatever functions they were founded to perform." *Id.* (quoting *Kozup*, 663 F. Supp. at 1060-61).

WASA was established as "an independent authority . . . within the District government" organized "to plan, design, construct, operate, maintain, regulate, finance, repair, modernize, and improve water distribution and sewage collection, treatment, and disposal systems and services, and to encourage conservation." D.C. Code § 34.2202.02(a), (c). It is apparent that WASA exists for a distinctly public purpose and that the fees WASA charges are to maintain its solvency and to enable it to fulfill its statutory public purposes, not to turn a profit. D.C. Code § 34-2202.16. Moreover, in creating WASA, the Council explicitly rejected the idea of privatizing water and sewer services. WASA Report at 5. Indeed, WASA's enabling statute commands that the authority's assets cannot be transferred to private ownership and must revert to the District in the event of WASA's dissolution. D.C. Code § 34-2202.20. The court therefore concludes that, under the CPPA in effect at the time of the transactions at issue in this case, WASA was not a merchant, and for that reason WASA is entitled to summary judgment on Plaintiffs' CPPA claims.

Even if WASA were a merchant under the CPPA when the claims arose, WASA would be entitled to summary judgment on Plaintiffs' CPPA claims for "damages for personal injury of a tortious nature." The Department of Consumer and Regulatory Affairs ("DCRA") was originally solely responsible for enforcing CPPA's substantive provisions. Under the statute, DCRA is barred from recovering "damages for personal injury of a tortious nature." D.C Code. § 28-3903(c). The CPPA also includes a private right of action for consumers to enforce CPPA's substantive provisions within DCRA's jurisdiction by filing suit in the Superior Court.

D.C Code. § 28-3905(k). Before 2000, this provision explicitly restricted the private right of action to the types of relief that were within the jurisdiction of DCRA, which do not include "damages for personal injury of a tortious nature." In 2000, the Council expanded the private right of action and eliminated this restriction. *See Childs v. Purll*, 882 A.2d at 238. Plaintiffs argue that, by eliminating this language, the Council intended to allow individuals to sue for "damages for personal injury of a tortious nature."

The Court of Appeals has recently expressed the view that the 2000 amendment to § 28-3905(k) did *not* grant individuals a private right to sue for "damages for personal injury of a tortious nature." In *Gomez v. Independence Mgmt. of Delaware*, 967 A.2d 1276 (D.C. 2009), the Court noted that at the same time the Council in 2000 amended section 28-3905(k) to sever the linkage between remedies available to individuals under the CPPA and remedies available to DCRA, it also extended the suspension of the enforcement authority of DCRA, which had not been enforcing the CPPA since 1995. *Id.* at 1287. Given this legislative history, the Court in *Gomez* concluded:

> Because the DCRA was not enforcing the CPPA at that time, it made no sense when rewriting this section to preserve the language which linked the scope of the private action to the jurisdiction of the DCRA. More importantly, there is no indication whatsoever that the Council intended by deleting this language to expand the reach of the CPPA. Significantly, the Council did not repeal the express limitations on DCRA activities set forth in D.C. Code § 28-3903 (c) (2001).

Id.

Plaintiffs cite to the pre-*Gomez* opinion in *Parker v. Martin*, 905 A.2d 756, 764 (D.C. 2006), in support of their argument that the Council intended to expand the private right of action in § 28-3905(k) to include "damages for personal injury of a tortious nature." However, the language in *Parker* on which Plaintiffs rely is *dictum*, and it cites as authority only *Caulfield v.*

Stark, 893 A.2d 970, 977 (D.C. 2006). In *Caulfield*, the Court explicitly did not reach the question whether the 2000 amendments were intended to create a private right of action for personal injury tort damages, because the alleged unfair trade practices in *Caulfield* occurred before the amendment became law. *Id.* at 976. In light of the later decision in *Gomez*, Plaintiffs' reliance on *dictum* in *Parker v. Martin* is unavailing. *See McGaughey v. Dist. Of Columbia*, 740 F. Supp. 2d 23, 26 (D.D.C. 2010); *see also Juarez v. District of Columbia Water and Sewer Authority*, 2010 CA 4412 (D.C. Sup. Ct. May 13, 2014). Therefore, even if WASA were a "merchant," which it was not, Defendant would be entitled to summary judgment on Plaintiffs' CPPA claims.[8]

For the foregoing reasons, it is this 13th day of January, 2016,

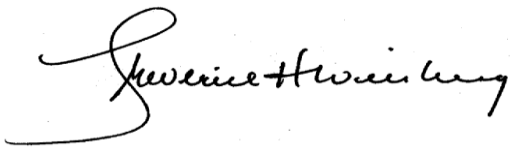
ORDERED that Defendant's motion for judgment as a matter of law based on the public duty doctrine is granted with respect to Plaintiffs' negligence claims, and is otherwise denied; and it is further

ORDERED that Defendant's motion for judgment as a matter of law based on (1) derivative discretionary function immunity and (2) federal preemption is denied; and it is further

ORDERED that Defendant's motion for judgment as a matter of law on Plaintiffs' claims under the CPPA is granted; and it is further

ORDERED that Plaintiffs' negligence claims and Plaintiff's claims under the CPPA be, and they hereby are, dismissed.

[8] Plaintiffs make a last ditch effort to squeeze their claims under the CPPA by asserting that they would be entitled to "statutory damages" even if they could not recover tort damages for personal injury. However, because WASA was not a "merchant" at the time of the transactions at issue, Plaintiffs are barred from seeking any remedy under the Act. Moreover, Plaintiffs' Complaints do not allege a claim for statutory damages. Because Plaintiffs' CPPA claims are limited to personal injury tort damages, which are not recoverable under the CPPA, Plaintiffs have failed to allege an injury-in-fact sufficient to establish CPPA standing even if WASA were a merchant. *See Grayson v. AT&T Corp.*, 15 A.3d 219, 247 (D.C. 2011).



JUDGE FREDERICK H. WEISBERG

Copies to: All parties listed in Case File Xpress