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)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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This case examines the effects of Exxon's stewardship of a 70-year old easement along the route of the Pegasus Pipeline. That picture is painted on a canvas that contains an easement entered into by Landowners and Exxon in 1947, and a pipeline that was shut down by Exxon in 2002. Well beyond what had been assumed was only a 30-year lifespan,[1] Exxon not only operated the Pegasus Pipeline for more than *twice* that period, but then, after making a decision to shut it down for four years, brought it back to life again, with dire consequences for those whose property rested above it.

The record supports Plaintiffs' allegations that Exxon neglected and abused the Pegasus Pipeline in a uniform manner, treating that pipeline as a single, unified mechanism for transporting its product. Exxon's actions constituted nothing less than a singular and substantial misuse of the property of all the

[1] As engineering experts from Magnolia Oil Pipeline Company have confirmed, the normal life of the Pegasus Pipeline at the time of its creation had been *only 30 years*. (A-685). Magnolia Oil was the original installer of the Pegasus Pipeline; when Exxon acquired the pipeline, it acquired Magnolia Oil as well. (A-685).

Landowners, That misuse, which was no more segmented or divisible than the pipeline itself, was a breach of Exxon's easement contracts with the Landowners as a class. (A-37-38).

Lest there be any doubt to the contemporary nature of Exxon's abuse of the Pegasus Pipeline (and its unified misuse of the easement contracts on which it depends), that doubt was surely vitiated in 2006, when Exxon started up its old pipeline once again. But this time, Exxon not only *reversed* the flow of its product, but *changed* the product flowing through that pipeline from light "sweet" Texas crude to Canadian heavy tar sands, a substance which caused more stress to the ancient pipeline and contained hazardous toxins as well. (A-35). Not content to push the pipeline to its limits by varying the nature of what it carried and reversing the direction of its flow, Exxon then compounded its misuse of the pipeline by *increasing the flow* of the now thick, heavy sands moving through it by an *additional 50%,* or from *66,000 to 99,000 barrels* per day (A-27-28, 856). This qualitative and quantitative misuse of the pipeline interfered with and damaged the Landowners' property, and by doing so, breached their easement contracts. Dr. Tom Eagar, head of Material and Engineering at MIT,

who brings over forty years of metallurgical experience to bear on the problem, finds it plain. "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 . . . . " (A-1542-1545).

The material properties of the pipe itself cannot contain the cancer causing asbestos which coats it, nor can it contain the pipe's residual oil, interfering with the property where the pipeline and its coating are located. (A-1542-1545). Moreover, Don Deaver, a former Exxon pipeline engineer for over 30 years as a supervisor of pipelines, testified that the Pegasus Pipeline was worn out and a bad pipe. (A–169, 181, 192-195). "Areas of damage and deterioration in the Pegasus Pipeline," Deaver lamented, "are an irreversible condition." (A-181). Simply, the material toughness of the pipe cannot be improved: It is what it is; what has been done, has been done. Exxon's conduct with regard to the ownership and operation of the Pegasus Pipeline was done at the Landowners' expense and in derogation of the rights expressly articulated and implied by their easements.

1. Class Certification is reviewed *De Novo* and the District Court Should Be Reversed Based on an Error of Law

A district court abuses its discretion if it commits an error of law. "[A] district court's rulings on issues of law are reviewed de novo." *In re: St. Jude Med'l, Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005). Here, the district court committed an error of law when it prematurely conducted fact-finding and then resolved the case on its merits, notwithstanding that the matter was only at the class certification stage.

At the February 9, 2015 hearing held to finalize notice to the class members, the district court *affirmed* class certification and flatly denied any inclination to reconsider that decision, stating: "And as far as decertifying, I'm going to stand on my order so far." (A-1636). Within one month – and without any hearing or notice – the district court suddenly and completely reversed course. It decertified the class and reversed many prior rulings by deeming common law claims to be preempted and by placing dispositive weight on a single Arkansas case from 1977, which neither addressed pipelines nor willful misuse. (Add–19, 22).

This Court has specifically cautioned that at the class certification stage, a district court must walk carefully as it approaches the heart of the case, *i.e.*, the substantive merits of the claims. *See Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005). Fundamentally, a decision to certify a class "is far from a conclusive judgment on the merits of the case." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). A district court may not intertwine a Rule 23 class certification procedural analysis with a substantive merits analysis of the claims, defenses and evidence (akin to Rule 56). *Id.* This type of analysis converts Rule 23 into a substantive, rather than a procedural, mechanism, resulting in an error of law. *Zurn Pex Plumbing Products Litig.*, 644 F.3d 604, 616 (8th Cir. 2011) ("[A] district court abuses its discretion if it commits an error of law." (quotation omitted)).

In *Zurn Pex Plumbing Products Litig.*, 644 F.3d at 613, this Court highlighted the distinction between the Rule 23 analysis and a ruling on the substantive merits of a case:

> [A] court's inquiry on a motion for class certification is "tentative," "preliminary," and "limited." *Coopers & Lybrand*, 437 U.S. at 469 n.11, 98 S.Ct. 2454; *Blades*, 400 F.3d at 566. The court must determine only if "questions of law or fact common to class members

> predominate over any questions affecting only individual members [and if] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

In the case at bar, the original certification order properly evaluated the certification of the claims, finding that the Landowners' proof was common against Exxon. This initial assessment of the record was wholly warranted, given that Plaintiffs presented the district court with a voluminous record sufficient to show that Exxon's "liability to all plaintiffs may be established with common evidence." *Id.* at 614. The Court's original class certification decision correctly recognized that a Rule 23 analysis stops there, staying away from any premature merits determination.

The merits-based argument used by Exxon below convinced the district court to enter a reconsideration order on class certification; however, that merits-based argument produced a finding of fact based on an error of law. Nonetheless, Exxon continues here to argue for a complete merits analysis in an effort to defeat class certification. Exxon uses an expert rebuttal opinion to support a factual finding that the pipeline was not unitary, but

segmented, requiring a detailed, landowner-by-landowner analysis, which the district court transmuted into a "segment by segment" analysis. On the strength of Exxon's expert rebuttal opinion proposing that the Pipeline was actually segmented, the court adopted the view that class determination would involve a detailed landowner-by-landowner analysis. Exxon persuaded the court to reach that conclusion despite the fact that it had received no new evidence, heard no new argument, and there had been no change in controlling law between the time of its order granting certification and the reconsideration of that decision.

In essence, the district court pivoted and reversed direction, for the first time, adopting Exxon's argument, regarding it as incorrect to refer to the Pegasus Pipeline as a "single entity." "[A] more appropriate way to view the pipeline is as a series of individual segments, with each segment corresponding to each individual landowner." (Add-25) What had changed in two weeks? The facts had not. But the court now accepted, apparently as an article of faith, that "Exxon's actions, or inactions, on one individual's land would not necessarily implicate the interests of other landowners. For example, a pipeline leak in Illinois would have no practical

effect on a landowner in Texas." *Id.* The district court reliance on Exxon's argument was misplaced and resulted in an error of law. A pipeline is not a segmented mechanism. While Exxon argues it can be viewed as made up of pieces, it is not those pieces that define its use. The use of a pipeline is to provide a single, uninterrupted delivery system. Alone, the links are not a pipeline but have to be put together to form a pipeline. The pipeline is *all* or nothing at all.

The job of the Pegasus Pipeline is to move product from Point A to Point B. In order to do so, *all* parts of the pipeline must work; if not, the pipeline fails. To suggest that misuse of the pipeline in Texas does not affect the pipeline in Arkansas is incorrect. In this case, pumping heavy Canadian tar sands through the pipeline instead of sweet Texas crude damages the entire structure, not just one part of it, in the same sense that drastically increasing the flow of product at one end has dire consequences at the other, in the same manner that reversing the flow of that product from one end impacts the landowner at the other as well. In its reconsideration decision, the district court adopted Exxon's claim that "simply because Exxon may not be fulfilling its duties on one person's land does not necessarily mean it is not fulfilling its duties on all

landowner's property." *Id.* Based on the "duties" evidenced in the record, that is not the case.

By ruling on the merits of Exxon's affirmative defenses in the Rule 23 proceeding, the district court prematurely delved into the final resolution of the case. Rather than limit its inquiry to class certification issues, the court instead gave credence to Exxon's argument that because the replacement and repair of the damaged pipeline required different individualized determinations, commonality was destroyed. The district court's ruling, made in a vacuum, did not weigh all benefits, burdens and reciprocal rights of the parties, and instead, resolved fact questions that require and deserve more than motion practice on the limited question of class certification. The merits-based inquiry adopted by the court allowed it to avoid the question at issue, *i.e.*, did Exxon misuse the easements it possessed through a concerted course of uniform conduct towards a common end. This it did in error and in derogation of Rule 23. *Zurn Pex Plumbing Products Litig.*, 644 F.3d at 616 ("While disputes about Rule 23 criteria may overlap with questions going to the merits of the case, the district court should not resolve the merits of the case at class certification.").

Most bewildering is that the district court originally issued the correct decision. In its original certification decision, the court appropriately *avoided* a merits analysis, specifically ruling that it was *improper* to engage in such a merits analysis at the certification stage and *necessary to avoid* a "determination of the ultimate issue." (Add - 11). Yet, that's precisely what the court would do. *See Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1194-1195 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

The harm behind the district's court epiphany; before it's reversal of its own class certification order; was that by virtue of that order, Landowners were suddenly thrust into a merits analysis *without any useful merits discovery*. For whatever reason, the merits discovery provided by Exxon was corrupted and unusable. Were that not enough, Landowners could never have addressed Exxon's merits argument because Exxon was still actively producing those documents all the way up to the date of the district court's March 17, 2015, rulings. Exxon's argument supporting a *sua sponte*, merits-based reconsideration of class certification, in

the absence of discovery, is not only unfair, but error under Rule 23's class certification requirements.

2. The District Court's Original Class Certification Order is Correct

Fed. R. Civ. P. 23, as a procedural rule, provides a mechanism designed to eliminate multiple rulings on the same facts and issues. Its purpose is to produce a single result from similar claims that are capable of resolution in a single lawsuit. *Amgen Inc.,* 133 S.Ct. at 1194-1195; *Zurn Pex Plumbing Products Litig.*, 644 F.3d at 616. One could scarcely conceive a better example of Rule 23's target dispute than a common set of landowners, each who have granted the same easement, to one, single, common pipeline, owned by one company and carrying the same product through each of their properties. The ultimate merits of such a unified claim can be decided by one court, in one decision, even-handedly applying justice to each party collectively.

That was precisely what the district court's original August 12, 2014 Order found. There was but one case. It concerned a single pipeline which ran under the property of each of the putative members of the class as a consequence of the same easement rights

(Add-12). Exxon's answering brief illustrates quite effectively the manner in which the district court went beyond those procedural prerequisites to delve deep into the merits of parcel analysis in its replacement decision. Rather than appreciating the single, predominating corporate conduct, an issue common to all proposed claimants, the court decided factual issues of little consequence on a Rule 23 determination, ignoring the overwhelming commonality of the claim itself. Procedural prerequisites which need to be addressed at the inception of a class action do not require a conclusive decision as to who wins the case at the end. Here, upon rigorous analysis, the common evidence on Exxon's use of the pipeline and interference with the property owners' property was established, as evidenced by the district court's original decision.

a. Landowners Have Set Forth Common Issues

This appeal is somewhat unique in that Landowners are not the only ones to have made the argument as to commonality and the sufficiency of the putative class under Rule 23. It was also made by the district court in is original decision. In the district court's own words, Landowners "set forth several issues common to the class, most notably whether Exxon has failed to properly

operate and maintain the pipeline, and whether such failure constitutes breach of their easement contracts." (Add-12). Common questions on common issues concerning a common allegation of liability are the core of Rule 23's inquiry. "The answers to these questions are central to the validity of all class members' claims, and will provide class-wide resolution." (Add-12). In the replacement decision, the district court rejected its own analysis, now interpreting the Landowners' claims all too narrowly in order to preclude class treatment. The district court knew, as evidenced in its original decision, that the failure to properly operate and maintain the pipeline were but mere examples of Exxon's misuse and unreasonable interference with Landowners' property. Landowners were in a position to prove a continuing breach of the easement contracts, for that breach was not a single incident, against a single landowner on a single date. Instead, the breach in the complaint was based on Exxon's uniform course of corporate conduct; affirmative acts which were endemic to Exxon's abuse of the Pegasus Pipeline and stewardship of the easement it had bound itself to. It was that common, intentional and directed course of conduct which ultimately led to a pipeline that contaminated and

damaged, and continues to contaminate and damage, Landowners' property; property where the pipeline and its coating are located. Hence, there was no individualized inquiry which was necessary here to prove that common breach and those common damages. The original certification Order was correct in its conclusion that any allegations as to the repair and replacement of the pipeline is more proper suited for an affirmative defense by Exxon, *e.g.*, that it had reasonably used the easements, for ruling otherwise would be a premature determination of "the ultimate issue." (Add-11). That is the case here.

The Landowners' claims of breach of contract are inextricably linked to Exxon's willful and substantial misuse of the easements, which Landowners have continuously argued requires the remedy of rescission. Exxon mischaracterizes the entirety of Landowners' claims in a "maintain" and "repair" framework, which led the district court to commit an error of law. However, in the February 9, 2015 hearing, the district court understood that Landowners sought rescission of the contracts due to misuse. In this regard, the district court specifically asked.

> So the remedy would be -- under the circumstances that I raised, the remedy would be not an order directing Exxon to repair or replace, but an order requiring that the easements be vacated? (A-1632).

Landowners' agreed that the position of the class was for the easements to be vacated: "That's correct. And if the easements are vacated, then the individuals have private rights which would be before this Court, too." (A-1632).

Exxon fails to rebut the effect of Landowners' remedy of rescission in its answering brief; a remedy which the district court found in its original order to be the main issue for resolution at trial, specifically, whether the Exxon easements could stay in place if Landowners were successful at trial. The district court reasoned in its original order that "[a]ll the plaintiffs are attempting to do, however, is enforce their easement contracts via a common law breach of contract claim, which speaks to the larger issue of whether the easement itself can continue to exist." (Add-10). It is precisely that common contractual relationship between Exxon and the Landowners that distinguishes this case from any case cited by Exxon.

For example, Exxon's reliance on this Court's recent holding in *Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921 (8th Cir. 2015) is misplaced. *Smith* is supportive of Landowners' position. Initially, it is significant that the landowners in *Smith* were not a class of easement holders, who, like the landowners here, are capable of proving a class-wide breach of identical easement contracts involving a single pipeline with one common set of proofs. Secondly, the contamination in *Smith* was not found on all class members' property. 801 F.3d at 926. In the case at bar, the coating of the pipeline and the residual oil in the pipe damages and unreasonably interferes with the property of all Landowners "where the whole pipeline and coating is located." (A-1543-1544). The pipeline coating and residual oil contaminants within that pipeline are both current and past damages commonly suffered by all Landowners. Thus, each class member is commonly affected by contamination and unreasonable interference on underlying property, satisfying the commonality requirement of Rule 23.

By the same token, Exxon's citation to *Walmart v. Dukes*, 131 S.Ct. 2541 (2011), and the Court's reliance on *Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 571 (8th Cir. 2015), fails to

appreciate that in this case there are *common questions* on willful and intentional misuse with *common answers* for the jury to address. Unlike *Dukes*, Exxon's overarching corporate policies, decisions and conduct which resulted in the misuse of the Pegasus Pipeline damaged and contaminated the property of *all* landowners. (A–1544-1555). The record showed that rather than operating in an isolated fashion, Exxon made a unified corporate policy decision to continue using the entire Pegasus Pipeline after twice its original intended life of 30 years; made a single, overarching corporate decision to begin transporting heavy tar sands rather than sweet Texas crude through the entire pipeline; made a comprehensive corporate decision to reverse the flow of the product flowing through the entire Pegasus Pipeline; and made its own, corporate decision, to increase the pressure of the product flowing through the entire Pegasus Pipeline.

The sacrifice of the Pegasus Pipeline to a corporate purpose comes straight out of one place: the corporation. Exxon's misuse of the pipeline was applied, as one would expect, using a single, uniform course of conduct which implicated the interests of all Landowners. (A-28, 30-31, 856). The record demonstrates that

these corporate decisions and policies by Exxon uniformly affected each Landowner and the Landowners' rights under the easements. (A – 1544-1545). It is no surprise, then, that such proof creates common questions that can only be answered with responses that are sufficient enough to resolve the issues of *all* class members. The district court recognized as much at its February 9, 2015 hearing:

> And so why should I – if I'm not clear – and with summary judgment, the way I view it is it should be absolutely 100 percent clear to me before I grant a summary judgment, and if it's not quite clear, why don't I let the jury decide and then address the issue of what the remedy will be after we get a verdict?

(A-1626).

The main issue in this case is the right that the Landowners were expressly guaranteed by Exxon in their easement; the right to "fully use and enjoy their property." Not without cause, it is an issue which Exxon assiduously avoids discussing in its answering brief. For, unlike *City of Crossett v. Riles*, 549 S.W.2d 800 (Ark. 1977), a single Arkansas case with different facts, here the four states through which the Pegasus Pipeline passes not only apply a general reasonableness standard to such easements, but even more

important, each class member in this case has the *express* right of full use and enjoyment *directly incorporated* into each easement.

There will certainly be a time when the district court, and ultimately, the jury, can consider the affirmative defenses that Exxon may bring to bear on the merits, but Rule 23 certification is not that time. The result of that premature determination by the court, and not the trier of fact, has resulted in a misinterpretation of the law and the dismissal of the claims of all Class Members in Arkansas, Illinois, Missouri and Texas.

b. Landowners Satisfy Rule 23(b)(3) Because the Common Issues Set Forth Are Capable of Class-Wide Adjudication

Both parties agree the proposed class must be "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.* v. *Windsor,* 531 U.S. 591, 623 (1997). Contrary to Exxon's contention below, Landowners can prove class-wide breach of the easement contracts without individualized determinations. As the district court found in its original decision, "[t]he proposed class members all are subject to Exxon's easement, and their claims depend on the rights as specified in their easement contracts." (Add-16). The easement requires reasonable use of Exxon's limited

grant, and further, expressly reserves Landowners' rights to "fully use and enjoy" the premises. In violation of that guarantee, Landowners have produced evidence of willful and substantial misuse, unreasonable interference, and corroboration of their claims of being unable to fully use and enjoy their property.

The rights of landowners here are even more acute, better expressed and more prominent than the right contained in the easement discussed in *Mattson II*, in which the Montana Supreme Court deemed worthy of certification, even after *Dukes*, claims questioning defendants' adherence to the duty of reasonableness implied in every easement. *Mattson v. Mont. Power Co.*, 291 P.3d 1209, 1221 (Mt. 2012) ("But in the present case, as we did in *Chipman,* we conclude that Landowners satisfy the more stringent standard in any event, because their claims "'depend upon a common contention" which is "of such a nature that it is capable of classwide resolution'"—i.e., the "'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.'" (quoting *Dukes,* 131 S. Ct. at 2551); *cf. Mattson v. Mont. Power Co.*, 215 P.3d 675, 690 (Mont. 2009) ("An easement must be used reasonably." (quotation omitted)).

The Landowners claims' predominate over individualized determinations. Exxon's uniform course of conduct, recklessly disregarding the holders of its easement, was uniform. All Landowners have a pipeline that has been active for nearly forty years after its useful lifespan on their property. The use of the easements by Exxon was unitary: Exxon uniformly applied an increase to capacity, a reversal of flow and a change in product to all Landowners' property simultaneously. These actions were taken with full knowledge that the Pegasus Pipeline could only withstand a fraction of the forces it could back in 1947. That combination of Exxon's unilateral actions and decisions resulted in a pipeline that now contaminates all Landowners' property (where the pipe and coating are located), creating a textbook class-wide breach of contract.

On review, this Court should not overlook the fact that the entire pipeline passing through the Landowners' real property, by virtue of identical easements, is bad. It is currently injuring and contaminating Landowners' property. As confirmed by leading metallurgical expert, Dr. Tom Eagar, "[t]he 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 property where the whole pipeline and coating is located*[.]" (A-1543-1544) (emphasis added) The "mechanism" of that injury is the same as to each Landowner. No reasonable dominant tenement granted a pipeline easement would operate a pipeline kept in operation two-and-a-half times longer than its estimated lifespan, then increase the capacity of that pipeline by fifty percent, reverse the flow, change the substance flowing through the pipeline to a heavier crude oil with hazardous toxic substances and antiquated cancer-causing asbestos coating, and finally run the pipeline until the pipe itself becomes a contaminant and an unreasonable interference with the Landowners' property. If Exxon believes that such conduct can be shown to be reasonable, the showing must be made to a jury, not a district court judge faced with a Rule 23 certification question.

c. All Four States Involved in this Class Action Require the Application of the Same Easement Law

The district court erred when it found that Arkansas is "unique in the interpretation" of easements and "risks imposing a unique Arkansas state law remedy across four states." (Add–28). Contrary to the district court's belief in its reconsideration opinion, *City of Crossett* does not control the analysis of this case. All four states involved here recognize as actionable the misuse of and unreasonable interference with an easement. (*Appellants' Br.*–52-53). These four states each recognize that the reciprocal rights of parties in easement contracts require the application of the duty of reasonableness with respect to any claimed interference with those rights. Were that implied right insufficient, the easement expressly provides for that right as it crosses each state and touches the real property of each Landowner.[2]

Additionally, Arkansas, Illinois, Texas and Missouri all recognize the reciprocal rights of easements contracts and provide

[2] Exxon's argument that only Arkansas recognizes misuse is incorrect. *See, e.g., Barfield v. Sho-Me Power Elec. Co-op*, 10 F. Supp. 3d 997, 1010 (W.D. Mo. 2014), citing *Maasen v. Shaw*, 133 S.W.3d 514, 519 (Mo. App. 2004) ("'Any doubt concerning an easement's scope should be resolved in favor of the servient owner's free and untrammeled use of the land.'").

remedies for interference with those rights. That is, one tenement cannot interfere with the other tenement's rights pursuant to the easement contract or at common law.

An easement owner must use the easement in a manner that will not interfere with the property owner's right to fully use and enjoy the premises. *See Bean v. Johnson*, 279 Ark. 111, 113 (1983). Similarly, in Illinois, the duty is on the dominant owner not to interfere with use and enjoyment or act is such a way as to alter characteristics of the easements. Courts in Illinois can grant equitable relief for altering or exceeding the scope of the easement. *See, e.g., Triplett v. Beuckman*, 40 Ill. App. 3d 379, 382 (1976). Likewise, in Texas and Missouri, the easement owner must make reasonable use of the right and not unreasonably interfere with the property rights of the owner of the servient estate. *San Jacinto Sand Co. v. Sw. Bell Tel. Co.*, 426 S.W.2d 338, 345 (Tex. Civ. App. 1968); *see also Maasen v. Shaw*, 133 S.W.3d 514, 519 (Mo. Ct. App. 2004) (reasoning change in easement's quality of use is not permissible because it would create substantial new burden on servient estate).

Notwithstanding these authorities, and discarding its original decision, the district court misapplied *City of Crossett* in the

reconsideration order. Exxon then magnified the effect of that error arguing for *Crossett* to spill over and control all the substantive claims of the Landowner Class Members, who have the same pipeline and same easement in Arkansas, Illinois, Missouri and Texas, which is an error of law. *(Appellants' Br.*–35, 54-55).

II. EXXON'S USE IS UNREASONABLE AND DAMAGES THE LANDOWNERS

Fifteen years after *City of Crossett*, the Arkansas Supreme in *Dwiggins v. Propst Helicopters, Inc.*, 832 S.W.2d 840 (Ark. 1992), held that an easement holder did not have an unqualified right to damage and interfere with the servient property owner. The property owner could have full and free use of his right of way in the same manner as the servient landowner, whose benefit of the bargain was use of the land. Even more recently, the Arkansas Supreme Court in *Sluyter v. Hale Fireworks P'ship*, 262 S.W.3d 154, 158 (Ark. 2007), recognized that a dominant easement owner can misuse an easement and, if the facts show that it was willful and substantial misuse, the easement can be forfeited.

The district court improperly applied *City of Crossett* to the facts of this case. (Add–28, 36). The underlying facts, together with

the Landowner's express easement right "to fully use and enjoy their property," were never discussed in *Crossett*. (A-43). "Willful and substantial misuse" and "unreasonable interference" were never discussed in the *Crossett* opinion. In fact, it seems the City of Crossett never even used the easement after the initial installation of the drainage ditch for which it was obtained. Exxon concedes, as it must, that *Crossett* was "silent on the issue" of "willful and substantial misuse" as applied to an *express provision* reserving a landowner's right to "fully use and enjoy" his property. (*Appellee's Br.* 46). The present record serves to distinguish this action from *Crossett* on any number of indices, but the most critical distinctions relate to the nature of the misuse. Unlike the facts in *City of Crossett*, Exxon "knowingly transported tar sands at a high volume through [its] "bad pipeline" and "interfered with and continues to interfere with the [Landowners] right to fully use and enjoy their property." (A-44). That operative fact pattern *is the same for each member of the putative class*.

The Arkansas Supreme Court has long recognized the reciprocal rights of parties pursuant to easement contracts. A long line of state court decisions establishes that "respective owners

must use the way in a manner that will not interfere with the other's right to utilization and enjoyment thereof." *Davis v. La. Gas Co.*, 248 Ark. 881, 884 (1970). This was (and is) controlling Arkansas law both before and after *City of Crossett*. *Bean v. Johnson*, 279 Ark. 111, 113 (1983). "It is generally recognized that the holder of the dominant estate has a duty to use the property so as not to damage the owner of the servient estate." *Wilson v. Johnson*, 320 Ark. 240, 248 (1995).

Exxon intentionally avoids the Landowners' claim for Exxon's misuse of the easement. Exxon failed to address this claim at the district court and moreover fails to substantively address this point on appeal. This issue alone should result in reversal because Exxon's misuse palpably restricted Landowners' right to fully use and enjoy their property.

> The reversal of flow, more aggressive fluid and increased operating stress places the entire pipeline resting in landowners' property in a contaminated condition. By not replacing the Pegasus Pipeline, the landowners' property is experiencing contamination and the landowners are unable to fully use and enjoy their land due to the unreasonable use, interference and contamination with their real property.

(A–1544 [Statement of Dr. Tom Eagar]). That conduct remains unexposed to judicial review as a result of the opinion below. This disputed material fact question cannot be resolved by summary judgment on this record. Disputed facts should be resolved by the fact-finder. *See* Fed. R. Civ. P. 56.

III. THE PIPELINE CONDITION IS THE HARM

In the affidavit of Don Deaver, a pipeline expert, submitted in support of class certification, he describes the impact of Exxon's abuse on the *entire* pipeline for *all* landowners with an easement. Mr. Deaver opined as follows: "Exxon Mobil failed to undertake a proper engineering analysis and overlooked its own evidence and internal information that the Pegasus Pipeline was prone to seam failures along the entire pipeline." (A-192).

Mr. Deaver was direct and factual: "Exxon Mobil, as a major industry operator of oil, gas, and bitumen pipelines, knew that its pre-1970 ERW pipe was defective, containing hook cracks that can cause seam cracks and welds to fail as in the Mayflower failure and that the defect in it was present along the entire length of the pipeline." (A-192-193). Deaver supported class certification and

provided ample evidence additional evidence that Exxon had misused its easement.

The district court's reconsideration decision (with no new evidence, change in the law, or legal standard), facilitated by Exxon's ploy to provide corrupt discovery information to the Landowners during the merits phase while moving for summary judgment, undermines the harm to the Landowners who have evidence in the record to support their position. That is, the district court's overall ruling, on March 17, 2015, essentially provides immunity for Exxon on a bad pipeline, which is contaminating the Landowners' property and with no available recourse under the common law.

IV. FEDERAL LAW DOES NOT GOVERN EASEMENTS

Exxon continues to insist that the PSA preempts the Landowners' state common law claims. Exxon is mistaken. It is well settled that the "purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In that regard, "the best indication of Congress' intentions, as usual, is the text of the statute itself." *S. Port Marine, LLC v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 65 (1st Cir.

2000). Although courts have interpreted the "text of" the PSA to "preempt[] state laws *regarding pipeline safety*," *Am. Energy Corp. v. Tex. E. Transmission, LP*, 701 F. Supp. 2d 921, 929 (S.D. Ohio 2010) (emphasis added), those same tribunals have determined that "neither the PSA, nor the [Natural Gas Act], prevents claims based on state contract, tort, or property law," *id.* at 931. This much is evident from the plain language of the PSA.

To be more specific, the PSA provides that "[a] State authority may not adopt or continue in force *safety standards* for . . . . pipeline facilities." 49 U.S.C.§ 60104(c) (emphasis added). Alongside this rather feeble preemption statement, the law simultaneously ensures that it does "not affect the tort liability of any person," *id.* § 60120(c), while confirming that any "right to relief that a person *or a class of persons* may have under another law *or at common law*" remains intact, *id.* § 60121(d) (emphases added). Understandably, courts have harmonized these preemption and savings clauses to conclude that the PSA effects no preemption of state "contract, tort, or property law," for the statute contains "no explicit preemption language . . . or any evidence of inferences of preemption." *Abramson v. Fla. Gas Transmission Co.*, 909 F. Supp.

410, 416 (E.D. La. 1995); *see also Am. Energy Corp.*, 701 F. Supp. 2d at 931 ("The PSA does not preempt [state] property or tort law.").

Exxon seeks to extend the preemptive reach of the PSA far beyond what is authorized by the statute's terms, and the company does so on the strength of cases interpreting other laws evidencing that Congress, in those instances, meant to cast a wide net of preemption. That the national legislature has sometimes chosen to nullify state tort laws lends no support to Exxon here, where the PSA expressly states that it does "not affect the tort liability of any person." 49 U.S.C. § 60120(c). Likewise, the *ability* of Congress to displace state common law, if it so desires, does not change the fact that the PSA leaves untouched any "right to relief that a person *or a class of persons* may have . . . *at common law*." *Id.* § 60121(d).

This Court is among those courts that view the PSA as precluding "states from *regulating* in the *area of safety* in connection with interstate hazardous liquid pipelines." *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358 (8th Cir. 1993) (emphases added); *see also Wash Gas Light Co. v. Prince George's County Council sitting as Dist. Council*, No. 12-1443, at *15 (4th Cir. Mar. 25, 2013) (Fastcase, Federal Appellate Courts Library) ("[T]he PSA

expressly preempts state and local law *in the field of safety*." (emphasis added)). At the same time, the "PSA does not preempt [state] property or tort law." *Am. Energy Corp.*, 701 F. Supp. 2d at 931; *see also Abramson*, 909 F. Supp. at 416 (reasoning that the PSA does not preempt state "contract, tort, or property law"); *cf. Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 221 (1993) ("[P]re-emption doctrines apply only to state *regulation*." (emphasis in original)).

Despite what Exxon would have this Court believe, the PSA does not preempt Landowners' common law claims.

V. CORRUPTED DISCOVERY IS NOT FAIR DISCOVERY

Fundamental fairness is the governing rod in merits discovery and litigation before summary judgment is granted. *See, e.g., Costello, Porter v. Providers Fid. Life Ins.*, 958 F.2d 836, 839 (8th Cir. 1992). "It is not fair to tie the only hand a party has to defend itself." *Costello, Porter*, 958 F.2d at 839. In the discovery phase of this case, Exxon effectively tied the Landowners' hand by producing one corrupted document dump after filing its motion for summary judgment. This corrupted discovery resulted in essentially no real,

tangible, usable discovery for the Landowners leading up to the district court granting summary judgment in favor of Exxon. Landowners diligently worked with Exxon and tried to work out the discovery problem.[3] Having won on the merits by producing corrupted, unusable discovery seems starkly unfair. Landowners were unable to take depositions on the merits until after receiving usable written discovery in electronic format. Landowners' provided an expert affidavit from Westlaw, at their own cost, in support of the corrupted discovery dilemma and a "Production Integrity Report." (A–1595, 1602).

The rules of fairness for discovery and the exchange of facts in modern electronic production require considerable cooperation between parties for the exchange of discovery documents provided in electronic format. Therefore, it is paramount under Rule 26 that the provider of information (1) cooperate with the recipient on electronic discovery protocols, search terms and other important

[3] Exxon's contention that Landowners should have filed a Rule 56(d) affidavit is unavailing as Landowners were still attempting to view the disks for months and at the February 9, 2015 hearing, it seemed apparent that summary judgment was going to be denied. Landowners were flying to Houston to take their first depositions the day summary judgment was granted.

variables for discovery and (2) provide actual usable information to the recipient. Otherwise fundamental fairness and the legitimacy of the discovery process as a basic and necessary means of ferreting out the truth is lost. Exxon's unilateral elimination of predictive coding and self-selection of its own pre-determined search terms prejudiced Plaintiffs by narrowing the database of documents. Predictive coding would allow identification of the relevant documents, categorization usable documents to the specific issues in this lawsuit and permit unadulterated review by the Plaintiffs. However, not only did Exxon prevent access to information, but the database produced by Exxon was corrupted.

This type of discovery misconduct is especially telling when merits discovery develops. Here, Exxon gave Plaintiff corrupted and unusable discovery information even as it engaged in motion practice to terminate the case on the merits. Still, the minimal discovery that was viewable revealed the harm to the Landowners. Consequently, Exxon's production of unusable information severely prejudiced the Landowners inasmuch as it is apparent that functional data would have provided information to assist Landowners in responding to summary judgment. *See Alpern v.*

UtiliCorp United, Inc., 84 F.3d 1525 (8th Cir. 1996). Usable discovery information was especially critical in the underlying case because a substantial portion of the "direct evidence" came from Exxon. *Id.* at 1536-37 ("[U]nearthing proof of scienter was especially difficult in this case because direct evidence had to come primarily from UtiliCorp."); *see also, e.g., Costello, Porter,* 958 F.2d at 838–39.

CONCLUSION

Landowners respectfully request the order and judgment below be reversed, this case remanded for notification of the putative class, merits discovery, factual determination as to contamination and interference with the Landowners' property, and all other relief appropriate and just under the law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 6,904 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This reply 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 reply 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 reply brief filed with this Court has been scanned for viruses and is virus-free.

/s/Phillip Duncan
Attorney for Plaintiffs-Appellants

Dated: February 24, 2016

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 February 24, 2016.

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