15-2879

United States Court of Appeals
for the
Eighth Circuit

RUDY F. WEBB; BETTY WEBB; ARNEZ HARPER; CHARLETHA HARPER,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

– v. –

EXXON MOBIL CORPORATION; EXXONMOBIL PIPELINE COMPANY;
EXXONMOBIL PIPELINE COMPANY, L.P.; MOBIL PIPE LINE COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS (LITTLE ROCK)

BRIEF FOR PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE

This case involves a nearly seventy-year-old pipeline, known as the "Pegasus Pipeline," which runs along an easement and physically touches servient easement landowners' property ("Landowners"). The hazardous properties of the pipe constituting the Pegasus Pipeline render the pipe itself a physical contaminant. The pipeline uses antiquated technology abandoned in the 1970's because it was hazardous. The Pegasus Pipeline is operated by Exxon and uniformly operates through Texas, Arkansas, Missouri, and Illinois.

Landowners seek a common law remedy. The district court, as a matter of law, granted summary judgment in Exxon's favor on March 17, 2015. In the same ruling, the district court abruptly and unexpectedly recalled its prior decisions which granted class certification and rejected Exxon's preemption arguments. Reversing itself, the district court decertified and preempted the same claims.

Landowners argue here that the unique nature of this case, its interaction with federal law; and implications for servient easement owners warrant oral argument. Landowners respectfully submit 30 minutes for each side would be adequate.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this lawsuit. There is complete federal diversity pursuant to 28 U.S.C. § 1332, because the amount in controversy exceeds $75,000, exclusive of interest and costs, and there is complete diversity of citizenship among the parties. Further, under the Class Action Fairness Act ("CAFA") and 28 U.S.C. § 1332(d), there are more than 100 class members and the Complaint alleges aggregate damages in excess of $5,000,000.00, exclusive of interest and costs.

This appeal is from a final judgment of the United States district court for the Eastern District of Arkansas. This Court has jurisdiction by virtue of 28 U.S.C. § 1291, which provides for appellate jurisdiction over a final judgment. The district court's order granting summary judgment, with prejudice, was entered on March 17, 2015, with entry of judgment following on that same day. On April 13, 2015, Landowners filed a motion under Fed. R. Civ. P. 59(e), to alter or amend the judgment and order granting summary judgment and for relief under Fed. R. Civ. P. 60(b). The District court denied Landowners' motion on July 24, 2015, and Landowners filed a timely Notice of Appeal on August 20, 2015.

STATEMENT OF THE ISSUES

I. Whether the district court erred as a matter of law in granting Exxon's motion for reconsideration of the class certification decision?

Alpern v. UtiliCorp United Inc., 84 F.3d 1525 (8th Cir. 1996)

Barfield v. Sho-Me Power Electric Coop., Case No. 11-cv-04321-NKL, 2013 WL 3872181 (W.D. Mo. 2013)

Wal-Mart Store, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011)

Mattson v. Montana Power Company, 215 P.3d 675 (2009)

II. Whether the Pipeline Safety Act's preemption of state "safety standards" extends to state common law and property claims?

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)

Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2014)

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988)

Am. Energy Corp. v. Tex E. Transmission, LP, 701 F.Supp.2d 921 (S.D. Ohio 2010)

III. Whether the district court erred when it ignored extant issues of fact to grant summary judgment based on a determination that the Arkansas Supreme Court's opinion

in *City of Crossett* precluded Landowners' putative class state common law property claims?

Dwiggins v. Propst Helicopters, Inc., 832 S.W.2d 840 (1992)

Wilson v. Brown, 897 S.W.2d 546 (1995)

Sluyter v. Hale Fireworks P'ship, 262 S.W.3d 154 (2007)

Barnett v. Sanders, 451 S.W.3d 211 (2014)

IV. Whether the district court erred when it limited Landowners' damages to those addressing only odor, discoloration or physical oil damages?

Felton Oil Co., LLC v. Gee, 183 S.W.3d 72 (2004)

Bean v. Johnson, 649 S.W.2d 171 (1983)

V. Whether the district court abused its discretion when it denied Landowners' Rule 59 and 60 motions in the face of new evidence previously withheld by Exxon in discovery – evidence that established unreasonable interference with Landowners' land?

Alpern v. UtiliCorp United Inc., 84 F.3d 1525 (8th Cir. 1996)

Burd v. Ford Motor Co., No.3:13-CV-20976, 2015 WL 4137915 (S.D.W. Va. July 8, 2015)

Apple, Inc. v. Samsung Electronics Co. Ltd., No. 12–CV–0630, 2013 WL 1942163 (N.D. Cal. May 9, 2013)

STATEMENT OF THE CASE

A. FACTS

This appeal involves private contract and property rights under state law concerning Landowners who each have granted identical easements to Exxon Mobil Corporation d/b/a ExxonMobil, and subsidiaries ("Exxon") which contain an express covenant guaranteeing those Landowners the ability to "fully use and enjoy" their premises. Although the reciprocal easement contracts also allow Exxon to operate an oil pipeline – which has come to be known as the "Pegasus Pipeline" – within the easements, Landowners contend that Exxon's operation of the pipeline has come at the expense of their independent and express right of "use" and "enjoy[ment]." (A-64) As a result of Exxon's breach of the unqualified covenant allowing the landowners to "fully use and enjoy" the premises, Landowners sought a common law remedy in the court below, *i.e.*, rescission, specific performance, or alternatively, damages.

This appeal involves the first section of the Pegasus Pipeline (variously, "the pipeline"), constructed between 1947 and 1948. *Id.* The uniform pipeline system is 20 inch diameter pipe, 648 miles

long with antiquated technology. (A-138) Discontinued by 1980 for safety issues, especially for pipe manufactured before 1970 – these pipelines have inherent integrity problems. *Id.*

The Pegasus Pipeline originally transported light Texas sweet crude oil in a northward direction. *Id.* However, in 2002, the pipeline was shut down and purged with nitrogen. *Id.* Four years later, in 2006, Exxon changed the product transported by the pipeline to a heavier Wabasca crude oil, which contains "tar sands," in order to increase profits. (A-27) Then Exxon *reversed* the flow of the pipeline, pumping the heavier crude oil and tar sands southward. *Id.* Three years later, in 2009, Exxon substantially *increased* the volume of heavy petroleum product being pumped through the pipeline by 33,000 barrels per day. (A-28 [from 66,000 barrels per day to 99,000 barrels per day]) The Complaint alleges as a result of the additional stress placed on the pipeline, the Pegasus Pipeline experienced a *massive rupture and failure*, releasing Canadian petroleum bitumen diluted with distillates, known as "dilbit" or "tar sands." *Id.*

Landowners filed a complaint for a class-wide breach of their identical easement contracts due to Exxon's shoddy operation of the

Pegasus Pipeline. Fundamentally, Landowners alleged that Exxon's actions had violated their common law property rights, which were also the same in each affected state. (A-25, A-29-30) Landowners sought common law redress to restore them to the position they would have been had the breach not occurred. *Id.*

B. PROCEDURAL HISTORY

The underlying lawsuit was filed on April 17, 2013. (A-10) An Amended Complaint was filed on June 13, 2013. (A-25) On June 27, 2013, ExxonMobil filed a motion to dismiss. (A-66) The District court denied the motion on October 31, 2013. (A-82, Add-3) A motion to certify the lawsuit as a class action was filed on February 3, 2014. (A-137) Exxon filed a response to the motion on April 15, 2014. (A-295) On August 12, 2014, the court certified this lawsuit as a class action. (A-563, Add-6) Two weeks later, on August 26, 2014, Exxon moved for reconsideration of the Rule 23 class certification decision. (A-575) In the motion for reconsideration, Exxon cited no new, intervening case law, or newly discovered evidence[1] (A-575-576) During the time the motion for

[1] A motion for reconsideration is not expressly authorized by the Federal Rules of Civil Procedure, but these motions are typically

reconsideration was pending in the court below, Exxon's petition for permission to appeal the Rule 23 decision was denied. *Webb v. Exxon Mobil Corp.*, Appeal No. 14-8021 (8th Cir. Sept., 16, 2014).

On September 8, 2014, Exxon moved for summary judgment. (A-579) Exxon's primary argument in support of summary judgment was that its interpretation of a single Arkansas case, *City of Crossett v. Riles*, 549 S.W.2d 800 (1977), should govern the claims of class members from four different states.[2] Because the district court had bifurcated discovery, with merits discovery at a standstill pending a ruling on class certification, Exxon filed its motion before producing any merits discovery. (A-987, A-1048) (A-1596-1597) In the meantime, Landowners had filed a motion to approve a class notice plan on October 13, 2014, which was granted in part on January 16, 2015. (A-1331)

Landowners did not receive all documents requested in discovery and filed a motion to compel on December 5, 2014,

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treated as a Rule 59(e) motion to alter or amend an order or judgment, or as a Rule 60(b) motion under the same standard. *Auto Services Co., Inc. v. KPMG, LLP*, 537 F.3d 853, 855 (8th Cir. 2008).

[2]The summary judgment motion also again renewed Exxon's argument for preemption, which had been previously denied by the court. (A - 579).

addressing the production deficiency and the need for an electronic discovery protocol, especially the development of "search terms" essential for effective review of Exxon's massive store of documents. (A-987) On February 9, 2015, the district court held a brief hearing, in which it addressed and approved class notice to the affected easement owners. (A-1511) At the hearing, the district court informed those present that there was "little chance that the motion for reconsideration and/or for summary judgment would be granted." *Id.* The district court also commented on the class certification order: "And as far as decertifying, I'm going to stand on my order so far." (A-1636) After the hearing, the district court issued an order on February 9, 2015, denying the Landowners' motion to compel discovery. (A-1508)

On March 17, 2015, a little over a month after the February hearing, the district court issued an order and judgment dismissing all of Landowners' claims with prejudice. (A-1509, Add-41) In doing so, the court reversed its original certification decision, decertified the class, and completely backtracked on its prior rulings on preemption to hold that the National Pipeline Safety Act ("PSA") preempted the Landowners' private state contract claims and

common law remedies[3], applying to the entire Class (which encompasses those who own land within 4 states) Exxon's reading of *City of Crossett*, *i.e.*, that Exxon had no duty to the Landowners. (A-1512-1530, Add 22-40)

[3]The district court, in previously denying Defendants' preemption argument, also stated that "it would be premature to dismiss Landowners' request for equitable relief until the parties have been given an opportunity to develop the record and put the case to a jury." (A-81, Add-3); (A-563, Add-8-10)

SUMMARY OF THE ARGUMENT

I. The originally certified class does not require individualized determinations. Facts, issues, and applicable law are identical for all Landowners. Exxon's misuse of these easements, as common grantee, is uniform with respect to all Landowners along the pipeline. Further, the hazardous and contaminated pipe is, in and of itself, a burden causing injury to the land. It physically touches and affects the property of each Landowner. The state common law contract and property claims are identical as to each Landowner. All members of the originally certified class pursue the same remedial theory: To place the Landowners in the position they would have occupied had the common contract been reasonably performed through specific performance, rescission of the easement contracts due to substantial misuse, unreasonable interference, and alternatively, damages.

II. Landowners' causes of action are not preempted by the PSA because the claims are not state safety standards promulgated by a state authority. Instead, Landowners are simply "trying to enforce their easement contract via common law breach of contract claim[s]" in conjunction with common law property claims. (A-567,

Add-10) The PSA expressly protects the availability of state common law remedies like these. In this regard, Congress has specifically provided that "[a] remedy under [the PSA] is *in addition to* any other remedies provided by law. This section **does not restrict a right to relief that a person or class** of persons may have under another law or at **common law**." 49 U.S.C. § 60121(d) (emphasis added).

III. Summary judgment was improperly granted because questions of fact exist which need to be determined by a trier of fact, relating to physical interference with and contamination of real property. The decision in *City of Crossett* is not at all parallel to Landowners' case, given that Landowners' easements in the four states along the Exxon pipeline contain an *express provision* specifically reserving Landowners' rights to "fully use and enjoy" the premises subject only to the easement. The Arkansas Supreme Court did not discuss or analyze any similar provision in the *Crossett* case. Among the remaining questions of fact, then, are: (1) Whether Exxon's use and operation of a pipe that physically touches Landowners' property breaches the easement contracts by unreasonably interfering with Landowners' express right to use and enjoy their property; and (2) Whether Exxon breached its

contractual obligation of good faith by, among other things, changing the nature of the oil flowing through the pipeline, changing the direction of the flow through the pipeline and finally, increasing that flow by a full third on a pipeline known to be inadequate to withstand the increased forces

The district court committed a most basic error of law in this diversity action by allowing the misapplication of a case from *one* jurisdiction to shape the substantive claims of class members with property subject to the laws of three other states. Moreover, once the *City of Crossett* case is properly understood, an analysis of longstanding authority from each of the four states involved – Arkansas, Missouri, Texas and Illinois – reveals the courts of each have each held that valid common law claims include the unreasonable misuse of an easement and the unreasonable interference placed on the Landowners' property. Similarly, each state has held such questions of reasonableness to be questions of fact, inappropriate for adjudication as a matter of law.

IV. Landowners alleged common law claims with common law remedies – exactly the type of common law remedies protected under the PSA. Contrary to the law of the four relevant states, the

District court improperly limited the nature of Landowners' damages to odor, discoloration and physical damage from oil touching their land. Thus, the district court committed an error of law through its failure to recognize remedies preserved by the PSA.

V. The district court failed to fully assess the uncontroverted documentary evidence and expert testimony submitted with Landowners' Rule 60(b) application. Due to the procedural posture of the litigation, discovery proceeded on a rolling basis. While Landowners presented evidence as soon as practicable to show the impropriety of summary judgment, the logistics were daunting. Landowners were responsible for digesting over a million pages of documents which were still being produced up to ***four days*** before the dismissal of the case. Attached to the Rule 60(b) motion, Landowners submitted documentary evidence and sworn, expert testimony from Massachusetts Institute of Technology Professor and renowned expert metallurgist, Dr. Tom Eager, who opined: "[A]ntiquated cancer-causing asbestos coating and contamination from constituents in residual oil combined with the deterioration over the past 70 years **unreasonably burdens, injures and interferes** with the property where the pipeline and coating is

located." (A-1543-1544) [emphasis added]. Yet, the district court made a *factual* determination against Landowners, finding *no* evidence of *unreasonable* interference, referencing its original order of dismissal, stating that "nothing indicates that there has been unreasonable interference with the Landowners' land." (A-1689 citing A-1528). This was error.

ARGUMENT

Landowners Rudy and Betty Webb and Arnez and Charletha Harper brought this action to secure their rights under their private easement contracts with Exxon. The Amended Complaint alleges that Exxon's defective and contaminated pipeline is unreasonably burdening and unreasonably interfering with the express and implied right of Landowners and the members of the putative class to fully use and enjoy their property. (A-43-44). Expert metallurgist, Dr. Tom Eager explained:

> The Pegasus Pipeline is [seventy] years old and is worn out. Continued use presents an unreasonable hazard to the environment and the use of the property through which the pipe passes . . . . In 2004, Exxon testing indicated extremely low toughness at normal operating pressures, perhaps as low as 1.5 to 5 foot pounds where the fracture science would normally expect something in the 25 to 30 foot pounds range for pipe of this spec and vintage. (A-1542-1545)

> The original poor manufactured quality, antiquated cancer-causing asbestos coating and contamination from constituents in residual oil combined with the deterioration over the past [seventy] years unreasonably burdens, injures and interferes with the property where the pipeline and coating is located unless the Pegasus Pipeline is removed and [the land] remediated. *Id.*

The Landowners were denied enforcement of their private rights under state common law to remedy this unreasonable interference with their property. As a consequence, the contamination from the Pegasus Pipeline will simply stay in the ground, continuing to permanently injure the Landowners' property. (A-1543-1544) By virtue of the district court's action, Landowners with a contractual easement, which reserves to them substantial rights, must continue to suffer a dangerous pipeline on their property without any redress for their claims under state law.

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED EXXON'S MOTION FOR RECONSIDERATION OF CLASS CERTIFICATION

The district court stated, "the common question set forth by [Landowners] is whether Exxon fulfilled its contractual duties to maintain and repair the pipeline." (A-1514). The Landowners satisfied the requisite standards under Rule 23. *United States*

Parole Commission v. Gereghty, 445 U.S. 388, 403 (1980) ("The Federal Rules of Civil Procedure give the proposed class representative *the right to have a class certified if the requirements of the Rule are met.*" (emphasis added)).

Each of the Landowners have the same, uniform contractual and implied "right to fully use and enjoy their property," which touches the Pegasus Pipeline. The pipeline operates as one unit along each easement holders' common plot. The fact to be determined is whether Exxon's operation affects the class members unreasonably or not; that is, whether it violates the Landowners' easement rights under state common law, or not. (A-1569-1570) This is a single judicial determination suitable for class treatment which avoids inconsistent decisions concerning the same pipeline and the same rights.

A. Standard of Review

The standards for granting a motion for reconsideration under Federal Rule of Civil Procedure 59(e) are quite high. "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of" or as an attempt to relitigate "a point of disagreement between the Court and the litigant." *Waye v.*

First Citizen's Nat'l Bank, 846 F.Supp. 310, 314 n. 3 (M.D.Pa.), *aff'd.* 31 F.3d 1175 (3d Cir. 1994). *See also Arnold v. ADT Sec. Servs., Inc.,* 627 F.3d 716, 721 (8th Cir. 2010). The motion may only be granted if "(1) there has been an intervening change in controlling law; (2) new evidence, which was not available, has become available, or (3) it is necessary to correct a clear error of law or prevent a manifest injustice." *Id. See also Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (discussing appropriateness of granting motion under Rule 59 where court committed "manifest errors of law"). Here, the district court committed erred as a matter of law in granting Exxon's motion for reconsideration where no grounds existed. This necessitates a *de novo* standard of review.

Importantly, the "trial court must apply the correct standard and the appeals court must make sure that has occurred." *Fox v. Vice*, 563 U.S. 826, 131 S.Ct. 2205, 2216 (2001). "A district court by definition abuses its discretion when it makes an error of law." *Id.* (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)). A trial court has wide discretion, "but only when, it calls the game by the right rules." *Id.* at 2217. Thus, a trial court's decision is entitled to deference "only if based on the correct legal standard." *United*

States v. Clarke, 134 S.Ct. 2361, 2368 (2014) (quoting *Fox*, 131 S.Ct. at 2217). Here, because the district court employed an incorrect legal standard, no deference is required on review.

B. The Landowners Satisfy Rule 23

The uniform easements of Landowners form a single pipeline. The use of the easement is *uniform* to all Landowners because the Pegasus Pipeline is *one pipeline*. (A-1569-1570) The pipeline functions and is operated by Exxon as *one continuous unit* along the Landowners' property and has the *same contractual promise from Exxon*. *Id.* The pipeline operates as a whole for a single purpose and is one petroleum delivery system, pumping petroleum throughout and physically touching the Landowners' real property. (A-1574).

1. THE LANDOWNERS SHARE COMMON ISSUES AND FACTS CENTRAL TO THEIR CLAIMS

To meet the commonality standard of Rule 23(a)(2)[4], the "common contention must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Store, Inc.* v. *Dukes*, 131

[4] Exxon does not deny that the Class is sufficiently numerous under Rule 23(c)(1). (A- 325).

S. Ct. 2541, 2551 (2011); *see also Bennett v. Nucor Corp.*, 656 F.3d. 802, 814 (8th Cir. 2011). Even a single common question will do. *Wal-Mart Store, Inc.,* 131 S. Ct. at 2556.

Landowners have set forth common issues that should be resolved in one action. (A-83-85, Add-3-4) The putative class members' predecessors signed *identical* easement contracts. The breach of easement contract claims and Exxon's uniform course of conduct presents *common facts*, and thus, legal obligations arising from the contracts present *common issues of law*. There is no reason that such clearly identified class-common issues cannot be determined on a class-wide basis.

The reality is that Landowners' claims will *not* require a parcel-by-parcel analysis. This was supported below by sworn, expert testimony. The use of the easement is *uniform* to all putative class members because the Pegasus Pipeline is *one pipeline*. (A-1569-1570) The pipeline functions and is operated by Exxon as *one* continuous unit along the landowners' property and based on the same contractual promise from Exxon. *Id.* The pipeline operates as a whole for a single purpose and is one petroleum delivery system, pumping petroleum throughout the landowners' real property. (A-

1574) The contamination factors produced by the Pegasus Pipeline are common to the entire pipeline and the Landowners' real property through which it passes. (*Id;* A-1543-1544).

Contrary to the Eighth Circuit's commonality standard, the district court made a legal merits finding too close to the heart of the claim when it adopted Exxon's affirmative defense and reversed class certification ruling that the pipeline consisted of different segments and considered each landowner's easement independently. (A-1515). The commonality requirement is not so demanding and is easily satisfied. *In re Zurn Pex Plumbing Products Liability Litigation*, 267 F.R.D. 549, 559 (D. Minn. 2010) (*aff'd* 8th Cir., 644 F.3d 605). It requires only that the course of conduct gives rise to a cause of action for all class members and one element of the claim is shared - *not* that the individual class members are identically situated in every way. *Id.* Notably, the district court granted class certification and previously declined to rule on Exxon's affirmative defenses recognizing it is a "determination of the ultimate issue." The district court correctly stated that the affirmative defenses raised by Exxon at the class certification stage would be:

> "more proper as a defense to be raised later in litigation … because that would require a determination of the ultimate issue: that by replacing [segments] of the pipe, Exxon is complying with the terms of its easement contract."

(A-568, Add-16). However, in reversing itself on class certification, the district court erroneously granted Exxon's motion for reconsideration making the very "ultimate issue" finding on the merits of the case it previously refused to do. This was an error of law.

Exxon's common operation and conduct toward all of the Landowners and the common language and purpose of the easements it secured can be resolved in one lawsuit. *Alpern*, 84 F.3d 1525 (8th Cir. 1996) (reversing denial of class certification and summary judgment.) Exxon's operation and uniform course of conduct vis-à-vis the pipeline and whether it unreasonably interfered with Landowners' full use and enjoyment of property cannot be reasonable and unreasonable at the same time. *See Mattson v. Montana Power Company*, 215 P.3d 675, 689 (Mt. 2009) ("Insofar as the flood easements are concerned, the dam's operation cannot simultaneously be reasonable and unreasonable.")

Moreover, as stated in *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 692 (N.D. Ga. 2003), "[b]reach of contract claims are certifiable as appropriate for class action." *Id.* (citing *Upshaw v. Ga. Catalog Sales, Inc.*, 206 F.R.D. 694, 700-01 (M.D. Ga. 2002); *Mick v. Level Propane Gases, Inc.*, 203 F.R.D. 324, 330-31 (S.D. Ohio 2001).

Despite the district court's previous ruling for class certification, the district court erroneously entered into a fact and merits finding granting Exxon's affirmative defenses that the pipeline consisted of different segments. (A-1515) Exxon's whole pipe is hazardous. The hazard is the harm and each class member is subjected to the same hazard. Further, the pipe touches every Landowner's property, and the conduct that gave rise to the cause of the action is identical for each Landowner. Therefore, Landowners have met the commonality requirement.

2. LANDOWNERS' CLAIMS ARE TYPICAL OF THOSE OF THE CLASS

Whether claims are typical is a burden "'fairly easily met so long as other class members have claims similar to the named plaintiff.'" *Alpern*, 84 F.3d. at 1540 (quoting *Deboer v. Mellon Mortg. Co.*, 64 F.3d. 1171, 1174 (8th Cir.1995)). Factual variations in individual claims will not normally preclude class certification so

long as the claim and claims of the class representative arose from the same event or course of conduct as the class claims and give rise to the same legal or remedial theory. *Donaldson v. Pillsbury Co.,* 554 F.2d 825, 831 (8th Cir. 1977); *see, e.g., DeBoer,* 64 F.3d at 1174–75 (typicality requirement satisfied even though class members held different mortgage instruments but sought same form of relief); *see generally* 1 Herbert B. Newberg, *Newberg on Class Actions: A Manual for Group Litigation at Federal and State Levels* § 3.13, at 167 (2d ed. 1985) (characterizing claim as typical if it challenges same unlawful conduct affecting named plaintiff and putative class).

For the same rezones Landowners meet commonality, they also meet the typicality requirement because they and putative class members assert identical claims producing the same remedial theory. (A-25, A-41) Therefore, the Landowners have met the typicality requirement of Rule 23(a)(3).

3. MAINTENANCE OF THE CLASS ACTION IS MANAGEABLE AND THEIR COUNSEL ARE MORE THAN ADEQUATE REPRESENTATIVES

The focus of Rule 23(a)(4) is whether (1) the class representatives have common interests with the putative members

of the class and those interests won't diverge and (2) the class representatives will vigorously prosecute the interests of the class through qualified counsel. *See Barfield v. Sho-Me Elec.Co-op.,* Case No. 11-cv-04321-NKL, 2013 WL 3872181, *3 (W.D. Mo., July 25, 2013) (class representatives have common interests with proposed class members because they claim defendants exceeded the scope of all class members' easements); *accord Paxton v. Union Nat'l Bank,* 688 F.2d 552, 559 (8th Cir. 1982); *see also Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 626 n. 20, 117 S. Ct. 2231, 2251 n. 20 (1997). Further, trial courts, under Rule 23, have the ability to manage class actions to address damage issues *separately* from liability and let a class proceed on issues of liability which are common to all class members to avoid multiple liability determinations. *See, e.g., Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Landowners restate and incorporate the arguments set forth in the commonality and typicality sections, and for the reasons stated there, the maintenance of class treatment is simple, proper and superior. The district court's August 12, 2014 order was correct when it granted class certification. (A-563, Add-13) In that order,

the court stated that "the [proposed Class Representatives'] claims are typical of those of the entire class, a review of the submitted résumés of class counsel indicates that counsel are qualified to handle this case. Thus, the Landowners have shown adequacy." (A-570, Add-13). In the end, the proposed Class Representatives have identical claims. Thus, interests are not likely to diverge between the two. What was right in the August 12, 2014 order certifying the Landowners as a class remains right now. Landowners have met the adequacy requirements under Rule 23(a)(4).

4. LANDOWNERS SATISFY PREDOMINANCE

These landowners with a common easement satisfy the Rule 23 requirements because the originally certified class met the elements of predominance and superiority.

A district court must conduct a limited preliminary inquiry, looking behind the pleadings, to determine whether common questions predominate. *Blades v. Monsanto Co.*, 400F.3d 562, 566 (8th Cir. 2005). Landowners have alleged a common question of whether Exxon used the easement unreasonably and whether the contaminated, hazardous pipe is currently causing unreasonable damage to Landowners' properties. These questions plainly

predominate over any questions affecting only individual class members. *See Mattson v. Montana Power Co.*, 291 P.3d 1209, 1221 (Mt. 2012). Unreasonable use and operation of a pipeline must be resolved as one action for all Landowners who have an easement and the pipeline on their property. In *Mattson*, the Montana Supreme Court after thoroughly studying a similar issue, recognized that precise principle, stating:

> This contention is not merely 'capable of class-wide resolution,' but is in fact ***incapable of being resolved on a property-by-property basis***. As explained, the reasonableness of the dam's operation and resulting damage to shoreline properties depends on a balancing of many factors, one of which is the aggregate of the benefits and *burdens imposed on* ***all*** *shoreline properties concurrently*.

Id. (emphasis supplied).

The district court, in reversing itself as a result of Exxon's motion for reconsideration, reasoned that because Landowners failed to meet the commonality requirement of Rule 23(a)(2), they failed to show that common issues predominated over individualized determinations. (A-1515, Add-25) However, class-wide breach can be proven with one set of common proof in one lawsuit with identical claims, facts, and applicable law. Exxon's operation of its antiquated pipeline within the Landowners'

easements is reasonable or unreasonable and the burden imposed on all Landowners by the pipe is concurrent. *Mattson*, 291 P.3d at 1221. Without any intervening law or newly discovered facts, the district court abruptly changed direction when it reversed the August 12, 2014 class certification order. That original certification order aptly supports Landowners' arguments here:

> Exxon's argument has been raised before in similar cases concerning easements. In 2013, several thousand Missouri landowners sued a defendant electric cooperative which held easements over the individual parcels of land in order to transmit electric power. *See Barfield* at *1. The landowners sought a class action, claiming that the cooperative had exceeded the scope of the easements. *Id.* In response, the electrical cooperative cited a number of cases which it argued supported denial of class certification on the ground that there were too many fact-specific property ownership issues. (A-572-574, Add-15-16)
>
> Like the Barfield Landowners, however, the proposed class members all are subject to Exxon's easements, and their claims depend on the rights as specified in their easement contracts. *See id.* at *8. Thus, Exxon's argument that the class should not be certified on that basis is unpersuasive. *(Id.)*

The district court's initial impression was the correct one. Class certification is appropriate here, applied to a single pipeline setting upon identical easements. Certification will provide economy of costs and judicial resources, as well as, avoiding

inconsistent determinations as well. Landowners have met the predominance and superiority requirements of Rule 23(b)(3).

II. THE PIPELINE SAFETY ACT DOES NOT PRE-EMPT STATE LAW CLAIMS THAT ARE NOT SAFETY STANDARDS

In passing the PSA, Congress had no intention to preempt state common law claims, state law remedies or state law damages, and said so explicitly. These rights were left with the states and the people in those states respecting private disputes that might involve pipelines. That is the case here.

A. Standard of Review

Preemption is a question of law reviewable by the Court *de novo*. *See Humphrey v. Sequentia, Inc.,* 58 F.3d 1238, 1243 (8th Cir. 1995); *see also Nat'l Bank of Commerce of El Dorado, Arkansas v. Dow Chemical Co.*,165 F.3d 602, 607 (8th Cir. 1999).

B. The Congressional Intent of the PSA Was Not to Pre-Empt State-Law Claims Nor Contracts Between Private Landowners and Oil Companies

Congressional intent is the critical question in any preemption analysis. *Kinley Corp. v. Iowa Utilities, Utilities Div., Dep't of Commerce*, 999 F.2d 354, 357 (8th Cir. 1993) (citing *Louisiana Public Service Comm'n v. FCC,* 476 U.S. 355, 369 (1986)). Recently,

the Supreme Court, in *Oneok, Inc., et al., v. Learjet, Inc., et al.,* 135 S. Ct. 1591 (2014), reaffirmed the importance of considering "the *target* at which the state law *aims* in determining whether that law is pre-empted" in the pre-emption analysis. *Id.* at 1592 (emphasis added). The state law here is common law, not state statutory and regulatory safety standards, which conflict with the PSA.

In denying preemption in a regulated industry, the Supreme Court has held the "basis for a contract action is the parties' agreement." *American Airlines, Inc. v. Wolens*, 513 US. 219, 233 (1995). Landowners here seek only common law remedies based upon their underlying right to use and enjoy their property, subject only to the contractual easement agreed to between them and Exxon. *Id.* at 228. In *Wolens*, the Supreme Court appropriately reaffirmed *Cipollone v. Liggett Group*, reasoning:

> [A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement ... *imposed under State law* within the meaning of [Federal Cigarette Labeling and Advertising Act] § 5(b) (quoting from *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992) (plurality opinion)). ***A remedy confined to a contract's terms simply holds parties to their agreements*** ....

Wolens, 513 U.S. at 229 (emphasis supplied).

The Landowners' breach of contract claims and common law property claims are not aimed at any provision within the PSA. (A-567, Add-10) The easement landowners' claims are simply to enforce Exxon's bargained for agreements in the easement contracts themselves. (A-567, Add-10) The easement contracts expressly require Exxon to act or not act to interfere with the landowners' right to "fully use and enjoy" their property. (A-64). This is also the common law rule.

As detailed more fully here, the Landowners' rights are the same under the contract and property law claims in Arkansas, Missouri, Illinois and Texas. Similar to the state antitrust claims in *Oneok, Inc.*, the broad applicability of common law claims for breach of contract and property rights across the four states involved supports no preemption of state common law.

1. CONGRESS' INTENT IS EVIDENCED BY THE PSA'S EXPRESS LIMITATION ON PREEMPTION TO STATE SAFETY STANDARDS WHICH CONFLICT

When Congress has explicitly limited the preempted area within a statute, a court need not proceed to consider areas implicitly covered. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). With exceptions not relevant here, the PSA explicitly

preempts *only* state "safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c).

The question is whether Landowners' breach of contract claims and common law property claims of unreasonable use and unreasonable interference are state "safety standards." They are not. The state laws at issue are designed solely to uphold bargained for agreements and to protect dominant and servient owners from abusing each other's rights. Landowners make no reference to any state law standards regarding safety that might raise questions of PSA preemption. (A-567, Add-10) The district court found "easement grantors would essentially be able to hold pipeline easement holders hostage, threatening them with lawsuits or contract rescission every time the easement grantors possess any notion that the companies are not meeting the easement grantors' personal safety standards." (A-1511-1512, Add-21-22) This ruling presents a logical flaw. Grantors only have knowledge of unreasonable use and unreasonable interference ***after*** the breach has occurred and the breach involves private documents and physical impact to people's land in four states. The government agency does not address these issues. Congress did not intend to

supplant the common law of easements and the physical impact to landowners' real property along a pipeline with a government agency. Preemption would change the entire landscape, making contracts and real property federal government issues addressed by a government agency without any authority to make such determinations under the PSA or any other Congressional empowerment. The district court's ruling changes the landscape.

2. THE PSA EXPLICITLY ALLOWS COMMON LAW REMEDIES

Pursuant to 49 U.S.C. § 60121(d), the PSA expressly provides, "A remedy under this section is in addition to any other remedies provided by law. This section does not restrict a right to relief that a person or a class of persons may have under another law or at common law." Notably, even PHMSA, the government agency, recognizes the private rights or property owners to seek judicial redress. Landowners have asserted common law claims with common law remedies: rescission, specific performance or alternatively, damages. (A-25) Former PHMSA administrator, Howard Dugoff, noted in a response letter to a concerned servient easement owner, Mrs. White:

> [R]ights as a landowner or developer should be protected fully under State or local laws and covenants or agreements with the pipeline company involved. Of course, where there are disputes Mrs. White has access to the courts for redress. (A-1610)

The PSA provides no safe quarter for those who might argue preemption; in fact, it does just the opposite, barring preemption explicitly.

III. THE DISTRICT COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT AS A MATTER OF LAW

The district court erred in finding that *City of Crossett* controls Landowners' case and precludes Landowners' claims. It also ignored the landscape, veritably littered with multiple questions of fact precluding summary relief.

A. Standard of Review

The grant of a motion for summary judgment is reviewed de novo with all inferences from the evidence drawn in favor of the nonmoving party. *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1541 (8th Cir. 1996). Summary judgment is inappropriate "[i]f reasonable minds could differ as to the import of the evidence." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). If there are material questions of fact that have not been determined,

summary judgment cannot be granted. *See Anderson,* 477 U.S. at 248.

B. *City of Crossett v. Riles* Is Not Controlling under the Facts

Landowners' property rights are fundamental and specifically articulated in the language of a written easement. This written easement language is consistent with the common law duties in Arkansas, Missouri, Texas and Illinois, directing that the dominant estate cannot unreasonably interfere with the servient easement holder's property, preventing the servient easement holder from the right to fully use and enjoy his or her property.

Professor Susan F. French[5] opined by affidavit:

> The holder of an easement has the right to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the easement, but is not entitled to cause unreasonable damage to, or interfere unreasonably with, enjoyment of the servient estate unless authorized to do so by the terms of the easement. There is nothing in the language of the easement in this

[5]Professor Susan F. French is a UCLA Professor of Law and Reporter for the Restatement (Third) of the Law of Property, Servitudes. Professor French has written extensively on easements and servitudes, including casebooks. (A-1539)

> case that authorizes the holder of the easement to cause unreasonable damage to or interfere unreasonably with enjoyment of the servient estate."

(A-1539)

In spite of this express right in the law of easements and the common law duties underlying these rights, the district court ruled that Exxon had no such duty at all, relying primarily on one Arkansas case, *City of Crossett v. Riles*, 549 S.W.2d 800 (Ark. 1977). (A-1525, Add-35). *City of Crossett* does not operate so as to preclude the rights of Landowners to claim breach of contract and breach of common law property rights involving a contaminated pipeline on their property by virtue of an easement.[6]

1. LANDOWNERS' EASEMENT CONTAINS AN EXPRESS CONTRACTUAL RIGHT PROVISION

The *specific contractual language* in the easement between Landowners and Exxon expressly provides that Landowners "shall

[6] The text demonstrates that the district court misapplied *City of Crossett,* and the court magnified its error by allowing its misinterpretation of an Arkansas case to control the substantive claims of Class Members with land in Illinois, Missouri, and Texas. *See Stroeder v. JPMorgan Chase Bank, N.A.*, No. 12-cv-01743-WJM-KLM, 2013 WL 951153, at *4 n.1 (D. Col. Feb. 7, 2013) (citing *Archer v. Eiland*, 64 F. App'x 676, 680 n.4 (10th Cir. 2003), for the proposition that "in an action based on diversity jurisdiction, federal courts are to apply the law of the state where the property at issue is located').

have the right to fully use and enjoy" their real property. That language is *not* found in the *Crossett* opinion or trial. *Id.* at 523-524, 549 S.W.2d at 801-802. In *Crossett*, the Arkansas Supreme Court examined the explicit language of the instrument between a landowner and the city, where rain had caused flooding on the landowner's property. 549 S.W.2d at 802. The court determined that the easement held by the city granted amorphous privileges, but recited *no written, affirmative duty to act* within those privileges. Additionally, the court *found no competent testimony at the trial* creating an issue of fact. *Id.* That is to say, under the special facts in *Crossett,* including a non-specific easement and lack of competent testimony, the court determined that Crossett's grant of a right of way and easement for the purpose of "constructing, maintaining and repairing a drainage ditch over, across, and through" a servient owner's land was simply a grant of right away, *not* an affirmative or implied duty to construct maintain or repair. *Id.*

Clearly, the legal significance of the *Crossett* decision is limited to the unique circumstances in that case. More significantly that in the almost forty years since the *Crossett* decision, the Arkansas

Supreme Court has continually placed an affirmative duty of reasonableness on easement holders and recognized the misuse of easements as being valid claims for servient landowners. *See Dwiggins v. Propst Helicopters, Inc.*, S.W.2d 840 (Ark. 1992) (deciding that easement holders did not have unqualified right to damage right-of-way without liability, where easement provided that property owner would have full and free use of right-of-way except for purposes stated); *also Sluyter v. Hale Fireworks P'ship*, 262 S.W.3d 154, 158 (Ark. 2007) (willful and substantial misuse of easement by dominant owner may be sufficient to cause forfeiture). Indeed, servient owners have long had common law protection from unreasonable use by a dominant easement holder. *St. Louis, I.M. & S. Ry. Co. v. Brooksher*, 109 S.W. 1169, 1170 (Ark. 1908) (dominant estate owner could have avoided interference to servient owner's land).

The court in *City of Crossett* never addressed the *misuse* of an easement which contractually limited the easement to the extent it might interfere with the landowner's "*right to fully use and enjoy*" his property because the easement in that case did not require it expressly. That is the factual case here, however as that right is

expressly provided in the contractual language of Landowners' easements. As such, the facts here are distinguishable and give rise to issues warranting consideration by a finder of fact.

Whether an antiquated, contaminated pipe interferes with Landowners' real property so that they cannot fully use and enjoy their land is a question for a trier of fact. For the Court's purposes here, however, the facts demonstrate that Exxon has done nothing whatsoever to eliminate that question and indeed, created the inference that Exxon has acted inconsistently with the Landowners' expressly retained right to "fully use and enjoy," their property, which was freely bargained for by Exxon in exchange for the ability to operate the pipeline within the easement it purchased. (A-1545)

2. LANDOWNERS DID NOT GRANT AN UNFETTERED RIGHT TO CONTAMINATE LANDOWNERS' LAND

The district court, adopting Exxon's argument, did not reconcile or fully address the express duty owed by dominant easement grantees to *not* unreasonably interfere with the servient estate's full use and enjoyment of the premises. The oil and gas lessee's estate is the dominant estate. Even without an express provision, the dominant estate must have due regard for the rights

of the owner of the servient estate. *See Sun Oil Co., v. Whitaker*, 432 S.W.2d 808, 811 (Tex. 1972). The owner of an easement may not place an additional burden or servitude upon the fee simple estate. *Barfield*, 10 F.Supp.3d at 1007. Thus, the question is whether the pipeline is unreasonable or unduly burdensome to the rights of Landowners in the use and enjoyment of their property. *See Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837, 842 (8th Cir. 1975). When servient owners, as here, have an express reservation in an easement contract, it is error to grant summary judgment giving the dominant owner the unqualified right to damage the land without liability. *Dwiggins*, 310 Ark. at 66; *see also Sluyter*, 262 S.W.3d at 158 (citing 25 AM.JUR.2D *Easements & Licenses* § 99, "misuse . . . is not sufficient to cause a forfeiture of the easement, unless the misuse of the easement is willful and substantial.") Thus, when an easement is limited in scope or purpose, as here, the property owner is entitled to *prevent* the burden of the easement from being increased. *Duresa v. Commonwealth Edison Co.*, 807 N.E.2d 1054, 1062-1063, (Ill. Ct. App. 3d. 2004).

Landowners, as grantors, granted a limited easement for limited uses and purposes. (A-64) Even with the severe limitations

Exxon placed on discovery, Landowners were able to make a summary judgment record creating at *a minimum* a fact question that the defective, contaminated pipe is unreasonable and Exxon's usage of the easement places a greater burden on the Landowner class. (A-1545) Further, Landowners contend the misuse of the easement, operating the pipeline in a reverse flow, forcing heavy crude through the pipe, substantially increasing the capacity beyond the pipe's integrity, all with the knowledge that the pipe is appallingly inadequate, was willful and substantial misuse. (A-1544, A-1570) That misuse could well provide a class-wide remedy of forfeiture of the easement. However, other alleged common law remedies including specific performance of the contract, or alternatively, damages, are also available.

C. The District Court Erred When It Granted Summary Judgment on the Breach of Contract Claim

1. The District Court Committed an Error of Law When It Interpreted the Contracts in Part

The primary rule in the construction of instruments is that the court must, if possible, ascertain and give effect to the intention of the parties. *Smith v. Arrington Gas & Oil, Inc.*, 664 F.3d 1208, 1212 (8th Cir. 2012) (applying Arkansas law and quoting *Harris v.*

Stephens Prod. Co., 832 S.W.2d 837, 840 (Ark. 1992)). Contracts must be interpreted as a whole, upon the *entire instrument*, and not merely upon disjointed or particular parts, to ascertain the intentions of the parties. *Id.*; *see also Byme Inc., v. Ivy*, 241 S.W.3d 229, 236 (Ark. 2006) (emphasis supplied). The words in the contract must be given their plain, ordinary understanding of the meanings of its words. *Id.* If there is any doubt or ambiguity in the plain language of the deed, it should be construed against the party who prepared it. *See Wilson v. Brown*, 897 S.W.2d 546, 548 (Ark. 1995). Further, if disjointed or particular parts conflict, the contract 'must be read together and construed so that all parts harmonize, if that is at all reasonably possible.' *Id.* (quoting *Cont'l Cas. Co. v. Davidson,* 463 S.W.2d 652, 655 (Ark. 1971)). Therefore, the contract should be construed to give effect to *all* provisions, and any construction that nullifies an express provision should *never* be adopted. *Id.*; (citing *Tyson Foods, Inc. v. Archer,* 147 S.W.3d 681, 686 (Ark. 2004)) (emphasis supplied).

The well-established principles of contract law were not followed by the district court. The court failed to interpret the easement contracts' plain language based upon the entire

instrument, which is obvious since it found no difference between the easement contracts in the case at bar and the easement contracts in *City of Crossett*.

In the March 17, 2014 order, the district court adopted Exxon's argument and interpreted a disjointed, isolated part of the easement contracts without giving effect to the entire instrument and the landowners' reciprocal rights:

> …[T]he [Landowners' predecessors in interest] hereby grant to [Exxon's predecessor in interest] . . . the rights of way, easements and privileges to lay, repair, maintain, operate and remove pipelines and replace existing lines with other lines, for the transportation of oil and gas. (A-1525, Add-35)

The *very next paragraph* in the easement contract continues with Landowners' express reservation, stating in unmistakable, mandatory language:

> The said Grantors **shall have the right to fully use and enjoy the said premises** except for the purposes hereinbefore granted unto said Magnolia Pipeline Company[.](emphasis supplied) (A-64)

No express provision such as the one in the Landowners' easements here was discussed in the *City of Crossett* easement. Nevertheless, the district court found "no marked difference" between the two easements. (A-1525, Add-35) The district court

failed to give any effect to the express provision of the contract and ruled in favor of Exxon instead. The rules of contract interpretation do not permit such construction. The district court's interpretation of the easement contracts is error and cannot support the grant of summary judgment and should be reversed.

2. The Grantors Intended the Express Provision "Fully Use and Enjoy" to Expressly Preserve Their Rights at Common Law

The construction of the contract, as interpreted by the district court, invalidates the subsequent provision which reserves Landowners' rights to fully use and enjoy the premises and is patently incorrect.

The plain, ordinary meaning of what is included in Landowners' agreement with Exxon, the express right to "fully use and enjoy" the property, is left undefined by that agreement. Beyond the plain meaning of such language is the district court's right to reinterpret that provision on a motion for summary judgment so as to conclude that Landowners intended not to "fully use and enjoy the property," but to authorize Exxon to install antiquated, contaminated pipe which will perpetually degrade and continually contaminate their property. There is surely nothing in

the record to support that conclusion from a factual standpoint, much less eliminate the question as one that awaits the determination of a trier of fact. Even more disturbing is that the district court interpreted that express provision included by the parties to the easement contract to have no effect on the instrument, presenting the Court with an error of law as well. (A-1525, Add-35) In the normal course, such an express provision included by the parties themselves -- and drafted by Exxon itself -- would evidence their intent to expressly reserve to the grantors of the easement their rights at common law, *i.e.,* that the dominant owner, Exxon, will not unreasonably use or unreasonably interfere with the Landowners' property.

This plain language construction is also confirmed by the era in which the easement contracts were signed. At the time Exxon and the grantors entered into the contracts, the modern PSA had not been passed by Congress and PHMSA was not in existence. Therefore, the one and only body of law and the one and only tribunal for the enforcement of the rights of either party were the courts and state common law. If Landowners needed to enforce their property rights; if they required that the rules governing the

creation of easements and the remedies for failing to protect the land under which such easements ran, it was state common law that they would turn to. Therefore, the language of the easement contracts at issue here cannot be understood outside of that environment; the "plain language" of the easement contracts is the "plain language" of the common law.

Such questions are ill-served by motions for summary relief, because an essential fact, *i.e.*, (what did the parties mean when they said that?), cannot be decided as a matter of law on this record alone. Whether viewed as a question of fact or a mixed question of law and fact, the record does not contain the answer in either case.

What landowner would specify limited purposes and uses in an easement contracts, but actually intend to grant an unqualified right to operate the easement on their property without redress for unreasonable use and unreasonable interference already provided by law? What landowner would do so with the intention of foregoing the remedy for violation of that easement from his own state courts, the only body available to do so? The district court's interpretation, based upon facts it decided on its own and inferences it concluded should be drawn in the *movant's* favor, was

that the entire easement contract only granted to Exxon "a mere right of way," which was for a limited purpose and did not allow Exxon to take anything from the land. *See Black's Law Dictionary* (10th Ed. 2014) (A-1526, Add-36) As a result, the court held, Exxon was correct in its argument for summary judgment:

> [T]he easement contracts between Exxon and landowners do not create an affirmative duty to maintain or repair the pipeline.

(A-1527, Add-37)

That determination eviscerates state common law and the rights of property owners granting easements. More importantly, the easement contracts in this case did nothing of the sort and expressly said as much. An easement is a relationship between one who owns property and one who wishes to make some use of some part of that property. Exxon's definition of the property it wished to use, stated in the easement contract which Exxon drew, expressly left to Landowners and the putative class members the right to reasonably use and enjoy their property subject only to the easement. This is exactly the same understanding as found in the common law. Both parties must respect each other's rights and not unreasonably interfere with or violate those rights that are reserved

to each party. Landowners alleged that no servient owner would be able to reasonably enjoy his or her property subject to the Exxon easement along the pipeline under the conditions shown in the record. (A-567, A-1543-1544, Add-10) This requires an integral finding of material fact to be made by a trier of fact. It goes to Landowners' claim of a willful and substantial misuse of the easement and resulting interference with the putative class's properties by Exxon. (A-573, Add-16) The factual determination of misuse is not a matter of law.

i. Pleading Alternatively, the Easement Contracts Are at Least Ambiguous

Assuming, for the purposes of argument only, that the Court disagrees with Landowners' reading of the express language in the easement contracts, the language of the easement contract is, at best, ambiguous. The determination of whether ambiguity exists is a question of law. *Dunn v. Aamodt*, 695 F.3d 797, 799 (8th Cir. 2012) (applying Arkansas law). If language is fairly susceptible to more than one equally reasonable interpretation, it is ambiguous. *Id.*

While the court below interpreted the easement provision which reserves a grantor's right to "fully use and enjoy the premises subject to easement" to be without effect and that the easement contract, instead, granted an unqualified right of use (A-1525, Add-35), an equally reasonable construction would be that the easement contract drafted by Exxon granted only a qualified right. It certainly would be reasonable to interpret "fully use and enjoy" as identifying the right of the grantor to enjoy the property free from antiquated, defective, contaminated pipe that will perpetually degrade and continually contaminate their property. (A-1543-1544) On this motion for summary judgment, where all evidence must be viewed and all inferences must be drawn in favor of the non-moving party, the district court's determination that the easement contract provision, which reserved to Landowners and putative class members the right to "fully use and enjoy the premises," was unambiguous and meaningless was error as a matter of law. *Quality Ag Service of Iowa, Inc. v. Burlington Northern and Santa Fe Railway*, No. 14-3025, 2015 WL 6600570, *2 (8th Cir., Oct. 30, 2015) ("We review a district court's grant of summary judgment de novo, 'viewing all evidence and drawing all reasonable inferences in

favor of the nonmoving party.' *Jones v. Frost*, 770 F.3d 1183, 1185 (8th Cir.2014). Summary judgment is appropriate 'when there is no genuine dispute of material fact and the prevailing party is entitled to judgment as a matter of law.' *Id.*)

3. QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT

If there is some doubt about a disputed factual issue regarding interference with Landowners' rights as servient easement owners, it is error to decide that factual issue by summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Dwiggins*, 832 S.W.2d at 842 (where servient owner had express reservation in easement contract, error to grant summary judgment on whether dominant owner had unqualified right to damage property without liability); *Quality Ag Service of Iowa, Inc. v. Burlington Northern and Santa Fe Ry.*, 2015 WL 6600570 at *2.

The right to fully use and enjoy property is a separate, independent and fully expressed right granted to Landowners under the easement contract. In order to reach the issue of the breach of that right, the facts of misuse must be analyzed to determine if the Landowners' rights were violated.

Landowners adduced ample evidence upon which a trier of fact could find that Exxon has misused the easements and unreasonably interfered with their property rights. (A-1542-1545, A-1570, A-1574) Landowners are entitled to seek a remedy for their loss and their losses in the future. The Arkansas Supreme Court recognizes that damages for injury to property may involve injury to use and enjoyment of the land. *Felton Oil Co., LLC v. Gee*, 182 S.W.2d 72, 75 (2004). Notably, other courts have specifically held asbestos contamination from pipeline wrap as fully recognizable damage to a servient owners' property. *See Jackson v. Unocal Corp.*, 262 P.3d 874, 890 (Colo. 2011) (en banc) (certifying two different plaintiff classes in a pipeline easement property cases for asbestos contamination).

The right to hold property free from unreasonable interference is a distinct property right, which courts protect from contamination. Such a failure to be a "good neighbor" to the subservient estate or affected landowner is a violation of both law and public policy. Landowners have sufficiently alleged just such harm. (A-1542-1545, A-1574)

D. The District Court Erred When It Disposed of the Unreasonable Use and Unreasonable Interference Claims Because All Putative Class Members Have the Same Common Law Easement Rights

The rule in Arkansas is that the owner of an easement may make use of the easement compatible with its authorized use by the easement holder so long as that use is reasonable in light of all facts and circumstances of the case. *Hatfield v. Arkansas W. Gas Co.,* 632 S.W.2d 238, 241 (1982) (citing *Massee v. Schiller*, 420 S.W.2d 839 (1967)). This principle, that property owners with easements should be protected from unreasonable interference with their use and enjoyment is a separate right and obligation. *See Mattson v. Montana Power Company*, 215 P.3d at 689. In *Mattson,* the Montana Supreme Court noted that this was the majority view as to the rights of property owners respecting easements, citing to *Wilson v. Brown,* 897 S.W.2d 546, 550 (1995) ("[T]he holder of the dominant estate has a duty to use the property so as not to damage the owner of the servient estate.") *Mattson*, 215 P.3d at 690, fn.9. The effect of this common law property right as to easements extended by property owners is powerful in this case.

Even if *City of Crossett* negated Landowners' *breach of contract* claim, their common law property claims alleging misuse of an easement and unreasonable interference with the servient owner's property are fully cognizable under the common law of Arkansas, Texas, Illinois and Missouri. *Dwiggins, supra*; *Sluyter, supra* (recognizing willful and substantial misuse of easement can result in forfeiture); *Stout v. Christian*, 593 S.W.2d 146, 150 (Tex. Civ. App. Austin 1980) (dominant owner must make a reasonable use of right so as not to unreasonably interfere with property rights of owner of servient estate) (citing *San Jacinto Sand Co. v. Southwestern Bell Telephone Co.*, 426 S.W.2d 338, 345 (Tex. Civ. App. –Houston 1980)); *accord Simpson v. Phillips Pipe Line Co.*, 603 S.W.2d 307, 309 (Tex. Civ. App. –Beaumont 1980)(easement holder liable for injuries exceeding reasonably necessary uses); *Duresa, supra*. (citing *Consolidated Cable Utilities, Inc. v. City of Aurora*, 108 Ill.App.3d 1035, 1040, 64 Ill.Dec. 464, 439 N.E.2d 1272 (1982)); *Barfield, supra.*; *Masen v. Shaw*, 133 S.W.3d 514, 519 (Mo. App. 2004) (change in easement as to quality of use impermissible; creates substantial new burden on servient estate.). The court below was wrong when it found that a common adjudication of this

case involved "easements located in four separate states that are governed by the individual laws of those states, would be very difficult." (A-1518, Add-28)

The Landowners demonstrated that Exxon's use of the pipeline exceeded the scope of the rights granted to it by the easement contract it drew and that the pipe was an unreasonable interference with their property right, which placed a greater burden on the putative class than the burden, for which Exxon had contracted. (A-35-38, A-568, Add-16) Landowners submitted uncontroverted expert testimony and documentary evidence to support those claims. (A-1542-1545, A-1570, A-1574) The court below improperly disposed of the Landowners' unreasonable use and unreasonable interference claims.

1. THE REASONABLENESS OF USE AND INTERFERENCE IN AN EASEMENT IS A QUESTION OF FACT

The district court prematurely granted summary judgment in light of Landowners' claims of unreasonable use of the easement and unreasonable interference with their property. These are issues dependent on facts and no such facts have, as yet, been determined here. Exxon's obligation on summary judgment, to show that there

are no open questions of material fact, has not been met, precluding summary judgment.

Arkansas law recognizes that what is reasonable or unreasonable will vary with the facts of the case. *Wilson*, 320 Ark. at 248, 897 S.W.2d at 550; *accord Hatfield, supra*. (reasonable use is a factual finding). Whether any change in use is unreasonable, such as Exxon's conduct toward the Landowners here, is just such a fact question. *Fruth Farms v. Village of Holgate*, 442 F.Supp.2d 470, 479 n. 6, (N.D. Ohio 2006). Resolution of this question of fact requires that the parties engage in discovery to determine the extent of the reasonableness of the usage and whether the changes in the manner, frequency and intensity of characteristics of the pipeline's use of the easement amount to unreasonable use. *Id*. at 480-481 (denying summary judgment and requiring discovery on extent easement used by dominant owner and whether additional burden was imposed on servient owner). The reasonableness of the parties' actions is a question of fact for a trier of fact, to be determined at trial. *Vancleve v. Sparks*, 132 S.W.3d 902, 905 (Mo. App. 2004) (citing *Beiser v. Hensic,* 655 S.W.2d 660, 663 (Mo. App. 1983). "No precise rule can be stated as to when the use by the owner of the

servient or dominant estate was a reasonable use as distinguished from an unreasonable use; it is a question of fact to be determined from the facts and conditions prevailing." *Duresa*, 348 Ill. App. at 102, 807 N.E.2d at 1063, 283 Ill.Dec. at 222.

A recent Arkansas case is particularly instructive on this point. In *Barnett v. Sanders*, 451 S.W.3d 211, 214-15 (2014), the court followed the long held law that the relationship between the dominant easement grantee and servient easement grantor required factual findings before a determination could be made as to what constituted reasonable use or restriction of the easement. *Id.* In the case at bar, however, there have been no factual findings and the question of the misuse of the easement and the contaminated pipeline's unreasonable interference with the Landowners' real property remains unresolved. *See id.*

Viewed in another way, Landowners have been deprived of the opportunity for that factual determination on use and interference, reasonableness and unreasonableness, as a result of the decision below ruling as a matter of law. (A-1689) That decision resolving a fact dispute was in error and the mechanism used for its

determination singularly incompatible with the standards set for the grant of summary judgment.

IV. THE DISTRICT COURT ERRED WHEN IT LIMITED THE TYPES OF REMEDIES AND SCOPE OF DAMAGES AVAILABLE TO THE LANDOWNERS

Landowners alleged common law remedies. (A-25) The district court recognized that damages existed for unreasonable interference, but prejudicially and improperly limited the type or nature of those damages in derogation of state common law. (A-1529, Add-39)

A. Standard of Review

Whether a particular remedy is available and appropriate is a question of law, which is reviewed de novo. *Entergy Ark., Inc. v. Nebraska,* 358 F.3d 528, 556 (8th Cir. 2004).

B. Landowners Alleged Common Law Remedies for Unreasonable Interference, Which Were Improperly Limited to Only Odor, Discoloration and Physical Oil Damages

While the court below recognized there could be such a thing as unreasonable interference, it incorrectly and prejudicially limited what such "unreasonable interference" could be to only odor, discoloration, and physical oil damages, in direct contradiction to

Arkansas law. *See, e.g., Felton Oil Co., LLC v. Gee*, 183 S.W.3d 72 (2004). Landowner's property was not the same after Exxon's use of the easement, which constituted unreasonable interference with Landowners' right to "fully use and enjoy" the physical property. *See, e.g., Felton.* (A-1542-1545, A-1574) When an easement exists, the rights of the parties to the contract which creates the easement is reciprocal; owners of an easement rights must use the easement in a manner that will not interfere with the landowner's right to utilize and enjoy his property. *Bean v. Johnson*, 649 S.W.2d 171, 172 (1983) (citing *Davis v. Arkansas Louisiana Gas Co.,* 454 S.W.2d 331 (1970)) Although Landowners alleged current property damage due to the unreasonable interference of the defective and contaminated pipe, the district court, without the citation to any authority, improperly limited such unreasonable interference and the loss of use and enjoyment to only odor, discoloration or physical oil damages. (A-1529, Add-39) *Compare Felton*, 182 S.W.3d at 76 (citing *Restatement (Second) of Torts* § 929, comment *e* (1979)) (loss of use and enjoyment of one's property is a distinct damage).

Landowners alleged that the rescission of the easements for willful and substantial misuse, specific performance to remove the

contaminated pipe and remediate the land, or in the alternative, damages for Exxon's material breach of contract were proper. (A-25) Nonetheless, the district court did not fully analyze this right and violation from the point of view of the unreasonable interference by Exxon. Rather, the district court made factual findings at the summary judgment stage against the nonmoving Landowners while, at the same time, narrowing the type of damages that were available. (A-1529, Add-39) Under Arkansas law, Landowners have alleged unreasonable interference with the right to fully use and enjoy their property. This is an actual injury with controverted facts, unaddressed by the court below due to the narrowing of available damages. The district court erred when it limited the scope of unreasonable interference to three type of damages. This limitation of the Landowners' remedies available from unreasonable interference to odor, discoloration and physical oil leakage was an error of law.

V. THE DISTRICT COURT ERRED WHEN IT DENIED THE FED.R.CIV.P. RULE 59(e) and RULE 60(b) MOTIONS FOR RELIEF FROM JUDGMENT WITHOUT RIGOROUSLY ASSESSING THE NEW EVIDENCE

The discovery in this case was bifurcated for class certification purposes. Exxon initially produced only documents pertaining to class certification and did not produce documents pertaining to the merits until after the court's class certification decision on August 12, 2014. On August 26, Exxon filed its motion for reconsideration. (A-575) Then, on September 8, 2014 - - before producing any discovery on the merits of the case - - Exxon promptly filed its motion for summary judgment, thus effectively foreclosing any fact discovery. (A-579) These were the same motions for summary judgment and reconsideration that were granted fully ***eight months later***. (A-1509, Add-19)

On December 5, 2015, Landowners, stymied by the absence of fact discovery, filed a motion to compel that discovery. (A-1048-1049) The motion would prove useless, as Exxon never agreed to search terms for the ESI discovery process or an ESI discovery protocol. (A-1049)

A. Standard of Review

A party is entitled to relief from an order as to summary judgment upon the grounds of "newly discovered evidence" where (1) the evidence was discovered after the summary judgment hearing; (2) the moving party exercised due diligence to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) a new hearing considering the evidence would probably produce a different result. *In re Levaquin Prods. Liab. Litig.*, 739 F.3d 401, 404 (8th Cir. 2014) (outlining standard for Rule 60(b)(2); *Alpern v. UtiliCorp United Inc.*, 84 F.3d 1525 (8th Cir. 1996).

Here, the district court committed erred as a matter of law in denying Landowners' motion for reconsideration when legal and factual grounds for relief existed. This necessitates a *de novo* standard of review.

B. Landowners Submitted Uncontroverted Expert Testimony and Documentary Evidence That Would Probably Produce a Different Result

The Supreme Court has made it clear that parties are entitled to discovery in order to produce an adequate record before the grant of summary judgment can be sustained, thus avoiding a party

being 'railroaded' by a premature grant of summary relief. *Wynne v. Lee*, 842 F.2d 1266, 1269-1270 (11th Cir. 1988) (discussing *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986) (summary judgment denied; lack of opportunity for Landowners to obtain discovery.) Exxon's refusal to agree upon relevant search terms deliberately obstructed Landowners' ability to seek modifications to those terms and seek ESI discovery. *Burd v. Ford Motor Co.*, No.3:13-CV-20976, 2015 WL 4137915, at *3 (S.D.W. Va. July 8, 2015) ("[defendant] Ford was not forthcoming in sharing specifics about the results of the searches; thereby, hindering modifications to the search terms and phrases.") Courts recognize the importance of cooperation and transparency in the discovery of ESI. *Apple, Inc. v. Samsung Electronics Co. Ltd.*, No. 12–CV–0630, 2013 WL 1942163, at *3 (N.D. Cal. May 9, 2013) (discussing principles of cooperative, collaborative, and transparent discovery); *William A. Gross Const. Associates, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (concluding that "the

best solution in the entire area of electronic discovery is cooperation among counsel.")

Discovery was produced, instead, in large rolling productions on diskettes, which required extensive efforts to address major deficiencies. (A-1596-1600) The unfair and prejudicial manner in which Exxon took advantage of Landowners procedurally, was a classic "document dump", designed to inundate Landowners with a delayed, massive discovery production of documents in a disorderly and time-intensive form. This is nothing new to this Circuit.

> The timing of UtiliCorp's disclosures about its internal investigation and its results ***impeded Plaintiffs' ability to process and present the information prior to the court's ruling***. ***It also undercut the purpose of discovery, which is to enable parties to obtain the factual information needed to prepare their cases for disposition***.

Alpern, 84 F.3d at 1536 (emphasis supplied).

Without proper electronic search terms and cooperation, Exxon's documents, when they were eventually produced, were limited in scope, duplicitous in nature or even withheld entirely. After Exxon's motion for summary judgment was filed, some of these severely limited documents actually revealed the presence of *asbestos* as a uniform contaminant currently existing on the

pipeline sitting in the Landowner's property and water. (A-1542-1545)

In sum, fundamental fairness, equity and the interests of justice require a proper remedy for Landowners' limitation in opposing dismissal of their claims. The district court improperly denied Landowners' Rule 59 and 60 motions. The Court should, at a minimum, vacate those denials and remand the matter so that Landowners can complete their discovery.

CONCLUSION

Landowners respectfully request that the order below be reversed and remanded to the district court with a direction requiring notification to the members of the putative class and, following merits discovery, a factual determination as to the contamination and interference with the property of Landowners and the members of the putative class.

WHEREFORE, Plaintiffs respectfully submit their Appellants' Brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,151 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Bookman Old Style type.

3. I certify that the electronic version of the brief filed with this Court has been scanned for viruses and is virus-free.

/s/Phillip Duncan
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Dated: November 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on November 13, 2015. All participants in the appeal are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that one (1) copy of the foregoing was dispatched via Federal Express overnight delivery to the party listed below.

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