IN THE COURT OF APPEALS

APR 20 1992

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III,	)	BRIEF FOR APPELLANT
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

APPELLANTS' BRIEF

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April 20, 1992

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APPELLANTS' BRIEF

COME NOW Appellants, Peter F. Hoffman, Marie Boatwright Hoffman, Elizabeth Boatwright Bell, and J. K. Boatwright, III (hereinafter "Appellants") in the above-referenced action and file this their Brief and show this court as follows:

PART I

Part I of Appellants' Brief contains a succinct and accurate statement of the pleadings of facts which are essential to a consideration of the trial court's errors and a statement setting forth the method by which Appellants' preserved the enumeration of errors for review by this court.

A. Statement of Facts

Appellants are the owners of certain real property lying and being in Land Lot 103, Troup County, Georgia (the "Property").

(R. 687). A predecessor in title to Appellants granted an easement and right-of-way to Plantation Pipe Line Company ("PPL") through the Property. (R. 687). During the period from 1941 to 1970, PPL installed and operated a four-inch pipeline within the boundaries of the easement and right of way, from Macon, Georgia to LaGrange, Georgia (the "Pipeline") for the purpose of transporting refined petroleum products. (R. 687-688). PPL experienced numerous leaks from the segment of the Pipeline which traversed the Property (the "Pipeline Segment"). (R. 688). These releases are evidenced in part by the Spill, Repair, and Leak Reports maintained by PPL. (R. 688). The Pipeline was operated between LaGrange and Macon, Georgia and was the same "four-inch Macon line" which was within the easement described in Exhibit "B" of the Complaint filed by Appellants in the Superior Court of Fulton County on August 29, 1990 (hereinafter "Appellants' Complaint"). (R. 688).

PPL's Spill, Repair, and Leak Reports indicate that at least four (4) leaks occurred from the Pipeline Segment, with two (2) leaks occurring in November of 1954, one (1) leak in November of 1955, and one (1) leak in November of 1956. (R. 688). From approximately 1954 to 1956, gasoline leaks of unknown quantities were discovered in the Pipeline Segment. (R. 688). PPL estimated that approximately one thousand (1,000) barrels (i.e., 42,000 gallons)(Perry & Green, Chemical Engineers' Handbook (6th ed.

1984) p. 1-15) of petroleum products had been released from the Pipeline Segment into the soils and groundwater of the Property. (R. 688). The hydrocarbon contamination on the Property is gasoline, kerosene, or other products (the "Contamination"). (R. 688).

On or about December 30, 1970, PPL sold the Pipeline and transferred and assigned its easement rights and obligations to Atlanta Gas Light Company (hereinafter "AGL"), as set forth in the Quitclaim and Assignment and Transfer of Easement and Rights-of-way and Bill of Sale (the "Quitclaim Agreement"). (R. 689). Mr. Hoffman and his father-in-law, J. K. Boatwright (deceased, having granted his interest to his heirs), purchased the Property in April 1984. (R. 689).

PPL admits that the presence of hydrocarbon products in the environment, under certain circumstances, may be a health hazard and that chemical byproducts may be formed and released therefrom. (R. 689).

It is undisputed that the Contamination can be removed. (R. 689). Further, it is undisputed that the Contamination continues to migrate outward from the Pipeline Segment and Easement and that as this outward migration continues, the expense of removing the Contamination increases. (R. 689).

Appellees, PPL and AGL, were informed by Appellants in 1988 of the presence of the Contamination. (R. 689). On March 15, 1990, Appellants formally demanded that Appellees remove the Contamination

from the Property. (R. 689). Both Appellees refused to remove the Contamination. (R. 689). Appellants were forced to commence this civil action against Appellees on August 29, 1990. (R. 689).

In October, 1991, Appellees filed Motions for Summary Judgment on all counts of Appellants' Complaint. (R. 281 and 287). On November 7, 1991, Appellants filed their responses to Appellees' Motions for Summary Judgment. (R. 687 and 752). On January 6, 1992, the trial court issued an order granting Appellees' Motions for Summary Judgment without an opinion or explanation. (R. 1524). On January 30, 1992, Appellants filed their Notice of Appeal from the trial court's January 6, 1992, Order. (R. 1).

B. Statement Of Method Of Preservation Of Enumeration Of Errors.

Appellants preserved the enumeration of errors associated with the trial court's January 6, 1992, Order which granted Appellees' Motions for Summary Judgment by filing Appellants' Notice of Appeal from that Order on January 30, 1992. (R. 1).

PART II

A. Enumeration Of Errors

(1) The trial court erred in granting Appellee Atlanta Gas Light Company's (hereinafter "AGL") Motion for Summary Judgment with respect to Count I of the Complaint filed by Appellants (hereinafter "Appellants' Complaint") for an injunction against AGL. (R. 1524).

(2) The trial court erred in granting Appellee Plantation Pipeline Company's (hereinafter "PPL") Motion for Summary Judgment with respect to Count II of Appellants' Complaint based upon the theory of nuisance. (R. 1524).

(3) The trial court erred in granting AGL's Motion for Summary Judgment with respect to Count II of Appellants' Complaint against AGL based upon the theory of nuisance. (R. 1524).

(4) The trial court erred in granting PPL's Motion for Summary Judgment with respect to Count III of Appellants' Complaint against PPL based upon the theory of trespass. (R. 1524).

(5) The trial court erred in granting PPL's Motion for Summary Judgment with respect to Count IV of Appellants' Complaint based upon the breach of an instrument under seal. (R. 1524).

(6) The trial court erred in granting AGL's Motion for Summary Judgment with respect to Count V of Appellants' Complaint based upon the breach of an instrument under seal. (R. 1524).

(7) The trial court erred in granting AGL's Motion for Summary Judgment with respect to Count VI to Appellants' Complaint based upon the theory of fraud. (R. 1524).

(8) The trial court erred in granting PPL's Motion for Summary Judgment with respect to Count VIII of Appellants' Complaint for punitive damages. (R. 1524).

(9) The trial court erred in granting PPL's Motion for Summary Judgment with respect to Count IX of Appellants' Complaint for punitive damages. (R. 1524).

B. Statement Of Jurisdiction

The Court of Appeals of the State of Georgia rather than the Supreme Court of the State of Georgia, has jurisdiction of this appeal because this case does not involve one of those cases as to which the Supreme Court of Georgia has exclusive jurisdiction pursuant to Art. XI, Sect. 6, ¶¶ 2 and 3 of the Constitution of the State of Georgia.

PART III

ARGUMENT AND CITATION OF AUTHORITY

Appellants are before this court on appeal from the trial court's Order granting summary judgment on all Counts of Appellants' Complaint. (R. 1). This court's function, when reviewing an order of the trial court granting summary judgment, is to examine the record and determine whether the allegations of the pleadings have been pierced so that no genuine issue of material fact remains. Lewis v. Rickenbaker, 174 Ga. App. 371, 330 S.E.2d 140, 143 (1985). Appellants' Enumeration of Errors are all based upon the granting of Summary Judgment by the trial court on all Counts of Appellants' Complaint. This court, therefore, should determine whether Appellees were able to pierce Appellants' pleadings by demonstrating that no genuine issue of material fact exists and that

Appellees are entitled to judgment on each Count as a matter of law with respect to each of the Counts of Appellants' Complaint.

A. Enumeration Of Errors Nos. 1, 2, 3, And 4

The trial court erred in granting AGL's and PPL's Motions for Summary Judgment on Appellants' claims which were based upon the legal principles of a continuing, abatable nuisance and a continuing, abatable trespass. (Enumeration of Errors Nos. 1, 2, 3, and 4).

Appellants' Complaint (R. 5-38, et seq.), and the record set forth sufficient facts to support claims for injunctive relief and damages against AGL and PPL based upon the legal principles of a continuing, abatable nuisance and a continuing, abatable trespass. PPL estimated that it suffered known releases of approximately one thousand (1,000) barrels (42,000 gallons) of petroleum products from its pipeline into the soils and groundwater of the Property. The Pipeline traversed the Property by way of the Easement. PPL sold the Pipeline and the Easement to AGL in 1970.

AGL acquired the Easement rights and the responsibilities that inure to the benefited party under the Easement. AGL, although enjoying the benefits of the Easement Agreement, is attempting to avoid its duties under the Easement Agreement. Similarly, PPL enjoyed the benefits of the Easement Agreement until PPL transferred the rights to the Easement Agreement to AGL in 1970. Further,

even though PPL released the Contamination, PPL never met its duties under the Easement Agreement with respect to the removal of the Contamination. As a result of the presence of the Contamination, Appellants have been unable to fully use and enjoy the Property. (R. 15).

The Easement Agreement has been in effect continuously since its inception in 1941. (R. 5-7). Under the Easement Agreement, Appellants are guaranteed the right "to fully use and enjoy" the Property. (R. 29). Although the Contamination can be removed from the Property, the Contamination continues to migrate throughout the Property, contaminating additional soils and groundwater. Further, the continued spread of Contamination throughout the Property results in ever-increasing expenses for the removal of the Contamination. Appellants will be able to fully use and enjoy the Property when the Contamination is removed.

1. The Presence of the Contamination is a Continuing, Abatable Nuisance and a Continuing, Abatable Trespass.

Appellants have brought causes of action based upon the tort principles of a continuing, abatable nuisance and a continuing, abatable trespass. "A nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance." O.C.G.A.

§ 41-1-1. A trespass is any misfeasance, transgression, or offense which damages another person's health, reputation, or property. King v. Citizen's Bank of DeKalb, 88 Ga. App. 40, 76 S.E.2d 86 (1953). The distinction between "nuisance" and "trespass" is that a trespass is a direct infringement on one's right of property, while a nuisance is an indirect tort. Jillson v. Barton, 139 Ga. App. 767, 229 S.E.2d 476 (1975).

The presence of the Contamination which was released from the Pipeline Segment is a direct infringement upon Appellants' rights in the Property. The Contamination can be removed, at which point the trespass will cease. The presence of the Contamination is, therefore, a continuing, abatable trespass. Similarily, the presence of the Contamination is an indirect infringement upon Appellants' rights in the Property. Due to the presence of the Contamination, not only have Appellants' rights in the portion of the Property where the Contamination exists been impacted, but also Appellants' rights in the Property as a whole have been impacted. The "damages" which Appellants are seeking to recover arise continuously due to the ongoing infringement of Appellants' rights to fully use and enjoy the Property. (R. 10).

2. The Existence of a Nuisance is a Question of Fact Which Should be Determined by a Jury.

A jury should be allowed to determine if the presence of the Contamination is a nuisance. City of Bowman v. Gunnells, 243

Ga. 809, 256 S.E.2d 782, 784 (1979). A nuisance is anything that causes hurt, inconvenience, or damage to another. O.C.G.A. § 41-1-2; Gatewood v. Hansford, 75 Ga. App. 567, 44 S.E.2d 126 (1947); Dumus v. Renfroe, 220 Ga. 33, 136 S.E.2d 753 (1964). However, courts have been unable to give a precise legal definition of nuisance that will apply to all situations. Bowman, 256 S.E.2d at 784. "It has been said that pornography cannot be defined but you know it when you see it." Id. The court in Bowman found that a nuisance is in a very similar category and whether a nuisance exists is generally a question of fact for a jury. Id.; citing, Bowen v. Little, 139 Ga. App. 176, 228 S.E.2d 159 (1976); citing also, City of Gainesville v. Pritchett, 129 Ga. App. 475, 199 S.E.2d 889 (1973).

Under O.C.G.A. § 41-1-1, "anything" can be a nuisance if it "causes hurt, inconvenience, or damage to another." (Emphasis added.) This "anything" can be a "continuous . . . condition which causes the hurt, inconvenience or injury." Trussell Services, Inc. v. City of Montezuma, 192 Ga. App. 863, 386 S.E.2d 732, 733 (1989)(Emphasis added).

Neither the Pipeline Segment nor the Pipeline is the nuisance in question in this case. The presence of the Contamination released from the Pipeline Segment and the Pipeline is the "anything" which constitutes a "continuous . . . condition which causes the hurt, inconvenience and injury to [Appellants]." The presence of the Contamination is the nuisance and not the Pipeline Segment. The Pipeline Segment and

the Pipeline were the source of the nuisance when they were leaking. (R. 7). When the leak(s) were repaired, the nuisance remained. The Contamination that PPL left in the soils and groundwater of the Property was and continues to be a nuisance and a trespass. (R. 11, 13).

The presence of the Contamination is a condition which adversely affects Appellants' rights in the Property on a continuous basis. The Property has not been damaged permanently by the Contamination. (R. 689). The "damage" is the year-to-year, day-to-day, infringement of Appellants' rights in the Property. Since the Contamination can be removed, Appellants have the right to assume that PPL and AGL will remove the Contamination or compensate Appellants for the continuing damages which Appellants suffer. See, Roughton v. Thiele Kaolin Co., 209 Ga. 577, 74 S.E.2d 844, 847 (1953).

3. The Statute of Limitations Does not Bar Appellants' Claims for Damages Arising in the Four-Year Period Prior to Filing This Action.

The statute of limitations is not a bar to a cause of action against PPL or AGL for damages sustained as a result of the presence of the Contamination due to PPL's and AGL's intentional failure to remove over 1,000 barrels (42,000 gallons) of contamination from the Property.

PPL and AGL continue to deny liability for damages suffered by Appellants as a proximate result of the presence of the Contamination in the Property. (R. 281 and 287). Even though it is undisputed that the Contamination can be removed from the Property, PPL and AGL refuse to remove or accept liability.

PPL argues that the presence of the Contamination is not a continuing, abatable nuisance or trespass. (R. 264). This defense is without merit and is diametrically opposed to the Supreme Court of Georgia's holding in City of Columbus v. Myszka, 246 Ga. 571, 272 S.E.2d 302 (1980). Likewise, this defense, if allowed, would pervert the plain language of O.C.G.A. §§ 41-1-1 and 9-3-30. Continued maintenance and control of a nuisance are not necessary elements of a cause of action for damages arising from a nuisance created by PPL. Myszka, 272 S.E.2d at 305. Further, AGL currently controls the Easement and should not be allowed to deny liability for the ongoing damages sustained by Appellants.

PPL's argument that it is not liable for Appellants' damages sustained in the four years prior to the filing of Appellants' lawsuit is contrary to the court's holding in Myszka. In Myszka the court held that the City of Columbus was not entitled to escape liability for damages sustained as a result of a continuing, abatable nuisance even though the City had approved and accepted the uphill subdivision construction more than four years prior to suit. Id., at 305. By choosing to approve the construction projects, which gave rise to a continuing, abatable nuisance,

the City became liable even though it had not acted or maintained control over the nuisance within the four years prior to the filing of the lawsuit. Id., at 304.

In the case sub judice, PPL decided to leave the Contamination in the Property and continues to refuse to remove the Contamination. The presence of the Contamination is causing Appellants to suffer "hurt, inconvenience and damage" because Appellants cannot "fully use and enjoy" the Property as a proximate result of the presence of the Contamination. Under O.C.G.A. § 41-1-1, the presence of the Contamination is a nuisance. At the very least, the question of whether the presence of the Contamination is a nuisance should be determined by a jury. See, Bowman, at 784.

The next question under Myszka is whether the presence of the Contamination is continuing and abatable. PPL's own records prove that PPL released over 1,000 barrels (42,000 gallons) of contamination into the Property. (R. 688). PPL has failed even to attempt to contradict that the Contamination can be removed. Appellants will continue to suffer new harm, inconvenience and damage until the Contamination is abated. (R. 10). the Contamination can be abated. Thus, it is undisputed that the Contamination is continuing and abatable.

PPL's reliance on the holdings in Citizens and Southern Trust Co. v. Phillips Petro. Co., 192 Ga. App. 499, 385 S.E.2d 426 (1989), Chatham

v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589 (1972) and Rowe v. Steve Allen & Associates, Inc., 197 Ga. App. 452, 398 S.E.2d 717 (1990), as a defense to liability in the case sub judice is misplaced and contrary to O.C.G.A. §§ 41-1-1 and 9-3-30 and the Supreme Court of Georgia's holdings in Myszka and Peebles v. Perkins, 165 Ga. 159, 140 S.E. 360 (1927). PPL's argument based upon control or maintenance is an implication that negligence is an element of recovery under a theory of a continuing, abatable nuisance. Negligence, however, is not an element of a cause of action arising from a nuisance. Cannon v. City of Macon, 81 Ga. App. 310, 58 S.E.2d 563 (1950).

PPL cited the case of Chatham v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589 (1972) as authority for PPL's defense that absent "maintenance" or "control" within the four years prior to filing suit, a plaintiffs' cause of action is barred. (R. 269-270). PPL's application of Chatham to the facts of the case sub judice is incorrect.

In Chatham, the court held that the "determining issue [was] the nature of the trespass; [was] the spillover a continuing trespass or otherwise?" Chatham, 191 S.E.2d at 590. The distinguishing fact present in the Chatham case, which is not present in the case sub judice, is that in Chatham, the court held that the trespass (i.e. placing fill dirt on the property) was permanent and complete. Id. The Chatham holding is restricted to a cause of action for an unabatable nuisance.

Conversley, in the case sub judice it is undisputed that: (1) the Contamination can be removed from the Property (R. 689); (2) the Contamination is causing Appellants to suffer continuing damage (R. 696); and (3) Appellants' damages will cease to accrue when the Contamination is removed (R. 10). Thus, it is undisputed that the Contamination is not permanent, but continuing and abatable. The court's holding in Chatham, therefore, is inapplicable to Appellants' claims in the case sub judice.

PPL also cited the case of Citizens as authority for its "maintain" and "control" defense. PPL cites the Citizen's court as follows: " . . . only four of the eight appellees were shown to have committed any act or omission or to have maintained any control over the underground storage tanks within the four-year period prior to the filing of appellant's suit . . . . " (Citation omitted.) (R. 1495). PPL also states that the "facts in Citizens are indistinguishable from the present case." (R. 1495). PPL is clearly incorrect.

The Citizens' opinion states that four of the eight appellees were shown to have: (l) committed an act or omission; or (2) maintained control over the underground storage tanks within the four-year period prior to filing the suit. The "within the four-year period" does not modify "committed any act or omission." The second "or" separates the elements for a cause of action based upon a nuisance. Under Citizens, PPL would be liable for the Nuisance if it "committed any act or omission." The

"act or omission" did not have to occur within the four years prior to filing of the lawsuit. Thus, PPL's own records demonstrate that PPL committed the act or omission which resulted in the presence of the Contamination which continues to damage Appellants. (R. 688). Since PPL states that Citizens "controls the disposition of Appellants' nuisance and trespass claims against PPL," (R. 1495), PPL is liable for the damages suffered by Appellants in the four years prior to filing suit.

Appellants are entitled to recover for their damages which were proximately caused by the Contamination within the four-year period prior to the date this action was filed. Each year that PPL refuses to remove the Contamination is another year that Appellants are unable to fully use and enjoy the Property. Appellants filed this law suit on August 29, 1990. (R. 5). Appellants are entitled to recover their damages which have occurred within the four-year period prior to August 29, 1990. See, Myszka, 272 S.E.2d at 305. Appellants' claims for breaches of a sealed agreement, however, are subject to a twenty-year statute of limitations. See, O.C.G.A. § 9-3-23.

Since PPL can abate the Contamination, Appellants are forced to sue for damages as and only after the damages accrue. City Council of Augusta v. Boyd, 70 Ga. App. 686, 29 S.E.2d 437 (1944). In Boyd, the court held that:

> If the nuisance is not of a permanent character, but such as the city may at will abate, and, when abated,

> the injury occasioned by its maintenance will cease, the plaintiff can recover merely the damages which he has sustained within the period prescribed by the statute of limitations for bringing a suit of this character.

Boyd, 29 S.E.2d at 438. The Property has not been damaged permanently. (R. 688). PPL, through an act or omission, released the Contamination into the Property and has failed to remove the Contamination, even upon demand. (R. 689). PPL's failure to remove the Contamination since the 1950's is not a bar to Appellants' claim. Instead PPL's refusal to remove the Contamination is a failure to abate the continuing nuisance and trespass which has caused Appellants "hurt, inconvenience and damage" in the past. This nuisance and trespass will continue into the future until the Contamination is removed from the Property.

If PPL and AGL continue to refuse to remove the Contamination, Appellants could not sue for future damages but would have to allow damages to accrue before bringing subsequent suits. See, id. After these damages accrued, Appellants would have to file another lawsuit to recover damages suffered in the future, unless PPL or AGL abate the Contamination as a result of this lawsuit. Accordingly, Appellants' causes of action based upon the principles of a continuing abatable nuisance and a continuing abatable trespass are not barred by the statute of limitations.

Appellants' claims are to recover damages sustained during the past four (4) years as a result of a continuing, abatable nuisance and a continuing, abatable trespass which began when the Contamination was first released from the Pipeline Segment in the 1950's. (R. 5-38). The Contamination has remained in the soils and groundwater of the Property and continues to constitute both a continuing, abatable nuisance and a continuing, abatable trespass. See, Peebles v. Perkins, 165 Ga. 159, 140 S.E. 360 (1927); Aspinwall v. Enterprise Development Co., 165 Ga. 83, 140 S.E. 67 (1927); Ellis v. Campbell, 211 Ga. 699, 88 S.E.2d 389 (1955); Davidson v. State Highway Dept. of Ga., 213 Ga. 599, 100 S.E.2d 439 (1957).

In Peebles, the court found that in many cases "where the completed act or acts amount to a continuing trespass or a continuing nuisance . . . the court, in consideration of the equities or the parties, may grant an injunction restraining the defendant from a continuing violation of the rights of the plaintiff . . . ." Peebles, 140 S.E.2d at 362. Similarly, in Aspinwall, a property owner was allowed to enjoin the defendant from obstructing a private way after completion of the obstruction. Aspinwall, at 68.

A recent case, Lincoln Land Co. v. Palfery, 130 Ga. App. 407, 203 S.E.2d 597, 606 (1973), found that if the failure to supply water to lots in a subdivision was a nuisance, the nuisance would continue until it was abated. Additionally, if the evidence does not indicate that the injury

cannot be abated, then the nuisance is abatable rather than permanent. Id. It is undisputed that the Contamination can be removed from the Property. (R. 688).

The presence of the Contamination at the Property is a continuing, abatable nuisance and a continuing, abatable trespass which is similar in nature to the "completed acts," which were found to be continuing violations of the rights of the plaintiffs in Peebles and Aspinwall. As in Peebles and Aspinwall, the releases from the Pipeline Segment in the 1950's and 1960's constituted completed acts which amount to a continuing, abatable trespass, a continuing, abatable nuisance, and, generally, a violation of Appellants' property rights. Thus, the trial court erred in granting AGL's and PPL's Motions for Summary Judgment on Counts I, II, and III of Appellants' Complaint which were based upon the legal principles of a continuing, abatable nuisance and a continuing abatable trespass.

B. **Enumeration Of Errors Nos. 5 And 6**

The trial court erred in granting Defendants' Motions for Summary Judgment on Counts IV and V set forth in Appellants' Complaint which were based upon breaches of an instrument under seal. (Enumeration of Errors Nos. 5 and 6).

Appellants' claims against Appellees for breach of the Easement Agreement are valid. Appellees' duties under the Easement Agreement and whether those duties were breached are questions of fact for a jury's

determination. See, Brown v. Dep't of Transp., 195 Ga. App. 262, 393 S.E.2d 36, 38 (1990).

The Easement Agreement runs with the land. Appellees are the benefited parties under the Easement Agreement and Appellants are the owners of the Property burdened by the Easement. (R. 687). The Easement Agreement establishes obligations of the benefitted parties (i.e., AGL and PPL) to the burdened parties (i.e., Appellants). See, 28 C.J. S. Easements § 94(2)(1941 and Supp. 1991)("[T]he rule being that he who uses the easement must keep it in proper condition, so that no unnecessary damage will result to the servient estate from its use). Appellants have the right to enforce the obligations of Appellees under the Easement Agreement. See, Lincoln Land Co. v. Palfery, 130 Ga. App. 407, 203 S.E.2d 597, 605 (1973)("[t]he beneficiary of a contract may maintain an action against the promissor on said contract").

Before Ga. Code Ann. § 3-108 (presently, O.C.G.A. § 9-3-23) was enacted, contracts beneficial to a third person were recognized, and a third party beneficiary could sue in his own name if he were either a party to the contract or in privity. Id. The language of the Easement Agreement reserves to the Grantor of the Easement Agreement, Appellants' predecessor in title, the "right to fully use and enjoy" the Property. (R. 29). This reservation of rights was meant to benefit the Property and anyone holding title thereto. The Easement Agreement reserves this right not only for the Grantor but also for "their, its successors, heirs or

assigns." (R. 29). (Emphasis added). Appellants, therefore, can bring claims against PPL and AGL for breach of the Easement Agreement.

In Lincoln, owners of lots in a subdivision brought a claim for damages against the developer for failure to supply adequate water to the subdivision. The complaint contained a count which alleged that the plaintiffs were beneficiaries of a contract between Lincoln Land Co. and the original lot purchasers in which an adequate water supply system was guaranteed. The Lincoln court held that the promise to supply water constituted a covenant inuring to the benefit of subsequent privies in estate. Lincoln, 203 S.E.2d at 605. Further, the court held that even if "there were no actual spelling out between these latter of the transfer of rights under the water contract it is almost a demanded conclusion that an intention to transfer the water rights to subsequent purchasers was implied . . . ." Id.

Similarly, in the case sub judice, the Easement Agreement reserved the right "to fully use and enjoy the Property" to the Grantor's "assigns." (R. 29).

Appellants have asserted that they are prevented from fully using and enjoying the Property. (R. 13-15). At a minimum there is a fact question of whether Appellants can use and enjoy the Property and whether Appellees have breached the contract. The reservation of the right to "fully use and enjoy" the Property is for the benefit of Appellants.

Appellee AGL currently controls the Easement and should be liable for any damages arising from breaches of the Easement Agreement. PPL owned the Easement until December 30, 1970. This suit was filed on August 29, 1990, less than twenty (20) years after PPL last breached the Easement Agreement. Since the Easement Agreement is under seal, a twenty-year statute of limitations is applicable. O.C.G.A. § 9-3-23. The trial court, therefore, erred in granting Appellees' Motion for Summary Judgment with respect to Counts IV and V of Appellants' Complaint.

C. Enumeration Of Errors No. 7

The trial court erred in granting AGL's Motion for Summary Judgment on Count VI of Appellants' Complaint which was based upon the theory of fraud. (Enumeration of Errors No. 7).

Under the circumstances of the case sub judice, AGL had a duty to inform Appellants of the presence of the Contamination and the results of the pressure tests of the Pipeline and the Pipeline Segment. The "[s]upression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud." Wilhite v. Mays, 239 Ga. 31, 235 S.E.2d 532 (1977). "The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." Id. (Emphasis added.)

AGL's duty to disclose that the Contamination was present in the Property and the results of the pressure tests of the Pipeline arose

from the nature of the easement which it enjoyed under the Easement Agreement. The Pipeline Segment is buried beneath the Property. (R. 771). Appellants could not have discovered the existence of a leak or the presence of the Contamination through the exercise of reasonable diligence. The Pipeline Segment is "hidden" from inspection by Appellants. Since AGL had knowledge that the Pipeline Segment could have been leaking and that approximately one thousand (1,000) barrels (42,000 gallons) of contamination had been released into the Property, AGL had a duty to inform Appellants. AGL never informed Appellants that approximately one thousand (1,000) barrels (42,000 gallons) of petroleum contamination had been released from the Pipeline Segment. (R. 15-16). A question of fact, therefore, remains as to whether the concealment of the presence of the Contamination and the results of the pressure tests constituted fraud. Thus, the trial court erred in granting AGL's Motion for Summary Judgment on Count VI of Appellants' Complaint.

D. Enumeration Of Errors Nos. 8 And 9

The trial court erred in granting AGL's and PPL's Motions for Summary Judgment on Appellants' claims for punitive damages. (Enumeration of Errors Nos. 8 and 9).

Appellants' Complaint sets forth sufficient facts to support claims for punitive damages against AGL and PPL. (R. 5-40). The question of whether to impose punitive damages is ordinarily for the jury.

Alliance Transp., Inc. v. Mayer, 165 Ga. App. 344, 301 S.E.2d 290 (1983). Appellants presented the trial court with undisputed testimony that PPL released approximately one thousand (1,000) barrels (42,000 gallons) of petroleum contamination into the Property. AGL was informed by PPL of the releases when AGL purchased the Easement and Pipeline from PPL in 1970. (R. 15-16). AGL and PPL have refused to remove the Contamination or abate the continued spread of the Contamination even though the Contamination can be removed. As a proximate result of the presence of the Contamination, Appellants are unable sell the Property at market price or fully use and enjoy the Property. Further, the expense of removing the Contamination increases daily as the Contamination continues to spread throughout the Property.

AGL and PPL continue to refuse willfully to remove the Contamination, even though the expense of removal and Appellants' damages increase daily. In the trial court, Appellees, as movants, had the duty to establish that no genuine issues of material fact existed with respect to each of Appellants' claims. The Piano & Organ Center, Inc. v. Southland Bonded Warehouse, Inc., 139 Ga. App. 480, 228 S.E.2d 615 (1976). Appellees failed to address the issues of punitive damages in their Motions for Summary Judgment. Questions of fact, therefore, remain with respect to Appellants' claims based upon the legal principles of a continuing, abatable nuisance; a continuing, abatable trespass; and fraud.

As a matter of law, the trial court erred in granting Appellees' Motion for Summary Judgment with respect to Counts VIII and IX of Appellants' Complaint which sought punitive damages.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Order of the trial court should be reversed, and the case should be remanded to the trial court for a trial by jury on Counts I, II, III, IV, V, VI, VIII, and IX of Appellants' Complaint.

Respectfully submitted this 20th day of April, 1992.

F. EDWIN HALLMAN, JR.
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0312P

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III,	)	
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following in the foregoing matter with a copy of the Appellants' Brief, by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon:

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This 20th day of April, 1992.

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IN THE COURT OF APPEALS APR 20 1992

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III,	)	
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

ENUMERATION OF ERRORS

F. Edwin Hallman, Jr.
David C. Moss
Suite 1200 Marquis II Tower
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Attorneys for Appellants:
Peter F. Hoffman
Marie Boatwright Hoffman
Elizabeth Boatwright Bell
and J. K. Boatwright, III

April 20, 1992

COMES NOW Appellants Peter F. Hoffman, Marie Boatwright Hoffman, Elizabeth Boatwright Bell, and J. K. Boatwright, III (hereinafter "Appellants") in the above-referenced action and file this their Enumeration of Errors as follows:

ENUMERATIONS OF ERROR

(1) The trial court erred in granting Appellee Atlanta Gas Light Company's (hereinafter "AGL") Motion for Summary Judgment with respect to Count I of the Complaint filed by Appellants (hereinafter "Appellants' Complaint") for an injunction against AGL. (R. 1524)

(2) The trial court erred in granting Appellee Plantation Pipeline Company's (hereinafter "PPL") Motion for Summary Judgment with respect to Count II of Appellants' Complaint based upon the theory of nuisance. (R. 1524)

(3) The trial court erred in granting AGL's Motion for Summary Judgment with respect to Count II of Appellants' Complaint against AGL based upon the theory of nuisance. (R. 1524)

(4) The trial court erred in granting PPL's Motion for Summary Judgment with respect to Count III of Appellants' Complaint against PPL based upon the theory of trespass. (R. 1524)

(5) The trial court erred in granting PPL's Motion for Summary Judgment with respect to Count IV of Appellants' Complaint based upon the breach of an instrument under seal. (R. 1524)

(6) The trial court erred in granting AGL's Motion for Summary Judgment with respect to Count V of Appellants' Complaint based upon the breach of an instrument under seal. (R. 1524)

(7) The trial court erred in granting AGL's Motion for Summary Judgment with respect to Count VI to Appellants' Complaint based upon the theory of fraud. (R. 1524)

(8) The trial court erred in granting PPL's Motion for Summary Judgment with respect to Count VIII of Appellants' Complaint for punitive damages. (R. 1524)

(9) The trial court erred in granting PPL's Motion for Summary Judgment with respect to Count IX of Appellants' Complaint for punitive damages. (R. 1524)

STATEMENT OF JURISDICTION

The Court of Appeals of the State of Georgia rather than the Supreme Court of the State of Georgia, has jurisdiction of this appeal for the reason that this case does not involve one of those cases as to which the Supreme Court of Georgia has exclusive jurisdiction pursuant to Art. XI, Sect. 6, ¶¶ 2 and 3 of the Constitution of the State of Georgia.

Respectfully submitted this 20th day of April, 1992.

F. Edwin Hallman, Jr.
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SIGNATURES CONTINUED ON NEXT PAGE

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IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III,	)	
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following in the foregoing matter with a copy of the Enumeration of Errors, by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon:

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IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III, Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	APPEAL CASE NO. A92A1352

BRIEF OF APPELLEE ATLANTA GAS LIGHT COMPANY

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Atlanta Gas Light Company

May 11, 1992

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III, Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	APPEAL CASE NO. A92A1352

BRIEF OF APPELLEE ATLANTA GAS LIGHT COMPANY

Appellee, Atlanta Gas Light Company (hereinafter "AGL"), files this Brief and shows the Court that undisputed evidence and the well-established law of Georgia supports the Trial Court's decision to grant AGL's Motion for Summary Judgment. AGL is entitled to judgment as a matter of law because uncontroverted evidence demonstrates: (1) AGL did not cause or contribute to any harm allegedly suffered by Appellants; (2) AGL has no contractual duty to remedy the harm allegedly suffered by Appellants; and (3) AGL has not defrauded Appellants.

PART I

STATEMENT OF FACTS

Appellants' Statement of the Facts is incomplete and misleading. AGL submits the following Statement of Facts:

Between 1941 and April 1970, Appellee Plantation Pipe Line Company (hereinafter "PPL") installed and operated a four-inch pipeline from Macon, Georgia to LaGrange, Georgia for the purpose of transporting gasoline, kerosene and other refined petroleum products. *[R. 834; R. 716-717]*

In 1941, Appellants' predecessor in title to the property granted an easement and right-of-way to PPL for a pipeline to cross his property. The portion of land through which the easement was granted is hereinafter referred to as "the Property." *[R. 6]*

From approximately 1954 until 1956, PPL discovered leaks of unknown quantities of gasoline in the section of the pipeline that traversed the Property. *[R. 855-866; R. 940, R. 942, and R. 945]*

There is no evidence of any leak from the pipeline onto the Property after 1956. *[R. 383-385]*

PPL transferred and assigned its easement rights to AGL on or about December of 1970. *[R. 30-38.]*

Before the pipeline was delivered to AGL, it was purged and filled with water. *[R. 716]*

AGL never used the segment of the pipeline that crossed over the Property. *[R. 382, R. 315]*

The contamination on the Property consists of gasoline, kerosene, and other refined petroleum products. *[R. 315-316; R. 367]*

AGL has never transported gasoline, kerosene, or other refined petroleum products through the pipeline. *[R. 316; R. 382]*

AGL had no knowledge of the presence of hydrocarbons on the Property until Appellants informed AGL of that fact in 1989. *[R. 383-385, R. 389-391, R. 394-395; R. 315-316]*

Until the present dispute, AGL made no statements to Appellants concerning the Property, the pipeline, or the presence or absence of contamination on the Property. *[R. 388-389]*

There is no evidence of an intent on the part of AGL to deceive Appellants. *[R. 405]*

PART II

ARGUMENT AND CITATION OF AUTHORITY

A. Summary Judgment Was Proper Because There Is No Evidence That AGL Created Or Maintained Any Nuisance Or Trespass

[*Appellants' Enumeration of Errors Nos. 1-4*]

Appellants' Brief in this appeal ignores the thrust of AGL's Motion for Summary Judgment regarding the nuisance and trespass claims. AGL argued extensively that even if a nuisance or trespass occurred, AGL could not be held liable because there was no causal connection between the harm complained of and AGL. *[R. 294-296; R. 1332-1334]* Appellants' silence on this critical point constitutes an implied admission that, as to AGL, Appellants' tort claims are hopelessly defective.

AGL's only connection to the Property is AGL's ownership interest in the pipeline and easement. Appellants admit that the pipeline does not create a nuisance or trespass. *[Appellants' Brief at 10.]* Nor can the easement itself constitute a nuisance or trespass since the easement is incorporeal and does not occupy space.

Instead, the nuisance and trespass complained of here is the presence of gasoline or other hydrocarbons on the Property. *[Appellants' Brief at 9.]* Appellants concede that any nuisance or trespass was not caused by AGL: "[t]he Contamination that PPL left in the soils and the groundwater of the property was and continues to be a nuisance and a trespass." *[Appellants' Brief at p. 11] (emphasis added).* Absent causation, the law in Georgia is clear that AGL cannot be liable for nuisance. See Citizens and Southern Trust Co. v. Phillips Petroleum Co., Inc., 192 Ga. App. 499, 385 S.E.2d 426 (1989).

Appellants' Brief fails to cite a single case in which the current owner of an easement was found to be liable for damage caused by the previous owner of an easement. Instead, Appellants' Brief makes the conclusory assertion that AGL should be liable for nuisance and trespass and cites, without explanation, the case of Roughton v. Thiele Kaolin Co., 209 Ga. 577, 74 S.E.2d 844, 847 (1953). *[Appellants' Brief at p. 11.]* In fact, the Roughton case is clearly inapplicable to the present case. In Roughton, the issue before the Court was whether the grantee or alienee of property causing a nuisance is liable for damages resulting from the continued maintenance of the nuisance. Roughton is inapplicable here because the "property" alienated to AGL consisted of a pipeline and an easement, neither of which is alleged to be or to be causing any nuisance or trespass. Although Roughton would apply to a situation in which the alienee of a leaking pipeline took no steps to stop the leakage, here there is no evidence that the pipeline leaked after 1956.

This Court recently upheld a summary judgment against a plaintiff on facts substantially similar to the present case. In Citizens & Southern Trust Company v. Phillips Petroleum Company, Inc., 192 Ga. App. 499, 385 S.E.2d 426 (1989), the

plaintiffs claimed that they were harmed by contamination that leaked from underground storage tanks located at a nearby service station. The evidence in the Citizens & Southern case showed that the tanks did not leak during the period of ownership by the current service station owners, Mr. & Mrs. Tyson.

The Court of Appeals ruled that the Tysons could not be held liable for a nuisance because they had neither created nor maintained the nuisance which proximately caused the harm to plaintiffs' property:

> A party is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failure of duty. If such consequences were caused by the acts of others, so operating as to produce the injury, he would not be liable.

192 Ga. App. at 500, 385 S.E.2d at 428 (quoting Brimberry v. Savannah Florida, et al., 78 Ga. 641, 3 S.E. 274 (1887)). Surprisingly, Appellants' Brief fails to address the causation requirement mandated by the Court in the Citizens & Southern case.

Citizens and Southern is factually indistinguishable and mandates a judgment in favor of AGL because the undisputed evidence leads to the inevitable conclusion that AGL has not caused the contamination on Appellants' property:

- The only leaks from the pipeline occurred from 1954-1956 *[R. 383-385]*;
- AGL did not acquire the easement until 1970 *[R. 30-38]*;

- When AGL acquired the pipeline and easement, the pipeline was clean. Before the pipeline was transferred to AGL, the pipeline had been flushed and filled with water *[R. 716]*;
- AGL never used the pipeline that traversed the Property *[R. 382; R. 315]*;
- The contamination on the Property consists of refined petroleum products such as gasoline. *[R. 367]* AGL has never transported refined petroleum products through its pipelines. *[R. 316; R. 382]*

In sum, the evidence is uncontroverted, and Appellants have admitted, that AGL has not caused any harm on the Property. Thus, pursuant to Citizens and Southern, AGL is entitled to judgment as a matter of law.

The same conclusion is reached from cases dealing with trespass. See, Chatham v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589, 590 (1972). In Chatham, the previous owner of adjoining property committed a trespass on the plaintiff's land by placing fill dirt on plaintiff's property. The dirt remained on the plaintiff's property for several years and the plaintiff eventually filed suit against a subsequent owner of the adjoining property alleging a "continuous" trespass. The Court of Appeals ruled that the subsequent owner of the adjacent property could not be held liable for trespass. Chatham, 126 Ga. App. at 655, 191 S.E.2d at 590. Moreover, the Court of Appeals noted that the prior owner's tort did not pass with the land because the subsequent landowner assumed no duty to remove the trespass:

> The law does not impose such a duty on one who purchases property after the trespass has been completed.
>
> The prior owner remains the tortfeasor. The effect of the conveyance

> does not alter his liability as a tortfeasor. . . The fact that [plaintiff's] remedy against the prior land owner is barred by the limitation statute does not create a cause of action against an innocent purchaser.

Chatham, 126 Ga. App. at 655, 191 S.E.2d at 591.

In the present case, if any trespass occurred, it was in 1956, the date of the last reported leak. Under Chatham, AGL cannot be held liable for the trespass of the previous owner of the easement and pipeline.

Appellants attempt to distinguish Chatham by erroneously suggesting that the Chatham holding is restricted to a cause of action for an unabatable nuisance." *[Appellants' Brief at 14.]* Appellants misinterpret Chatham and confuse the issues of a continuing trespass with an abatable trespass.

Appellants falsely claim that Chatham is distinguishable from the present case by alleging that the trespass in Chatham was unabatable. *[Appellants' Brief at 14.]* In Chatham, fill dirt was placed on the plaintiff's property where it remained for several years. Appellants' assertion that the presence of fill dirt created an "unabatable" trespass is plainly wrong. Obviously, the fill dirt could be removed at which point the trespass would cease.

Appellants' efforts to characterize the mere presence of contamination on their property as a "continuing" nuisance or trespass is squarely rebutted by Chatham. The Court in Chatham refused to find that the trespass was "continuing" despite the fact that the fill dirt remained on the plaintiff's property:

> Landfill is more analogous to floodwater caused by the erection of a dam, Smith v. Central of Ga. R. Co., 22 Ga. App. 572, 575, 96 S.E. 570, than to electric current constantly running through a wire, Savannah Electric & Power Co. v. Horton et al., 44 Ga. App. 578, 162 S.E. 299. The floodwater remains on the property after the initial trespass as does the landfill. Being a completed trespass of a permanent nature, it is categorized as one-act and not a continuing trespass. This contrasts with the electric current which recreates the trespass constantly by running through the wire. Thus, while erecting the wire may be a one-act trespass, it is the constant use and control of the current which creates a continuing and repeated trespass.

Chatham, 126 Ga. App. at 653, 191 S.E.2d at 590.

Chatham is indistinguishable in all material respects from the present case. There is no showing that AGL has used or controlled the contamination that is present on Appellants' property. Appellants have failed to demonstrate that AGL is liable for trespass.

Even apart from these deficiencies, Plaintiffs' nuisance and trespass claims are barred by the four-year statute of limitations for damage to real property. See O.C.G.A. § 9-3-30.

The only acts creating damage to real property here occurred no later than 1956. It is well-settled that the "discovery rule" does not apply to the statute of limitations for real property damage. Corporation of Mercer University v. National

Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988). The four-year statute of limitations for property damage expired in 1960. Appellants' claims are thus time-barred.

In an effort to circumvent the statute of limitations defense, Appellants attempt to characterize the presence of the contamination on their land as a "continuing" nuisance and trespass. As set forth above, Appellants' analysis is flawed. Absent continuous or recurrent acts, even an injury that continues permanently does not create a "continuing" nuisance or trespass. City of East Point v. H. J. Terhune, et al., 144 Ga. App. 865, 242 S.E.2d 728 (1978). See also, Chatham v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589, 590 (1972). Thus, the statue of limitations for any harm to Appellants' property expired more than thirty (30) years ago and Appellant's nuisance and trespass claims are stale.

B. Summary Judgment Was Proper Because As A Matter Of Law AGL Has No Contractual Liability for the Contamination

[*Appellants' Enumeration of Errors Nos. 5 and 6*]

Contrary to the assertions of Appellants,[1] it is the Court's duty to interpret the Easement Agreement. See Sims' Crane Service, Inc. v. Reliance Ins. Co., 514 F. Supp. 1033 (S.D. Ga. 1981) aff'd 667 F.2d 30 (11th Cir. 1982) (construction and interpretation of contract properly decided by summary judgment.) Nothing in the

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1 See Appellants' Brief at pp. 19-20, ("Appellees' duties under the Easement Agreement and whether those duties were breached are questions of fact for a jury determination.")

Easement Agreement could be construed to create a duty for AGL to clean up decades-old contamination caused by a third-party.

In response to AGL's Motion for Summary Judgment, Appellants offered two theories that the Easement Agreement expressly created a duty for AGL to clean up gasoline on the Property. First, Appellants cited a provision of the Easement Agreement that required the benefited party to "maintain" the easement and claimed that failure to remove the gasoline constituted failure to maintain the easement. Second, Appellants relied on a portion of the Easement Agreement that reserved the right to the grantor to "fully use and enjoy" the Property. Appellants claimed that this reservation of rights somehow created a corresponding affirmative duty in the holder of the easement to remove the gasoline.

On Appeal, Appellants reassert their argument with respect to the "right to fully use and enjoy" provision of the Easement Agreement; however, Appellants' Brief apparently abandons any claim that the language in the Easement Agreement requiring PPL to "maintain" the easement may be interpreted to create a duty to remove contamination. See Appellants' Brief at pp. 19-22. Instead, Appellants now suggest that the duty to maintain or keep an easement in proper condition is inherent in any easement agreement. In support of this assertion, Appellants simply cite a legal encyclopedia for the proposition that "he who uses the easement must keep it in proper condition, so that no unnecessary damage will result to the servient estate from its use." *[Appellants' Brief at p. 20] (citing 28 C.J.S. Easements § 94(2) (1941 and Supp. 1991).* Neither of these theories, however, could possibly apply to AGL for there is no basis in law or reason to support an assertion that a duty to "maintain" the easement or keep it in "proper condition," would require an easement holder to

repair a harm to the burdened estate which was caused by a third party three decades earlier.

The word "maintain" simply cannot be construed to require AGL to engage in the removal of contamination caused by a third party. See Black's Law Dictionary (1979) at 959 ("Maintain" is variously described as the prevention of a decline, the preservation of the status quo, or the holding of an existing condition.) Whatever "proper condition" means, it cannot be construed to require an improvement of conditions that existed when AGL acquired the easement. The only logical interpretation of a duty to "maintain" an easement or to keep an easement in "proper condition" is the obligation of the holder of the easement to refrain from using the easement in such a way that the property burdened by the easement is harmed. Here, there is no evidence that AGL has used the easement in a way that has harmed the Property.

Given these deficiencies, the Appellants cannot contend that AGL independently breached the Easement Agreement. Appellants apparently lapse into the argument that AGL somehow assumed alleged pre-existing liabilities for breach of contract when AGL acquired the easement from PPL. *[Appellants' Brief at pp. 19-22.]* However, the Easement Agreement and the Transfer of the Easement Agreement contain no suggestion that AGL agreed to assume any of PPL's liabilities for past breaches of contract. Nor could such an assumption arise as a matter of law. AGL simply purchased the assets of PPL in 1970. Under Georgia law, when one corporation purchases the assets of another, the purchasing corporation assumes only those obligations of the seller that it expressly contracts to assume. See Kemos, Inc. v Bader, 545 F.2d 913, 915 (5th Cir. 1977).

Accordingly, since AGL neither breached the Easement Agreement nor assumed any liability for alleged breach of the Easement Agreement by PPL, AGL is entitled to judgment as a matter of law on the contract claim.

Appellants' contract claims are defective for another reason which also mandates judgment for AGL as a matter of law. Since the pipeline leaks occurred in 1954 through 1956, any cause of action for breach of contract would have ripened no later than 1956. Appellants' contract claims are thus barred by any possible statute of limitations.[2]

---

2 Appellants claim that the Easement Agreement is an instrument under seal and thus a twenty year statute of limitation would apply. Appellants' Brief at p. 19. However, as set forth in PPL's Motion For Summary Judgment and Appellee's Brief, the Easement Agreement is not an instrument "under seal." Since the Easement agreement is not under seal, a six-year statute of limitations would apply. See generally Marshall v. Walker, 50 Ga. App. 551, 178 S.E. 760 (1935). Application of either statute of limitations would result in a bar for appellants' contract claims.

C. Summary Judgment Was Proper Because There is No Evidence of Fraud by AGL

[Appellants' Enumeration of Errors No. 7]

There is absolutely no evidence in the record to support Appellants' claim that AGL committed a fraud upon Appellants by not informing them of the existence of certain tests or test results on the pipeline in 1981.[3]

---

[3] Appellants' Complaint alleged that AGL should have informed Appellants of the results of pressure tests of the pipeline in 1981 *[R. 15-16]*. Appellants' Brief in this appeal makes the false assertion that "[s]ince AGL had knowledge that the pipeline could have been leaking and that approximately one thousand (1,000) barrels (42,000 gallons) of contamination had been released into the property, AGL had a duty to inform Appellants." *[Appellants' Brief at p. 23.]* The only "support" Appellants' cite for this false assertion is the statement in the Complaint that AGL should have revealed the results of the 1981 pressure test. *[Appellants' Brief at p. 23.]* First, Appellants cannot rely on the mere allegations of the Complaint. See O.C.G.A. § 9-11-56(e); Hinkley v. Building Material Merchants Association of Ga., Inc., 187 Ga. App. 345, 370 S.E. 2d 201 (1988). Second, Appellants did not even own the Property in 1981, so there is no way anyone could have informed them of the leak. *[R. 689; R 161.]* Finally, AGL's pressure test revealed only a pressure drop west of the test point -- there was not then and never has been a pressure test on Appellants' Property. *[R. 1031-1033.]* Even to this day, there is no evidence of any leak onto Appellants Property at any time after 1956. *[R. 383-385.]*

The essential elements of fraud are: (1) a false representation made by a defendant; (2) scienter; (3) an intent to induce the plaintiff to act or refrain from acting in reliance by plaintiff; (4) justifiable reliance by plaintiff; and (5) damages. Davi v. Shubert, 168 Ga. App. 420, 309 S.E.2d 415, 417 (1983) (offering the grant of summary judgment where plaintiffs are unable to show a genuine issue of fact on each element.) A concealment of information may constitute a fraud, but only where (1) the defendant has a duty to disclose, (2) the concealment concerns a material fact, and (3) the defendant concealed that fact with the intent to deceive and mislead. See generally, Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983). The element of intent to deceive is as necessary in an action based on concealment as one based on willful misrepresentation. See Conner v. Branch, 185 Ga. App. 565, 364 S.E.2d 890 cert. denied 185 Ga. App. 909, 364 S.E.2d 890 (1988).

Appellants cannot seriously contend that AGL committed a fraud for the record is barren of any fact that would support any element of a fraud claim:

- AGL had no knowledge of the presence of hydrocarbons on the Property until Appellants informed AGL of that fact in 1989. *[R. 315-316; R. 383-385; R. 389-401, R. 394-395]*
- Prior to this dispute, AGL made no statements to Appellants concerning the Property, the pipeline, or the presence or absence of contamination on the Property. *[R. 388-389]*;
- AGL never made a false statement to Appellants *[R. 386-389]*;
- There is no evidence of an intent on the part of AGL to deceive Appellants *[R. 405]*; and

- Appellants have not shown any special relationship between AGL and Appellants which would create a duty to disclose.

AGL cannot be held liable for the nondisclosure of facts about which it was unaware. Appellants' fraud claims are thus patently absurd and AGL is entitled to judgment as a matter of law.

D. Appellants are not Entitled to a Jury Trial on the Issue of Punitive Damages

[*Appellants' Enumeration of Errors Nos. 8 and 9*]

Appellants claim they are entitled to a jury trial on the issue of punitive damages because Appellees failed to address the issue of punitive damages in their Motions for Summary Judgment. [*Appellants' Brief at 24.*] As set forth above, AGL is entitled to judgment as a matter of law on Appellants' tort, contract and fraud claims. Appellants' hope to obtain any damages evaporated when the Trial Court granted AGL's Motion for Summary Judgment. Since Appellants are not entitled to any damages against AGL, the Trial Court's decision to grant summary judgment on the issue of punitive damages was proper.

CONCLUSION

The Trial Court's decision to grant Summary Judgment to AGL on all counts of Appellants' Complaint is supported by undisputed evidence and well-established law. Simply put, Appellants' complaint improperly seeks to hold AGL liable for contamination caused by a third party thirty years ago in spite of the fact that AGL

never agreed to clean up the contamination, owns none of the soil or water that is contaminated, and was incapable of misleading Appellants about the contamination. Moreover, even if the Court decided that AGL could be held liable in tort or contract absent causation or consent, Summary Judgment for AGL is nevertheless proper because Appellants' claims are barred by applicable statute of limitations.

For the foregoing reasons, AGL respectfully requests that the Order of the Trial Court be affirmed on all counts.

Respectfully submitted this 11th day of May, 1992.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing "BRIEF OF APPELLEE ATLANTA GAS LIGHT COMPANY" upon all parties by placing a copy of the same in the United States Mail with adequate postage affixed thereon and addressed as follows:

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Kurt A. Powell
Hunton & Williams
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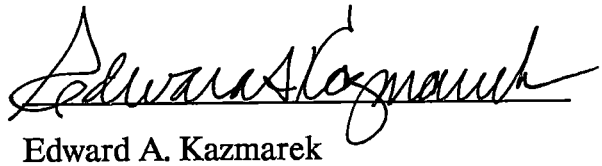
Atlanta, Georgia 30326

This 11th day of May, 1992.



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93-088

MAY 11 1992

IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J.K. BOATWRIGHT, III Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

BRIEF OF APPELLEE PLANTATION PIPE LINE COMPANY

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BRIEF OF APPELLEE PLANTATION PIPE LINE COMPANY

Appellee Plantation Pipe Line Company ("PPL") files its brief in the above-referenced matter and states as follows:

I. PRELIMINARY STATEMENT

Appellants originally filed this action in the Superior Court of Fulton County in August 1990 (R. 5). In October 1991 PPL and AGL each filed motions for summary judgment on Appellants' complaint (R. 281, R. 287), which the court granted on January 6, 1992 (R. 1524). Appellants filed their notice of appeal from the order granting summary judgment on January 30, 1992 (R. 1).

This case involves a pipeline which extends from Macon, Georgia, to LaGrange, Georgia (the "Pipeline") (R. 262).

Appellants allege that their property ("Land Lot 103") was contaminated by petroleum products released from the section of the Pipeline traversing Land Lot 103 ("the Pipeline Segment"). Appellants' Brief at 2. PPL originally obtained an easement across Land Lot 103 in 1941 (the "Easement"), but transferred its easement rights and obligations to Atlanta Gas Light Company ("AGL") in 1970 (R. 262). Appellants' claims are based on theories of continuing nuisance, continuing trespass, and breach of an agreement under seal.

As set forth below, Appellants' claims are without any factual or legal support. The statute of limitations governing Appellants' trespass and nuisance claims expired in 1960, four years after the last leak from the Pipeline Segment and the alleged contamination on Land Lot 103 does not constitute a continuing nuisance or trespass. Moreover, PPL transferred its easement rights and obligations to AGL in 1970 and has had no legal interest or control over the Pipeline or Pipeline Segment since that time. Finally, any claims that may have arisen as a result of leaks from the Pipeline Segment were barred by the time of Appellants' purchase of Land Lot 103.

Similarly, PPL has not breached the Easement Agreement. The undisputed facts establish that PPL has fulfilled any

maintenance obligations it may have had with respect to the Pipeline Segment, and no additional duties have been identified by Appellants.

II. STATEMENT OF FACTS

Appellants' statement of facts contained in their brief is incorrect, incomplete and misleading. Accordingly, PPL submits its own statement of facts.

Appellants are the owners of certain real property lying and being in Land Lot 103, Troup County, Georgia. A predecessor in title to Appellants granted an easement and right-of-way to PPL through Land Lot 103 (R. 141). During the period from 1941 to 1970, PPL installed and operated a four-inch pipeline from Macon, Georgia, to LaGrange, Georgia, for the purpose of transporting refined petroleum products (R. 142).

The only evidence of leaks from the Pipeline Segment is contained in Spill, Repair and Leak Reports maintained by PPL. Those records indicate that four leaks occurred between 1954 and 1956. However, these records also indicate that the owner of Land Lot 103 at that time was informed of the leaks and PPL's repairs of those leaks (R. 142). There is no evidence that this landowner made any objection to the repairs or demanded further action. Furthermore, there is no evidence of

any subsequent leaks from the Pipeline Segment during PPL's ownership nor is there evidence of any leak at all from the Pipeline Segment after 1956 (R. 143).

On or about December 30, 1970, PPL transferred and assigned its easement rights and obligations to AGL. Prior to conveying the Pipeline, PPL displaced all of the refined petroleum products from the Pipeline and filled it with water, as was the industry practice at that time. When the Pipeline was delivered to AGL, it had, in fact, been purged of refined petroleum products and filled with water and rust inhibitor (R. 143). There is no evidence of any leaks from the Pipeline Segment at any time during AGL's ownership, nor is there any evidence of the presence of any residual petroleum products during AGL's ownership (R. 144). AGL has never used the Pipeline Segment for transportation of refined petroleum products or natural gas service (R. 144). The uncontroverted facts demonstrate that no petroleum products escaped from the Pipeline Segment after 1956.

PPL currently holds no possessory interest in Land Lot 103 (R. 265). Appellants owned no interest in Land Lot 103 at any time during PPL's operation of the Pipeline or possessory interest in the easement (R. 144). Moreover, there is no

evidence of any contract, other than the Easement, between Appellants and AGL or PPL concerning Land Lot 103 (R. 265).

III. ARGUMENT AND CITATION OF AUTHORITY

A. The Statute Of Limitations Bars Action Against PPL Based Upon The Theories Of Nuisance And Trespass.

The statute of limitations for all actions for trespass upon or damage to real property is four years. O.C.G.A. § 9-3-30. The undisputed facts establish that there have been no leaks from the Pipeline Segment since 1956. Accordingly, any claims based on releases from the Pipeline Segment are barred by the statute of limitations. While Appellants attempt to circumvent this interpretation by alleging a continuing trespass, this argument is refuted by both the facts and the law.

1. Appellants have failed to prove the existence of a continuing trespass or a continuing nuisance.

Appellants contend that the mere presence of contamination on Land Lot 103 constitutes a continuing, abatable trespass. Appellants' Brief at 8. Appellants are wrong. Isolated acts in the distant past are insufficient to establish a continuing trespass. To prevail, Appellants must show that Land Lot 103 has been damaged by continuous or

recurrent acts on the part of PPL. City of East Point v. Terhune, 144 Ga. App. 865, 242 S.E.2d 728, 729 (1978); Trussell Services, Inc. v. City of Montezuma, 192 Ga. App. 863, 386 S.E.2d 732, 733 (1989). "The whole idea of nuisance is that of either a continuous or regularly repetitious act or condition which causes the hurt, inconvenience or injury." Terhune, 242 S.E.2d at 729. In this case, leaks from the Pipeline Segment neither continued nor recurred after 1956 (R. 267).

Isolated acts that occurred in the past are not converted into a continuing trespass simply by virtue of the fact that the property damage is of a "more or less permanent nature." Terhune, 242 S.E.2d at 729. Appellants have confused the "continuous or regularly repetitious act or condition" (leaks) with the "hurt, inconvenience or injury" (contamination). Continuing contamination is not relevant; the relevant issue is whether leaks have recurred during the last four years. The undisputed facts establish that there have been no leaks since 1956. These leaks simply cannot support a continuing trespass claim because those acts were complete as of 1956 and did not recur after that time.

Appellants fail to realize the distinction between past and completed acts and continuing or recurrent acts. An

isolated act occurring more than four years ago which caused damage to property is a completed act and will be barred by the four-year statute of limitations. Further, a permanent nuisance which causes damage, complete upon the occurrence of the act causing the nuisance, gives rise to only a single cause of action, against which the limitations period runs from the date of the creation of the nuisance. Georgia Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520 (1933).

For example, in R.P. Chatham v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589 (1972), the court held that where landfill spilled over onto an adjacent property, the action was "a completed trespass of a permanent nature . . . and not a continuing trespass" despite the fact that the landfill remained on the property after the initial trespass. 191 S.E.2d at 590. The court went on to hold that "plaintiff has not shown any act by defendant which would constitute a fresh injury or continuance of the trespass. The original entry, the placing of dirt . . . on plaintiff's property in 1963 thereby constitutes a one-act trespass. . . . Consequently, this action filed in April 1971 would be barred by the statute of limitations." Id. at 590-91.

Similarly, in the present case, the contamination is not a continuing trespass though it may remain on the property

long after the date of the release. The leaks which occurred in the 1950s were the "original entry," and Appellants have not alleged any act by PPL which could constitute a continuance of a trespass. There simply is no relevant difference between the landfill in Chatham and the contamination in the present situation.[1/]

Appellants make a futile attempt to distinguish Chatham by arguing that the opinion "is restricted to a cause of action for an unabatable nuisance." Appellants' Brief at 14. Appellants' contention that Chatham involved an "unabatable" nuisance strains credibility since that case involved the

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1/ In addition, as Appellants' counsel is surely aware, the Georgia Court of Appeals in Boyd v. Orkin Exterminating Co., Inc., 191 Ga. App. 38, 381 S.E.2d 295 (1989), rejected a claim by the plaintiffs that the misapplication of pesticides in their home was a continuing tort. The court held that any claim by the plaintiffs for property damage was barred, since the claim had not been brought within four years following the last allegedly tortious act by the exterminating company.

In Indiana Pipe Line Co. v. Christensen, 188 Ind. 400, 123 N.E. 789 (1919), a fact situation strikingly similar to the present case, the defendant's pipe line leaked and contaminated the plaintiff's soil with petroleum. The court held that the leak was a single completed act resulting in an injury, the results of which may continue indefinitely. "The damages occasioned by such an injury must be entirely compensated in a single award, as there is no continuing wrong . . . . " 123 N.E. at 790-91. Similarly, the leaks from the Pipeline Segment in the present case constituted individual completed acts; since the leaks occurred more than four years ago, recovery of damages for results of those leaks is barred. See Chatham, 191 S.E.2d at 590.

presence of fill dirt, a condition which could be abated by the removal of the dirt. Thus, as established by Chatham, the mere presence of contamination does not constitute a "continuing" trespass or nuisance.

Assuming arguendo that the contamination on Land Lot 103 is indeed abatable, that fact would not require a finding that the contamination was of a continuing nature as opposed to of a permanent nature. "A permanent nuisance is not necessarily one which can never, under any circumstances, be abated; but it is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely." Bainbridge Power Co. v. Ivey, 41 Ga. App. 193, 152 S.E. 306 (1929). Accordingly, even if the contamination in the present case is found to be abatable, it is not a continuing nuisance and Appellants' claims are still barred by the statute of limitations.

This reading of Chatham is confirmed by other cases rejecting claims similar to Appellants' as barred by the statute of limitations. Smith v. Central of Georgia Railway Co., 22 Ga. App. 572, 96 S.E. 570, 571 (1918), involved the erection of a dam, leading to floodwaters which rendered certain property unfit for cultivation. The court held that the statute of limitations period began to run at the

completion of the dam. This was true even though the floodwaters remained on the property after the initial trespass, causing what amounted to permanent damage. 96 S.E. at 571. Thus, even if Land Lot 103 is now unfit for its intended use due to the presence of contamination, those facts cannot support a continuing trespass claim. See also Smith v. Dallas Utility Co., 27 Ga. App. 22, 107 S.E. 381 (1921) (landowner's right of action for damages to her property caused by a dam was barred four years after completion of the dam).

Appellants place considerable reliance upon City of Columbus v. Myszka, 246 Ga. 571, 272 S.E.2d 302 (1980) for the proposition that the mere presence of contamination is a continuing, abatable nuisance. Appellants' Brief at 12-13. The facts in Myszka, however, are clearly distinguishable from the present case. In that case, the city knowingly had allowed a leaking sanitary sewer to flow sewage across the plaintiff's property for many months and had approved construction projects uphill from the plaintiff which resulted in increased stormwater runoff across the plaintiff's property. 272 S.E.2d at 304. The ongoing flow of sewage and stormwater in Myszka was a continuing or recurring nuisance. In the present case, however, there simply is no ongoing or

continuing nuisance because there have been no leaks from the Pipeline Segment since 1956.

2. PPL has not maintained control over the Pipeline during the last four years.

Appellants' continuing trespass theory is further undermined by the fact that PPL has not maintained control over the Pipeline for more than twenty years (R. 264). Thus, the alleged trespass is not abatable with respect to PPL. Appellants contend that PPL should remove the contaminants from Land Lot 103. However, while the contamination itself may be abatable in the sense that it may be possible to abate it, PPL has no legal right to do so. Culpability for a continuing trespass is based on the fact that the wrongdoer has a legal right to abate the trespass but elects not to exercise that right. "Where one creates a nuisance, and permits it to remain, it is treated as a continuing wrong . . . . But the principle upon which one is charged as a continuing wrongdoer is that he has a legal right . . . to terminate the cause of the injury." City Council of Augusta v. Lombard, 101 Ga. 724, 28 S.E. 994 (1897); Keener v. Addis, 61 Ga. App. 40, 5 S.E.2d 695 (1939). In other words, unless PPL has a legal right to remove the contamination, PPL cannot

be said to have caused or even allowed the contamination to continue.

Here, the undisputed facts demonstrate that the trespass is not an abatable one with respect to PPL. All easement rights and obligations were transferred to AGL in 1970, and since that time, PPL has had no possessory interest in Land Lot 103. Thus, PPL has no legal right to enter Land Lot 103 or the Easement which traverses it and consequently, cannot abate the contamination.

Furthermore, in a recent case this Court applied the four-year statute of limitations period in barring an action against certain defendants who had not maintained control over property that had been damaged due to contamination by gasoline. In Citizens and Southern Trust Co. v. Phillips Petroleum Co., Inc., 192 Ga. App. 499, 385 S.E.2d 426 (1989), commercial property had been contaminated by a gasoline leak from underground storage tanks located at nearby service stations. The court held that an action could be maintained only against those who:

> . . . were shown to have committed any act or omission or to have maintained any control over the underground storage

> tanks within the four-year period prior to the filing of appellants' suit.

385 S.E.2d at 428. That holding controls the disposition of this case. Here, the undisputed facts show that PPL has not maintained control over the Pipeline during the four years prior to the filing of this suit. In fact, Appellants have previously admitted that AGL was responsible for, and had "total control and use of that easement for at least the last four years." Transcript of Hearing on Motion for Reconsideration, February 21, 1992 ("Reconsideration Transcript"), at p. 18. Appellants have also admitted that "the [Citizens] case is applicable here on all fours." Reconsideration Transcript at p. 16. Thus, an action against PPL is barred by the statute of limitations.

In their brief, Appellants seek to alter the holding of Citizens by mischaracterizing the plain language of the opinion. Appellants essentially argue that since PPL "committed an[] act" more than thirty-five years ago, it therefore is liable to Appellants. To accept such an argument effectively would render the statute of limitations meaningless. Here, PPL has not "committed any act" or "maintained any control" over the Pipeline within the four-

year limitations period. Accordingly, the plain language of Citizens mandates judgment in PPL's favor.

Appellants' attempt to alter the holding of Citizens is further refuted by this Court's application of the statute of limitations in Rowe v. Steve Allen & Assocs., Inc., 197 Ga. App. 453, 398 S.E.2d 717 (1990). In Rowe, the appellants-plaintiffs brought an action for nuisance against a developer for the creation or maintenance of a landfill pit, seeking to recover for the settlement damage to their home which occurred because a portion of the foundation was built over the landfill pit. The appellants-plaintiffs purchased the lot in 1981 and filed their action in 1988. The court cited Citizens and stated:

> The appellee (developer) obviously cannot be deemed to have maintained, controlled or continued the alleged nuisance created by the landfill pit subsequent to the appellants' purchase of the property in 1981. Therefore, assuming arguendo that the appellants at one time had a cause of action against him based on nuisance, the four-year limitation period . . . had

> long since expired . . . by the time the present suit was filed in 1988.

398 S.E.2d at 718 (citations omitted). Just as the Rowe defendant could not be deemed to have "maintained, controlled or continued" the alleged nuisance created by the landfill pit, PPL cannot be deemed to have maintained, controlled or continued the alleged nuisance created by the alleged contamination after PPL's transfer of the Pipeline and easement in 1970.

3. Appellants cannot recover damages for leaks that occurred prior to their ownership of Land Lot 103.

Furthermore, Appellants cannot bring a continuing trespass or nuisance action based on leaks which occurred prior to their ownership. Appellants did not own Land Lot 103 at any time during PPL's operation of the Pipeline. Therefore, if leaks from the Pipeline Segment ever did constitute a continuing trespass, the owner at that time would have been the party with a right of action. That right of action, however, does not run with the land. Rome Kraft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571, 574 (1958). Appellants cannot bring an action for continuing trespass simply because such a right of action may have existed for a previous owner.

"[A] vendee of land upon which a trespass had been committed while it was the property of his vendor has no right of action against the trespasser for damages thus occasioned, which were recoverable by his vendor." Rome Kraft Co., 102 S.E.2d at 574. Thus, even if leaks from the Appellants' Pipeline Segment did constitute a continuing trespass at one time, that claim was extinguished with the conveyance of the land.

In addition, the court in Central of Ga., supra, held that since "the last of the alleged acts of trespass was before the petitioner became the owner of the land, the right of action . . . if any, was in her predecessor in title." 96 S.E.2d at 571. In the instant case, the last of the alleged leaks occurred before the Appellants owned Land Lot 103. The logic of Central of Ga. further supports the proposition that the right of action, if any, was in Appellants' predecessor in title.

B. PPL Has Not Violated An Agreement Under Seal.

Appellants' contention that PPL violated the Easement Agreement is a transparent attempt to circumvent the statute of limitations. Not only has PPL fulfilled any obligations it may have had under the Easement Agreement, but Appellants completely ignore the fact that the Agreement was not even under seal with respect to PPL.

1. The Easement Agreement is not under seal as to PPL.

In order for an agreement to be under seal, the agreement must have a recital to that effect both in the body of the instrument and following the signatures of the parties. Johnson v. International Agrl. Corp., 41, Ga. App. 740, 154 S.E. 465 (1930); Woodall v. Hixon, 154 Ga. App. 844, 270 S.E.2d 65 (1980). While the Easement Agreement may meet these requirements with respect to Appellants' predecessor in title, H.D. Glanton (R. 273), it does not meet any of them with respect to PPL. The document is not signed by any agent of PPL nor is there any language in the document indicating the agreement was intended to be under seal with respect to PPL.

Where an instrument is sealed by one party but not the other, the instrument is under seal with respect to the first party, but the obligations of the second party constitute a simple contract the breach of which is subject to the six-year statute of limitations. Marshall v. Walker, 50 Ga. App. 551, 178 S.E. 760 (1935). In constructing an instrument under seal, one party may extend its liability for twenty years by sealing the document while another may limit its liability to six years by declining to seal the same instrument. Lanier v. Berry, 41 Ga. App. 34, 151 S.E. 821, 822 (1930). This is

precisely the result of the wording in the Easement Agreement between PPL and H.D. Glanton.

2. PPL has not breached any obligations under the Easement Agreement.

Furthermore, even if the Easement Agreement is enforceable with respect to PPL, Appellants cannot identify any duty which PPL has breached. Appellants point to language in the Easement Agreement reserving to Appellants the right "to fully use and enjoy" the property. Appellants' Brief at 20. However, this provision is unenforceable because it does not sufficiently specify PPL's obligations. "A covenant that does not define what is to be done or furnished by the covenantor in discharging the duties incumbent upon him under its terms, except to give the covenantee an unlimited option as to what will be required, is too indefinite to be enforceable." Atlantic Coast Line Ry. Co. v. Georgia, Ashburn, Sylvester & Camilla Ry. Co., 91 Ga. App. 698, 87 S.E.2d 92, 94 (1955); Wittke v. Horne's Enterprises, Inc., 118 Ga. App. 211, 162 S.E.2d 898, 901 (1968).

Appellants also charge that PPL failed to properly maintain the Pipeline and Easement. Appellants' Brief at 20. Yet, the Easement Agreement imposes no maintenance obligations on PPL. Under the Easement Agreement, PPL is granted the

right to use the Easement and right-of-way for purposes of repairing and maintaining the Pipeline, but no duty is imposed on PPL. Repair and maintenance are merely among the permitted uses listed in the Easement.

Appellants rely on Lincoln Land Co. v. Palfery, 130 Ga. App. 407, 203 S.E.2d 597 (1973), for the proposition that a promise in a contract runs to the benefit of "subsequent privies in estate." Appellants' Brief at 21. Even assuming that Appellants are "privies" to the Easement Agreement, however, Appellants ignore the fact that the alleged maintenance obligations in the Easement Agreement are simply too indefinite to be enforceable in the first place. Atlantic Coast Line Ry. Co., 87 S.E.2d at 97-99. In Lincoln, the contract contained a detailed covenant by the defendant to supply adequate water to a subdivision. Lincoln, 203 S.E.2d at 604-05. In the present case, however, the Easement Agreement provides only the right "to fully use and enjoy the property." PPL's maintenance obligations, if any, are not described with sufficient particularity for a court to determine what the parties actually agreed. The Easement Agreement contains absolutely no maintenance standards or guidelines with which to evaluate PPL's performance. Moreover, Appellants' attempt to equate the existence of leaks

with poor maintenance is refuted by the facts. When leaks were discovered, they were repaired. There is no evidence of any leaks from the Pipeline Segment since 1956 caused by PPL. Similarly, there is no evidence that PPL ever failed to inspect the Pipeline, and there is no evidence that PPL failed to meet the existing standards for Pipeline maintenance.

Even if any maintenance obligations under the Easement Agreement are enforceable, any possible right of action for breach of the Easement Agreement was held solely by Appellants' predecessor in title. "[A] covenant which runs with the land becomes, immediately upon its breach, a nonassignable chose in action upon which no one except the grantee then in possession . . . can sue." 20 Am Jur. 2d § 21 Covenants, p. 593. See also 5 R. Powell, P. Rohan & S. Green, Powell on Real Property ¶ 673[3] (1991). This Court stated in Dougherty County v. Pylant, 104 Ga. App. 468, 122 S.E.2d 117 (1961), that:

> [w]hile a chose in action arising from a tort is assignable where it involves, directly or indirectly, a right of property . . ., such right of action, involving property, does not "run with the land" . . . and therefore does not

> pass to a subsequent purchaser by deed in the absence of a specific assignment thereof.

122 S.E.2d at 119 (citations omitted). The leaks in the Pipeline occurred in the 1950s, while Appellants' predecessor in interest held title to Land Lot 103. Any right of action arising from the leaks existed solely in Appellants' predecessor in interest. Since there was no specific assignment of that cause of action when Appellants purchased the property in 1984, Appellants have no claim against PPL.

3. Appellants' claim for breach of the Easement Agreement is time barred.

Even assuming arguendo that PPL did violate the Easement Agreement, and that Appellants have the right to bring a cause of action, Appellants still do not have a valid cause of action against PPL. No matter how Appellants choose to describe it, their cause of action must ultimately be based on leaks from the Pipeline. Thus, under this theory, the occurrence of the leaks would have constituted the breach of contractual duty. Yet, any claim based on leaks from the Pipeline is barred by the statute of limitations. True, the statute of limitations for breach of a sealed instrument is a generous twenty years. O.C.G.A. § 9-3-23. But since there is

no evidence of any leaks subsequent to 1956 caused by PPL, even the twenty-year statute of limitations period has run. Since the Easement Agreement was not under seal as to PPL, however, it constitutes a simple contract the breach of which is subject to the six-year statute of limitations. O.C.G.A. § 9-3-24.

The limitations period runs from the time the Agreement was broken. Mobley v. Murray County, 178 Ga. 388, 173 S.E. 680, 684-5 (1934); National Hills Shopping Center v. Insurance Co. of N. Am., 320 F. Supp. 1146 (1970). "Mere ignorance of the facts constituting [the] cause of action does not prevent the running of the statute of limitations." Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481, 482 (1966). Under either the twenty-year or the six-year statute of limitations, therefore, Appellants' claims are barred.

C. Appellants Cannot Recover Punitive Damages Against PPL.

Appellants make the unsupported argument that, simply because PPL has not removed the contamination from Land Lot 103, Appellants are entitled to receive punitive damages against PPL. It is well-established law that Appellants cannot recover punitive damages for an alleged breach of an

instrument under seal. Trust Co. Bank v. Citizens & Southern Trust Co., 260 Ga. 124, 390 S.E.2d 589 (1990). Furthermore, it is black-letter law in Georgia that a party is not entitled to punitive damages if he or she has failed to set out a cause of action in tort. Stiefel v. Schick, 260 Ga. 638, 398 S.E.2d 194 (1990). As discussed above, Appellants have fallen far short of proving their claims for nuisance or trespass.

Punitive damages may be awarded only in tort actions in which it is proven by "clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression" or an entire want of care. O.C.G.A. § 51-12-5.1. Appellants have set forth no evidence of conduct by PPL which would warrant the imposition of punitive damages in this case.

IV. CONCLUSION

If PPL, as the former owner of the Pipeline Segment, is held liable for corrosion leaks which occurred as a result of completed acts more than thirty-five years ago, a Pandora's box of litigation will ensue in the State of Georgia. Such future suits will obviously be mischaracterized, as in this case, as an abatable nuisance or an abatable trespass in a transparent attempt to escape the statute of limitations.

The Georgia Supreme Court and the Supreme Court of the United States have made very firm pronouncements concerning the general aims and purposes of statutes of limitations. The U.S. Supreme Court has stated that statutory limitations periods are:

> . . . designed to promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Bowen v. City of New York, 476 U.S. 467, 482 n.13 (1986). See also Bank of Jonesboro v. Carnes, 187 Ga. 795, 2 S.E.2d 495, 497 (1939) (Statutes of limitations "are intended not alone for the benefit of the party in whose favor they have run, but are also for the general public good.") Appellants should not be permitted to circumvent the clear time limitation

applicable to their claims by alleging continuing, abatable trespasses and continuing, abatable nuisances.

Accordingly, PPL respectfully requests that this Court affirm the order of the trial court granting summary judgment in favor of PPL.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 11th day of May, 1992, a true and accurate copy of the foregoing BRIEF OF APPELLEE PLANTATION PIPE LINE COMPANY was placed in the U.S. mail, postage prepaid, addressed to the following:

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IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III,	)	
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GASLIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

APPELLANTS' REPLY BRIEF OF APPELLEE
PLANTATION PIPE LINE COMPANY

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May 21, 1992

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III,	)	
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GASLIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

APPELLANTS' REPLY BRIEF OF APPELLEE PLANTATION PIPE LINE COMPANY

COME NOW Appellants, Peter F. Hoffman, Marie Boatwright Hoffman, Elizabeth Boatwright Bell, and J. K. Boatwright, III (hereinafter "Appellants"), in the above-referenced action and file this Reply to Brief of Appellee Plantation Pipe Line Company, and show this court as follows:

I. STATEMENT OF FACTS

The following facts have remained undisputed throughout the course of this lawsuit:

(1) Appellants own the Property, (R. 687);

(2) Appellants are unable to use and enjoy the Property due to the presence of the Contamination, (R. 760);

(3) The Contamination consists of over 1,000 barrels or 42,000 gallons of petroleum products released into

the soils of the Property by Plantation Pipe Line Company ("PPL") (R. 688);

(4) The Contamination can be removed (R. 689);

(5) The Contamination continues to spread throughout the Property (R. 689);

(6) The expense of removing the Contamination increases as the Contamination spreads (R. 689);

(7) PPL transferred ownership of the pipeline segment and the Easement to Atlanta Gas Light Company ("AGL") in December, 1970, (R. 689);

(8) Appellants demanded that PPL and AGL remove the Contamination, (R. 689);

(9) AGL and PPL continue to refuse to remove the Contamination, (R. 689); and

(10) The Easement Agreement gives AGL control over the section of the Property from which the Contamination is migrating, (R. 753).

II. ARGUMENT AND CITATION OF AUTHORITY

A. Appellants' Claims Based Upon the Theories of Nuisance and Trespass are not Barred by the Statute of Limitations

Appellants' claims are for damages which were suffered during the four years prior to the filing of this

lawsuit. The damages which Appellants suffered and continue to suffer are not barred by O.C.G.A. § 9-3-30. Under O.C.G.A. § 9-3-30, only those damages suffered more than four years prior to the filing of the lawsuit are barred. Appellants suffer damages each year and each day that the Contamination is not removed from the Property. Appellants' claims are for damages associated with the loss of the use and enjoyment of the Property which Appellants have suffered in the four years prior to the filing of this lawsuit. Appellants' damages, therefore, are continuing and recoverable.

The issue of whether the presence of the Contamination is a continuing, abatable trespass and a continuing, abatable nuisance should be decided by a jury. City of Bowman v. Gunnells, 243 Ga. 809, 256 S.E.2d 782, 784 (1979).

1. Recurrent Acts are not an Element of Recovery Under the Theories of Continuing Abatable Nuisance or Trespass

A nuisance is anything which works hurt, inconvenience, or damage to another. Towaliga Falls Power Co. v. Sims, 6 Ga. App. 749, 752, 65 S.E. 844 (1909).

Accordingly, the presence of the Contamination is a nuisance.[1]

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[1] In Philadelphia Elec. Co. v. Hercules, Inc. and Gould, Inc., 587 F. Supp. 144 (E.D. Penn. 1984), a property owner brought suit alleging claims for public and private nuisance based upon the presence of hydrocarbon resinous materials in the soils and groundwater of the property. The court in Philadelphia held that the case involved pollution, the effects of which were transmitted beyond the boundaries of the land upon which the objectionable condition exists. Philadelphia, 587 F. Supp. at 153. Further, the Philadelphia court adopted the Restatement of Torts (Second) § 840A:

> A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land.

Id. at 154 (emphasis added). Last, the Philadelphia court held that a vendor could be held

Appellee's argument that "continuous or recurrent acts on the part of PPL" are required to establish liability for a continuing, abatable trespass or a continuing, abatable nuisance, PPL's Brief at 6-7, is without merit.

"accountable for the abatement of the nuisance which its predecessor created," a theory which was supported by other jurisdictions. Id.

In Jensen v. Gen. Elec. Co., _____ A.D.2d ____ (Third Dept., 19__) (a New York court), the court addressed a case where General Electric had disposed of contaminants beneath the site which were migrating away from the site and creating a plume of water contamination in surrounding properties. The court in Jensen held that the "toxic chemicals present on plaintiff's property, being recurring wrongs, they are not subject to any Statute of Limitations because they constantly accrue, thus giving rise to successive causes of action." (A copy of the Memorandum and Order #64564 is attached hereto as Exhibit "A" and incorporated herein by reference).

The Supreme Court of Georgia has held that acts and omissions are not required within the four years prior to filing suit to recover upon the theory of a continuing, abatable nuisance. City of Columbus v. Myszka, 246 Ga. 571, 272 S.E.2d 302, 305 (1980). Further, O.C.G.A. § 9-3-30 only precludes the recovery of damages which were suffered more than four years prior to the filing of the lawsuit. Id. In Myszka the "act" which resulted in the nuisance was the city's approval of the construction project.

> The City's rather generalized argument, when seen in clear focus, is that it 'did nothing' rather than 'doing something' when it allowed the upstream and uphill development to proceed in such fashion that the volume of water flowing through the stream and dry wash was increased as a result of increased rain water run-off.

Id. at 304.

In Myszka, the City had not committed an act within the four years prior to the filing of the lawsuit. In the case sub judice, PPL has not committed an act within the four years prior to the filing of this lawsuit. The act in Myszka was the City's approval of a construction project which

resulted in interference with the plaintiff's rights to use and enjoy fully their property. The acts in the case sub judice were the releases of over 1,000 barrels or 42,000 gallons of petroleum products into the Property. The presence of the Contamination has resulted in interference with Appellants' rights to use and enjoy fully the Property. The interference with the plaintiff's property rights could be abated in Myszka. The interference with Appellants' property rights (i.e., the presence of the Contamination) can be abated in the case sub judice.

Since the nuisance was continuing and abatable, the Myszka court held that "[O.C.G.A. § 9-3-30 did] not preclude recovery for any damages save those which were suffered more than four years prior to the filing of the suit." Myszka, 272 S.E.2d at 305. Accordingly, since Appellants' property rights have been infringed upon continuously over the four years prior to the filing of this suit, Appellants can recover their damages which were suffered during this four-year period.

2. As a Matter of Law, the Presence of the Contamination is not a Permanent Nuisance

Since all nuisances are illegal, Appellants have the right to assume that the nuisance will be abated. Ingram v. Acworth, 90 Ga. App. 719, 84 S.E.2d 99, 103 (1954). When the

nuisance is temporary, a plaintiff must bring successive actions to recover damages until the nuisance is abated. City Council of Augusta v. Boyd, 70 Ga. App. 686, 29 S.E.2d 437 (1944).

Appellants will be able to use and enjoy fully the Property when the Contamination is removed. Since the Contamination can be removed, successive suits for damages are required. A suit for permanent damages associated with the presence of the Contamination has not and will not be available to Appellants. O.C.G.A. § 9-3-30 bars the recovery of damages which were suffered more than four years prior to the filing of a lawsuit. Appellants' claims are for damages which were suffered during the four years prior to the filing of the lawsuit.[2]

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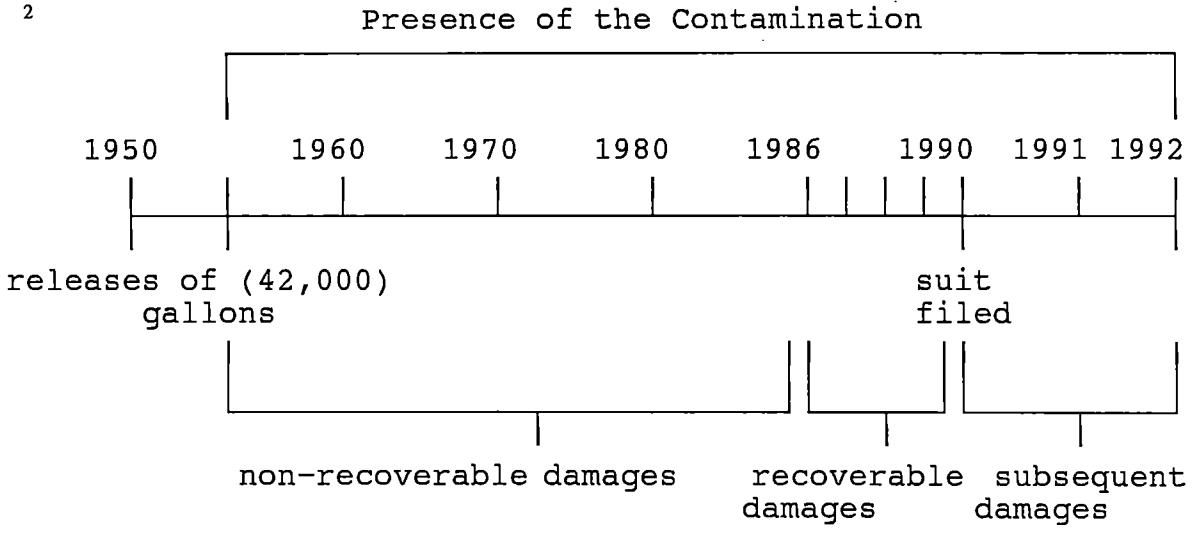
[2]



Appellants' damages accrue each day that they are unable to use the Property due to the presence of the Contamination. Damages accrued from the date of the releases until the present. A suit filed in 1960 would have been filed within four years of the date of the releases, yet the Appellants could not have recovered future damages because the presence of the Contamination is temporary.

In the case sub judice, Appellants filed suit in 1990. Only the damages which had accrued prior to 1986, four years prior to the filing of the suit, are barred by O.C.G.A. § 9-3-30.

PPL's application of the court's holding in R. P. Chatham v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589 (1972), to the facts of the case sub judice is misplaced. In Chatham, the court determined that the trespass was "permanent." 191 S.E.2d at 590. The facts in the case sub judice are undisputed that:

(1) The Contamination can be removed;

(2) The Contamination continues to migrate outward from the Easement;

(3) As the Contamination continues to migrate, the cost to abate the Contamination increases; and

(4) When the Contamination is removed, Appellants will be able to use and enjoy fully the Property. Accordingly, cases which pertain to permanent nuisances and trespasses are inapplicable to the case sub judice.

Claims which are based upon the theories of nuisance and trespass are fact specific and should be determined by a jury. Bowman, 256 S.E.2d at 784. In the case of Boyd v. Orkin Exterminating Co., 191 Ga. App. 38, 381 S.E.2d 295 (1989), Appellee's Brief, p. 9, fn. 1, there was no evidence that the toxic chemicals could be removed from the house. Courts and juries determine a case based upon the evidence before them.

In the case sub judice, the uncontroverted evidence is that the Contamination can be removed and that Appellants will be able to use and enjoy fully the Property when the Contamination is removed. Based upon the evidence in the case sub judice, the presence of the Contamination is, as a matter of law, continuing and abatable.

Both Appellees failed to set forth any evidence to contradict the deposition testimony of Appellants' witness who stated that the Contamination could be removed. Accordingly, cases such as Chatham and Boyd, where the evidence

demonstrated permanent nuisances, are inapplicable to the case sub judice.

Contrary to PPL's argument that "assuming arguendo that the [C]ontamination on [the Property] is indeed abatable," PPL's Brief, p. 10, it is uncontroverted that the Contamination can be abated. The case sub judice is in no way similar to the case before the court in Bainbridge Power Co. v. Ivy, 41 Ga. App. 193, 152 S.E. 306 (1929). The evidence is uncontroverted that the Contamination can be abated, through reasonable means, and that if it is not abated, it will continue to migrate throughout the Property.

3. Control Over the Pipeline and Easement is not Necessary for Liability for a Continuing, Abatable Nuisance or Continuing, Abatable Trespass

As set forth by the court in Myszka, control over the Property during the four years prior to filing suit is not a requirement for liability. Myszka, 272 S.E.2d at 305. In Myszka, the City committed one act (i.e., the approval of the construction project) which resulted in a continuing, abatable nuisance. Even though the City had not committed an act or maintained control over the nuisance within the four years prior to the filing of the suit, the City was found liable due

to its initial act which resulted in a continuing, abatable nuisance. Id.

In an attempt to misconstrue the language of the court's holding in Citizens & Southern Trust Co. v. Phillips Petroleum Co., 192 Ga. App. 499, 385 S.E.2d 426 (1989), PPL argues that an "act, omission, and control, must have occurred within the four years prior to the filing of the suit." PPL Brief, p. 14. PPL's application of the court's holding in Citizens is incorrect.

The court in Citizens held that an action could be maintained against the defendants who "were shown to have committed any act or omission or to have maintained any control over the underground storage tanks within the four year period prior to the filing of appellant's suit." 385 S.E.2d at 428 (emphasis added). PPL attempts to argue that since it has not maintained control over the pipeline during the four years prior to the filing of the suit, PPL cannot be held liable for the presence of the Contamination. PPL Brief, p. 14.

PPL overlooks the fact that the court in Citizens held that an action could be maintained against those who were shown to have committed any act or omission. Id. The court in Citizens did not state that the act or omission must have

been committed during the four years prior to filing of the suit, only that an act or omission is required to hold a party liable as a wrongdoer. Any other reading of the opinion in Citizens would be contrary to the holding of the Supreme Court of Georgia in Myszka (i.e., that an act or omission is not required within the four years prior to the filing of the suit).

As repeatedly admitted by PPL, PPL experienced releases of over 1,000 barrels or 42,000 gallons of petroleum products into the Property. The releases occurred as a result of PPL's acts or omissions. PPL's acts or omissions which resulted in the releases establish the basis for PPL's liability for the presence of the Contamination.

Although Appellants agree that Citizens is applicable to the case sub judice, PPL's reference to the "transcript of hearing on motion for reconsideration, February 21, 1992," PPL's Brief, p. 14, is inappropriate since the transcript is not part of the record before this court.

PPL continues to pontificate that since it has not "committed any act" or "maintained any control" over the pipeline within the four-year limitations period, PPL cannot be held liable or the damages suffered by Appellants. PPL's

misreading of the holding in Citizens is in direct conflict with the Supreme Court of Georgia's holding in Myszka.

The court's holding in Citizens is consistent with the court's holding in Myszka, Lincoln Land Co. v. Palfery, 130 Ga. App. 407, 203 S.E.2d 597 (1973), and Roughton v. Thiele, 209 Ga. 577, 74 S.E.2d 844, 847 (1953). The Supreme Court of Georgia has held that the law in this state is that an act or omission is not required within the four years prior to filing suit for nuisance liability, Myszka, 272 S.E.2d 305.

The court in Roughton has established that an individual who has control over property and, therefore, the ability to abate the nuisance, can be held liable for the nuisance even though the individual did not commit the act or omission which created the nuisance. Roughton, 74 S.E.2d 847. Similarly, the court's holding in Citizens follows with the court's holding in Roughton in that an individual can be liable for a nuisance even if the individual did not create the nuisance when that individual controls the property and refuses to abate the nuisance after notice and a request to do so.

The decisions in Myszka, Citizens, and Roughton are further complemented by the court's holding in Lincoln Land Co. In Lincoln Land Co., the court held that if the failure

to supply water to a development was found to be a nuisance, the nuisance would be continuing until abated, and would not be subject to the statute of limitations. Lincoln Land Co., 203 S.E.2d at 607.

4. Appellants are not Attempting to Recover Damages for Leaks that Occurred Prior to Their Ownership of the Property

Appellants' claims are not based upon the leaks which occurred prior to their ownership. Appellants' claims are based upon the presence of the Contamination which remains in the Property to date. Further, Appellants are not attempting to bring a cause of action for the damages which were suffered by Appellants' predecessor in title. Appellants' claims are for the damages which Appellants have suffered during the four years prior to the filing of this suit.

PPL is blatantly incorrect when it states that "even if leaks from the Appellants' [P]ipeline [S]egment did constitute a continuing trespass at one time, that claim was extinguished with the conveyance of the land." PPL's Brief, p. 17. In support of this proposition, PPL cites the case of Rome Craft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571, 574 (1958). The trespass in Rome Craft Co. was the cutting down

and taking of trees from the property. Clearly, this was a one act trespass.

Conversely, the presence of the Contamination is continuing, and is not extinguished when title to the Property is conveyed. Again, PPL is attempting to misguide the court with respect to the nature of the continuing, abatable nuisance and continuing, abatable trespass. In the case sub judice, the presence of the Contamination, and not the Pipeline Segment, is the "anything" which continues to cause Appellants' hurt and damage. Cases which concern one act trespasses, such as the removal of trees, are inapplicable to the case sub judice.

B. PPL Breached a Contract Under Seal by Failing to Remove the Contamination

PPL's failure to remove the Contamination and to maintain the Easement was a breach of PPL's obligations under the Easement Agreement.

1. The Easement Agreement is Under Seal with Respect to PPL

The Easement Agreement was an agreement under seal with respect to both PPL and Appellants. See, Kytle v. Kytle, 128 Ga. 387, 57 S.E. 748 (1907); see also, City of Lawrenceville v. Yancy, 163 Ga. App. 462, 294 S.E.2d 691

(1982). In Kytle, the court found that when the grantee accepted a deed which was under seal and signed by the grantor, the grantee accepted the deed "with all the legal consequences resulting from the character and form of he instrument." Kytle, 162 S.E. at 748.

PPL's assertion that the Easement Agreement is not under seal with respect to PPL, PPL's Brief, p. 18, is incorrect. In Yancy, the defendant contended that, because there was no recital in the body of the instrument, that it was signed under its seal as grantee, and no signature appears at all on its behalf, the covenant is "merely a simple contract in writing" as to the defendant. The Yancy court disagreed with the defendant, grantee, and followed the court's holding in Kytle, holding that the acceptance of a deed under seal, even if it is not signed by the grantee, places the deed under seal with respect to both parties. Yancy, 294 S.E.2d at 692. The Yancy court followed the court's holding in Kytle, and found that the deed was under seal with respect to both the grantor and the grantee, even though the grantee had not signed the deed, and that the 20-year statute of limitations applied to any breach of the covenants within the deed. Id., at 693.

The Easement Agreement in the case sub judice was signed under seal by Appellants' predecessor in title as grantor and accepted by PPL as grantee. PPL accepted the Easement Agreement under seal. Having accepted the Easement Agreement under seal, PPL is bound by the form of the Easement Agreement. Since the Easement Agreement is under seal with respect to PPL, a cause of action for a breach of the Easement Agreement is subject to the 20-year statute of limitations. Appellants' claim was filed within 20 years after the transfer of the Easement Agreement by PPL. Appellants' contract claims are, therefore, not barred by the statute of limitations.

Conversely, the case of Woodall v. Hickson, 154 Ga. App. 844, 270 S.E.2d 65 (1980), concerns a determination of whether a promissory note was under seal. A determination of whether a promissory note is under seal has no application to the facts in the case sub judice. The cases of Kytle and Yancy are directly on point and should control the court's determination of this issue.

2. A Determination of Whether PPL Breached the Easement Agreement is a Question of Fact for a Jury's Determination

A jury should determine PPL's obligations under the Easement Agreement and whether PPL breached these obligations.

See, Brown v. Dep't of Transp., 195 Ga. App. 262, 393 S.E.2d 36, 38 (1990). PPL states that the provision which reserves the right of Appellants to "fully use and enjoy" the Property is unenforceable because it does not sufficiently specify PPL's obligations. PPL's position is without merit. PPL had the continuing burden to maintain the Easement in a manner which would not result in unnecessary damage to the property.

The case of Atlantic Coast Line R. Co. v. Georgia, Ashburn, Sylvester, and Camillary Co., 91 Ga. App. 698, 87 S.E.2d 92 (1955) is inapplicable to the case sub judice. In Atlantic, the court determined that a covenant by which a party was obligated to erect new, and alter and improve existing signals, was too indefinite to be enforced because it did not describe or designate with sufficient particularity the kind of signals, quality, or quantity of signs that must be installed to meet the requirements of the covenant, nor yet, what work is to be done or materials furnished in making the alterations and improvements called for by the covenant. 87 S.E.2d at 98. The court focused on the words "new and improve" as being too indefinite to serve as descriptive phrases.

A jury should determine the nature of PPL's obligations under the Easement Agreement and whether PPL breached these obligations. See, Brown, 393 S.E.2d at 38.[3]

Similarly, the court's holding in Whittke v. Horne's Enter. Inc., 118 Ga. App. 211, 162 S.E.2d 898 (1968) is inapplicable to the case sub judice. In Whittke, the court determined that when the defendant told the mother of several boys that he would "take care of them" that, by its terms, the agreement was too indefinite to be enforceable. Whittke, 162 S.E.2d at 901. Neither the facts in Atlantic or Whittke have any similarity to those in the case sub judice. Accordingly, the court's holdings in Atlantic and Whittke are inapplicable to the facts of the case sub judice.

Contrary to PPL's allegation that the contract contained a detailed covenant by the defendant to supply

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[3] The question of what acts of repair are reasonable in the use and enjoyment of an easement is one of fact in each case, and depends upon the extent and character of the lawful use of the easement. Doan v. Allgood, 310 Ill. 381, 141 N.E. 779 (1923); Sell v. Finke, 295 Ill. 470, 129 N.E. 90 (1920).

adequate water to a subdivision in the case of Lincoln Land Co., PPL's Brief, p. 20, in reality, the representations "were made on corporate flyers and leaflets, as well as by the employees of the corporation, that water was abundantly available to the potential householder." Lincoln Land Co., 203 S.E.2d at 603. Further, the contract stated that the defendant would "supply at all times and under adequate pressure a sufficient quantity of water to meet the reasonable needs of purchaser." Lincoln Land Co., 203 S.E.2d at 604.

Clearly, to supply a "sufficient quantity of water to meet the reasonable needs of purchaser" is no more indefinite or difficult to enforce than an agreement to allow the grantor of an easement to fully use and enjoy the grantor's property. As in Lincoln Land Co., the failure to remove the contamination when it is uncontroverted that the contamination can be removed is identical in nature to the failure to supply water to a development. As in Lincoln Land Co., the Easement Agreement stated that the benefits of the Easement Agreement would inure to the grantor's assigns, and therefore, Appellants can maintain an action against PPL for failure to remove the Contamination.

Apparently, PPL has misread the court's holding in Dougherty County v. Pylant, 104 Ga. App. 468, 122 S.E.2d 117

(1961). PPL's Brief, p. 21. A reading of the court's holding in Dougherty, beyond the "cited by appellee," PPL's Brief, pp. 21-22, reveals that the Dougherty court cited the case of Evans v. Brown, 196 Ga. 634, 27 S.E. 300 (1943), for the proposition that "it was held that the conveyance of an estate in fee simple vested in the grantee, all of the grantor's rights as to the property, including the right of suit for breach of a conditional limitation contained in the deed, where the breach occurred prior to the conveyance." Dougherty, 122 S.E.2d at 120.

The Dougherty court went on to state that "this case did not involve an assignment of a chose action arising from a tort involving property." Id. PPL has confused, apparently, Appellants' claims based upon a breach of contract with respect to the Easement Agreement and Appellants' claims based upon the tort principles of a continuing, abatable nuisance and trespass.

Obviously, as set forth by the court in Dougherty, claims for damages arising from a tort for property damage do not run with the land unless specifically assigned. Dougherty, 122 S.E.2d at 119. In the case sub judice, however, Appellants' claims for breach of the agreement under seal run with the land and support Appellants' claims against

PPL for breach of the agreement under seal under the authority of Evans and Lincoln Land Co.. When the entire holding of the Dougherty court is read, it supports Appellants' position that Appellants' claim for breach of the Easement Agreement is valid against PPL.

4. Appellants' Claim for Breach of the Agreement Under Seal is not Barred by the Statute of Limitations

Appellants' claim for breach of the agreement under seal is based upon PPL's failure to maintain the Easement properly so that Appellants' could fully use and enjoy the Property. Appellants' claims are based upon PPL's failure to remove the Contamination, as opposed to the original leaks from the Pipeline Segment, as alleged by PPL. PPL's Brief, p. 22. PPL pontificates that the leaks are the basis for the breach and, therefore, even a claim under O.C.G.A. §9-3-23 is time barred. PPL's Brief, p. 22. The breach of the agreement is not premised upon the fact that the Pipeline Segment leaked, but upon the fact that PPL, up to the date of the transfer of the Easement Agreement to AGL, failed to maintain the Easement by failing to remove the Contamination. Since PPL had an ongoing duty under the Easement Agreement, the last breach occurred when the Easement Agreement was transferred to

Supreme Court—Appellate Division
Third Judicial Department

Decided and Entered: April 2, 1992 64564

ERIC C. JENSEN et al.,
Appellants,
v
GENERAL ELECTRIC COMPANY et al.,
Respondents.

MEMORANDUM AND ORDER

Calendar Date: February 6, 1992

Before: Weiss, P.J., Mikoll, Yesawich Jr. and Levine, JJ.

O'Connell & Aronowitz (Salvatore D. Ferlazzo of counsel), Albany, for appellants.

Bond, Schoeneck & King (John M. Freyer of counsel), Albany, for General Electric Company, respondent.

Carter, Conboy, Bardwell, Case, Blackmore & Napierski (Barbara Munger of counsel), Albany, for Albert J. Smaldone Sr. and Sons Inc., respondent.

Yesawich Jr., J.

Appeal from an order of the Supreme Court (Viscardi, J.), entered June 24, 1991 in Saratoga County, which granted defendants' motions to dismiss the complaint as time barred.

From 1958 to 1969, defendant General Electric Company (hereinafter GE) disposed of hazardous industrial waste at a site in the Town of Moreau, Saratoga County. Since November 1970 the site has been owned by defendant Albert J. Smaldone Sr. and Sons Inc. (hereinafter Smaldone). According to a public report issued by GE in November 1984, which detailed the findings of State and Federally mandated investigations as well as plans for remediation, the groundwater beneath the site contained varying amounts of contaminants including polychlorinated biphenyls and trichloroethylene which were migrating away from the site and creating a plume of water contamination in surrounding properties.

EXHIBIT A

Plaintiffs, Edith Perkett and Eric C. Jensen, her son, jointly owned property near the site and were first informed in December 1984 and September 1986, respectively, that part of their property had been contaminated. It was not, however, until June 1990, more than three years later, that they commenced this action against GE and Smaldone asserting causes of action in negligence, continuing trespass, continuing nuisance and strict liability; compensatory and punitive damages, as well as injunctive relief, are sought. When Supreme Court granted GE's motion and Smaldone's cross motion pursuant to CPLR 3211 (a) (5) to dismiss plaintiffs' complaint as time barred, plaintiffs appealed. Perkett has since passed away, leaving Jensen as sole owner of the property pursuant to a right of survivorship, and the action has proceeded (CPLR 1015 [b]).

The single issue before us is whether CPLR 214-c (2), which states that "the three year period within which an action to recover damages for * * * injury to property caused by the latent effects of exposure to any substance or combination of substances * * * upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier" (emphasis supplied), applies to causes of action in continuing trespass and continuing nuisance.

Although these causes of action do qualify as actions "to recover damages for * * * injury to property caused by the latent effects of exposure" (CPLR 214-c [2]) to the toxic chemicals present on plaintiffs' property, being recurring wrongs they are not subject to any Statute of Limitations because they constantly accrue, thus giving rise to successive causes of action (see, 509 Sixth Ave. Corp. v New York City Tr. Auth., 15 NY2d 48, 52; Cranesville Block Co. v Niagara Mohawk Power Corp., ___ AD2d ___ [July 18, 1991]; State of New York v Schenectady Chems., 103 AD2d 33, 37-38; Kearney v Atlantic Cement Co., 33 AD2d 848, 849; Siegel, NY Prac § 40, at 49 [2d ed]). As a consequence they are unaffected by the enactment of CPLR 214-c (2), which is aimed at providing "relief to injured New Yorkers whose claims would otherwise be dismissed for untimeliness simply because they were unaware of the latent injuries until after the limitation period had expired" (Mem of Senator Ronald B. Stafford, Governor's Bill Jacket, L 1986, ch 682; see, Mem of Attorney-General, Governor's Bill Jacket, L 1986, ch 682). The mischief CPLR 214-c is designed to relieve, namely the injustice experienced by those suffering from latent injuries, is not present here. Furthermore, defendants' reliance on Moore v Smith Corona Corp. (___ AD2d ___ [July 18, 1991]) is misplaced because that case did not deal with the question here at issue, but rather with the relationship between CPLR 214-c (2) and (4). In sum, plaintiffs' causes of action in continuing trespass and continuing nuisance are not time barred and, not having been

clearly abrogated by the Legislature, they continue as at common law to accrue so long as the alleged trespass and nuisance continue (see, Arbegast v Board of Educ. of S. New Berlin Cent. School, 65 NY2d 161, 169; McKinney's Cons Laws of NY, Book 1, Statutes § 301 [b]; see also, McKinney's Cons Laws of NY, Book 1, Statutes §§ 95, 321).

Weiss, P.J., Mikoll and Levine, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted the motions to dismiss the causes of action in continuing trespass and continuing nuisance; motions regarding said causes of action denied; and, as so modified, affirmed.

ENTER:

/s/ Michael J. Novack

Michael J. Novack
Clerk

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III, Appellants, v. ATLANTA GASLIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following in the foregoing matter with a copy of Appellants' Reply to Brief of Appellee Plantation Pipe Line Company by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon:

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IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III, Appellants, v. ATLANTA GASLIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

APPELLANTS' REPLY BRIEF OF APPELLEE
ATLANTA GAS LIGHT COMPANY

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May 21, 1992

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III,	)	
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GASLIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

APPELLANTS' REPLY TO BRIEF OF APPELLEE ATLANTA GAS LIGHT COMPANY

COME NOW Appellants, Peter F. Hoffman, Marie Boatwright Hoffman, Elizabeth Boatwright Bell, and J. K. Boatwright, III (hereinafter "Appellants"), in the above-referenced action and file this Reply to Brief of Appellee Atlanta Gas Light Company, and show this court as follows:

I. STATEMENT OF FACTS

The following facts have remained undisputed throughout the course of this lawsuit:

(1) Appellants own the Property, (R. 687);

(2) Appellants are unable to use and enjoy the Property due to the presence of the Contamination, (R. 760);

(3) The Contamination consists of over 1,000 barrels or 42,000 gallons of petroleum products released into the soils of the Property by Plantation Pipe Line Company ("PPL"), (R. 688);

(4) The Contamination can be removed, (R. 689);

(5) The Contamination continues to spread throughout the Property, (R. 689);

(6) The expense of removing the Contamination increases as the Contamination spreads, (R. 689);

(7) PPL transferred ownership of the pipeline segment and the easement to Atlanta Gas Light Company ("AGL") in December, 1970, (R. 689);

(8) Appellants demanded that PPL and AGL remove the Contamination, (R. 689);

(9) AGL and PPL continue to refuse to remove the Contamination, (R. 689); and

(10) The Easement Agreement gives AGL control over the section of the Property from which the Contamination is migrating, (R. 753).

II. ARGUMENT AND CITATION OF AUTHORITY

AGL's liability is premised upon AGL's control over the Easement and AGL's failure to remove the Contamination. Although the Easement does not "itself" constitute a nuisance

or a trespass, the Contamination is present in and migrates from the portion of the Property which is controlled by AGL under the Easement Agreement. The presence of the Contamination does "itself" constitute a continuing, abatable nuisance and a continuing, abatable trespass which is not subject to a statute of limitations.[1]

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[1] In Philadelphia Elec. Co. v. Hercules, inc. and Gould, Inc., 587 F. Supp. 144 (E.D. Penn. 1984), a property owner brought suit alleging claims for public and private nuisance based upon the presence of hydrocarbon resinous materials in the soils and groundwater of the property. The court in Philadelphia held that the case involved pollution, the effects of which were transmitted beyond the boundaries of the land upon which the objectionable condition exists. Philadelphia, 587 F. Supp. at 153. Further, the Philadelphia court adopted the Restatement of Torts (Second) § 840A:

> A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession

> remains subject to liability for the continuation of the nuisance after he transfers the land.

Id. at 154 (emphasis added). Last, the Philadelphia court held that a vendor could be held "accountable for the abatement of the nuisance which its predecessor created," a theory which was supported by other jurisdictions. Id.

Jensen v. Gen. Elec. Co., ____ A.D.2d ____ (Third Dept., 19__) (a New York court) involved a case where General Electric had disposed of contaminants beneath the site which were migrating away from the site and creating a plume of water contamination in surrounding properties. The court in Jensen held that the "toxic chemicals present on plaintiff's property, being recurring wrongs, they are not subject to any Statute of Limitations because they constantly accrue, thus giving rise to successive causes of action. (A copy of the Memorandum and Order #64564 is attached hereto as Exhibit "A" and incorporated herein by reference.)

A. AGL's Control of the Easement Establishes AGL's Liability for the Presence of the Contamination

The Contamination is present in the portion of the Property which is controlled by AGL under the terms of the Easement Agreement (i.e., the Easement). Since AGL controls the portion of the Property in which the Contamination (i.e., the nuisance) is present, AGL is liable for maintaining the nuisance, even though AGL did not create the nuisance. See, Roughton v. Thiele Kaolin Co., 209 Ga. 577, 74 S.E.2d 844, 847 (1953); see also, Citizens & Southern Trust Co. v. Phillips Petroleum Co., 192 Ga. App. 499, 385 S.E.2d 426 (1989); see also, Kiser v. Warner Robins Air Park Estates, Inc., 237 Ga. 385, 228 S.E.2d 795 (1976).[2]

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[2] "While the defendant in a nuisance action frequently is the owner of the property alleged to be the source of nuisance [Cit. omitted], property ownership is not a prerequisite to nuisance liability." Connecticut v. Tippetts-Abbett-McCarthy-Stratton, 204 Conn. 177, 527 A.2d 688, 692 (1987). Further, "like the other elements of the tort of nuisance, the question of whether a

a. AGL is Liable Even Though AGL did not Create the Nuisance

AGL is liable for the damages which arise as a result of the presence of the Contamination, even though AGL did not commit the act or omission which resulted in the release of the Contamination. See, Roughton. AGL's allegation that "Appellants' Brief fails to cite a single case in which the current owner of an easement was found to be liable for damage caused by the previous owner of an easement," AGL's Brief, p. 4, although true, is disingenuous. Appellants' claims against AGL are not for damages which were caused by PPL. Appellants' claims against AGL are based upon AGL's present control of the Easement and failure to abate the presence of the Contamination after notice and a request to abate. Having failed to abate the nuisance after notice and a request to abate, AGL is liable for the damages which Appellants have suffered in the four years prior to the filing of this suit. See, Roughton, 74 S.E.2d at 847.

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defendant maintains control over property sufficient to subject him to nuisance liability normally is a jury question." Id., 527 A.2d at 693.

b. AGL's Control Over the Easement is the Basis for Liability

In Citizens, the court held that a party would be liable for damages resulting from a nuisance if the party committed an act or omission or maintained control over the nuisance within the four years prior to the filing of the suit. Citizens, 385 S.E.2d at 428. Although AGL may not have committed an act or omission which resulted in the original creation of the nuisance, AGL has controlled the portion of the Property (i.e., the Easement) in which the Contamination is located and from which the Contamination continues to migrate, resulting in AGL's responsibility for the continuing, abatable nuisance.

c. The Presence of the Contamination and Its Migration from the Easement Constitute a Nuisance

The fact that AGL owns an easement and not the Property is irrelevant. In Kiser, the Supreme Court of Georgia addressed the maintenance of an easement, which included the prevention of the migration of dust from the easement to the surrounding property. Even though the grantee of the easement did not own the property, the grantee was required to maintain the road in a manner which would prevent

the migration of dust to the surrounding property. See, Kiser, 228 S.E.2d 795.

The law set forth in Roughton and in Citizens, when applied to the facts of the case sub judice, clearly demonstrates AGL's liability for the damages suffered as a result of the continuing, abatable nuisance. Under Citizens, control over the property on which a nuisance is located is sufficient to establish liability.

AGL, like PPL, enjoys pontificating to its own benefit and delight. For example, AGL states that "in sum, the evidence is uncontroverted, and Appellants have admitted, that AGL has not caused any harm on the [P]roperty." AGL's Brief, p. 6. This argument is ridiculous. The damage is to Appellants' rights to use and enjoy fully the Property which have been infringed upon due to AGL's control over the Easement wherein the Contamination is located and from which the Contamination migrates.

d. The Presence of the Contamination is not Permanent

As a matter of law, the facts of record in the case sub judice demonstrate that the presence of the Contamination is not permanent. The case of Chatham v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589, 590 (1972), AGL's Brief, p.

6, is inapplicable to the facts of the case sub judice. There is no completed trespass or nuisance under the facts of record in the case sub judice. Conversely, the undisputed facts in the case sub judice are that: (1) the Contamination can be removed; (2) the Contamination continues to migrate throughout the Property from the Easement; (3) as the Contamination migrates, the expense to remove the Contamination increases; and (4) when the Contamination is removed, Appellants can use and enjoy fully the Property. Since AGL failed to set forth any evidence to contradict the facts demonstrating that the Contamination can be removed, as a matter of law, the nuisance is continuing and abatable.

e. Continuous and Recurrent Acts are not Required for Liability

Finally, AGL alleges that "absent continuous or recurrent acts, even an injury that continues permanently does not create a 'continuing' nuisance or a trespass." AGL's Brief, p. 9. AGL's contention is squarely rebutted by the Supreme Court of Georgia's holdings in Myszka and in Peebles v. Perkins, 165 Ga. 159, 140 S.E. 360; see also, Aspinwall v. Enterprises Dev. Co., 165 Ga. 83, 140 S.E. 67 (1927) (A property owner was allowed to enjoin the defendant from

obstructing a private way after completion of the obstruction.)

In Myszka, the City was liable for the damages arising from a continuing, abatable nuisance even though the only act or omission by the City occurred over four years prior to the filing of the suit. Myszka, 272 S.E.2d at 305. Similarly, in Peebles, the Supreme Court of Georgia held that completed acts can amount to a continuing trespass, a continuing nuisance or a continuing violation of the rights of the plaintiff. Peebles, 140 S.E. at 362.

f. AGL Failed to Address Appellants' Claim for an Injunction

AGL failed to address Appellants' claim for an injunction. Accordingly, the trial court erred in failing to grant an injunction requiring AGL to maintain the Easement properly by removing the Contamination. In Peebles, the Supreme Court of Georgia held that "in consideration of the equities of the parties," a count may grant an injunction restraining the defendant from "a continuing violation of the rights of the plaintiff, such as enjoining an upper riparian owner from obstructing the flow of water, a completed act, by raising the height of a dam to the injury of a lower riparian owner." Peebles, 140 S.E. at 362; see also, Lincoln Land

Co., 203 S.E.2d at 606 (if the failure to supply water to lots in a subdivision was a nuisance, the nuisance would continue until it was abated.) Since AGL, by way of the Easement Agreement, controls the portion of the Property in which the Contamination is located and from which the Contamination migrates, AGL should be enjoined from allowing the continuing, abatable nuisance to remain.

B. AGL's Duties Under the Easement Agreement Should be Decided by a Jury

As argued in Appellants' Brief, a jury should determine the nature of AGL's obligations under the Easement Agreement and whether AGL breached those obligations.[3] The Easement Agreement reserves the right "to fully use and enjoy" the Property to Appellants, as the owners of the servient estate. The Easement Agreement also requires that AGL

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[3] The question of what acts of repair are reasonable in the use and enjoyment of an easement is one of fact in each case, and depends upon the extent and character of the lawful use of the easement. Doan v. Allgood, 310 Ill. 381, 141 N.E. 779 (1923); Sell v. Finke, 295 Ill. 470, 129 N.E. 90 (1920).

maintain the Easement. A jury should be allowed to determine if the failure to remove the Contamination is an ongoing breach of AGL's obligations under the Easement Agreement.

1. AGL Failed to Cite any Authority Which Contradicts That Set Forth by Appellants

In response to Appellants' argument that "he who uses the easement must keep it in proper condition, so that no unnecessary damage will result to the servient estate from its use," Appellants' Brief, p. 20, AGL merely states that Appellants' cited a legal dictionary as support for their argument. AGL's Brief, p. 10. AGL, however, fails to cite any authority to the contrary. AGL merely argues here is no basis in law or reason to support an assertion that a duty to 'maintain' the easement or keep it in 'proper condition,' would require an easement holder to repair a harm to the burdened estate which was caused by a third party three decades earlier." AGL's Brief, pp. 10-11. AGL's continued pontifications lack any legal authority.

AGL refers to Black's Law Dictionary for a definition of "maintain" which includes "the prevention of a decline, the preservation of the status quo, or the holding of an existing condition." AGL's Brief, p. 11. Clearly, a question of fact remains as to what the duty to "maintain" the

Easement requires. Even AGL and PPL are unable to set forth a unified interpretation of the duties under the Easement Agreement.

When AGL purchased the Easement Agreement from PPL, AGL purchased the right to control the portion of the Property burdened by the Easement. Specifically, AGL purchased the right to maintain the Pipeline Segment through and beneath the surface of the Property. The Contamination is present in and migrates from the portion of the Property controlled by AGL under the Easement Agreement.

AGL is responsible for abating a nuisance which exists on the Property over which AGL has control and continues to impact the Property. The fact that AGL did not create the nuisance is irrelevant. AGL assumed control over the Property and the Contamination present within the boundaries of the Easement. Appellants requested that AGL remove the Contamination and AGL refused. Accordingly, AGL has assumed control over the continuing, abatable nuisance and is liable for the damages suffered by Appellants in the four years prior to the filing of the suit.

2. AGL's Assertion That the Court has a Duty to Interpret the Easement Agreement is Without Merit

The court's holding in Sims' Crane Service, Inc. v. Reliance Ins. Co., 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982), is inapplicable to the case sub judice as set forth by AGL. In Sims', the court held that the construction and interpretation of a written contract is a matter of law for the court, unless an ambiguity remains after application of all applicable rules of construction, then a jury question is presented. Id., 667 F.2d at 1036. In the case sub judice, PPL has alleged that the contract language is "unenforceable because it does not sufficiently specify PPL's obligations." PPL's Brief, p. 19. Obviously, the language in the Easement Agreement is subject to more than one interpretation. Accordingly, a jury should determine the obligations which are present under the Easement Agreement. Id.

3. The Easement Agreement is Under Seal with Respect to AGL

AGL's attempt to argue that the Easement Agreement is not under seal with respect to AGL, AGL's Brief, p. 12, is without merit. To date, AGL has failed to distinguish or

address the holdings in the cases of Kytle v. Kytle, 128 Ga. 387, 57 S.E. 748 (1907), and City of Lawrenceville v. Yancy, 163 Ga. App. 462, 294 S.E.2d 691 (1982). In Kytle, the court found that when the grantee accepted a deed which was under seal and signed by the grantor, the grantee accepted the deed "with all the legal consequences resulting from the character and form of the instrument." Kytle, 162 S.E. at 748.

AGL's assertion that the Easement Agreement is not under seal with respect to AGL, AGL's Brief, p. 12, n. 2, is blatantly incorrect and contrary to the laws of the State of Georgia. In Yancy, the defendant contended that, because there was no recital in the body of the instrument that it was signed under its seal as grantee, and no signature appears at all on its behalf, the covenant is "merely a simple contract in writing" as to the defendant. The Yancy court disagreed with the defendant, grantee, and followed the court's holding in Kytle, holding that the acceptance of a deed under seal, even if it is not signed by the grantee, places the deed under seal with respect to both parties. Yancy, 294 S.E.2d at 692. The Yancy court followed the court's holding in Kytle, and found that the deed was under seal with respect to both the grantor and the grantee, even though the grantee had not signed the deed, and that the 20-year statute of limitations

applied to any breach of the covenants within the deed. Id. at 693.

C. Questions of Fact Remain as to Whether AGL's Failure to Inform Appellants of the Presence of the Contamination and the Results of the Pressure Tests Constitute Fraud

A jury should determine whether AGL's concealment of material facts constitutes fraud. Wilhite v. Mays, 239 Ga. 31, 235 S.E.2d 532, 533 (1977). AGL alleges that "[a] concealment of information may constitute a fraud, but only where (1) the defendant has a duty to disclose, (2) the concealment concerns a material fact, and (3) the defendant concealed the fact with the intent to deceive and mislead." AGL's Brief at p. 14.

The question of whether AGL had a duty to disclose under the circumstances of the case sub judice is for a jury's determination. Wilhite, 235 S.E.2d at 533.

Clearly, the presence of the Contamination and the results of the pressure tests which showed a failure of the integrity of the Pipeline Segment are material facts. AGL enjoyed, and continues to enjoy, the benefits of the Easement Agreement which allowed AGL to maintain the Pipeline Segment through and beneath the Property. Appellants could not have

determined the existence of the Contamination through the exercise of reasonable diligence. Further, it is uncontroverted that the expense of removing the Contamination from the Property increases as the Contamination continues to migrate from the Easement.

III. CONCLUSION

Based upon the above and foregoing, it is respectfully submitted that the Order of the trial court be reversed, and the case should be remanded to the trial court for a trial by jury on all Counts of Appellants' Complaint seeking relief against AGL.

Respectfully submitted this 21st day of May, 1992.

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Supreme Court—Appellate Division
Third Judicial Department

Decided and Entered: April 2, 1992 64564

ERIC C. JENSEN et al.,
Appellants,
v
GENERAL ELECTRIC COMPANY et al.,
Respondents.

MEMORANDUM AND ORDER

Calendar Date: February 6, 1992

Before: Weiss, P.J., Mikoll, Yesawich Jr. and Levine, JJ.

O'Connell & Aronowitz (Salvatore D. Ferlazzo of counsel), Albany, for appellants.

Bond, Schoeneck & King (John M. Freyer of counsel), Albany, for General Electric Company, respondent.

Carter, Conboy, Bardwell, Case, Blackmore & Napierski (Barbara Munger of counsel), Albany, for Albert J. Smaldone Sr. and Sons Inc., respondent.

Yesawich Jr., J.

Appeal from an order of the Supreme Court (Viscardi, J.), entered June 24, 1991 in Saratoga County, which granted defendants' motions to dismiss the complaint as time barred.

From 1958 to 1969, defendant General Electric Company (hereinafter GE) disposed of hazardous industrial waste at a site in the Town of Moreau, Saratoga County. Since November 1970 the site has been owned by defendant Albert J. Smaldone Sr. and Sons Inc. (hereinafter Smaldone). According to a public report issued by GE in November 1984, which detailed the findings of State and Federally mandated investigations as well as plans for remediation, the groundwater beneath the site contained varying amounts of contaminants including polychlorinated biphenyls and trichloroethylene which were migrating away from the site and creating a plume of water contamination in surrounding properties.

EXHIBIT A

Plaintiffs, Edith Perkett and Eric C. Jensen, her son, jointly owned property near the site and were first informed in December 1984 and September 1986, respectively, that part of their property had been contaminated. It was not, however, until June 1990, more than three years later, that they commenced this action against GE and Smaldone asserting causes of action in negligence, continuing trespass, continuing nuisance and strict liability; compensatory and punitive damages, as well as injunctive relief, are sought. When Supreme Court granted GE's motion and Smaldone's cross motion pursuant to CPLR 3211 (a) (5) to dismiss plaintiffs' complaint as time barred, plaintiffs appealed. Perkett has since passed away, leaving Jensen as sole owner of the property pursuant to a right of survivorship, and the action has proceeded (CPLR 1015 [b]).

The single issue before us is whether CPLR 214-c (2), which states that "the three year period within which an action to recover damages for * * * injury to property caused by the latent effects of exposure to any substance or combination of substances * * * upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier" (emphasis supplied), applies to causes of action in continuing trespass and continuing nuisance.

Although these causes of action do qualify as actions "to recover damages for * * * injury to property caused by the latent effects of exposure" (CPLR 214-c [2]) to the toxic chemicals present on plaintiffs' property, being recurring wrongs they are not subject to any Statute of Limitations because they constantly accrue, thus giving rise to successive causes of action (see, 509 Sixth Ave. Corp. v New York City Tr. Auth., 15 NY2d 48, 52; Cranesville Block Co. v Niagara Mohawk Power Corp., ___ AD2d ___ [July 18, 1991]; State of New York v Schenectady Chems., 103 AD2d 33, 37-38; Kearney v Atlantic Cement Co., 33 AD2d 848, 849; Siegel, NY Prac § 40, at 49 [2d ed]). As a consequence they are unaffected by the enactment of CPLR 214-c (2), which is aimed at providing "relief to injured New Yorkers whose claims would otherwise be dismissed for untimeliness simply because they were unaware of the latent injuries until after the limitation period had expired" (Mem of Senator Ronald B. Stafford, Governor's Bill Jacket, L 1986, ch 682; see, Mem of Attorney-General, Governor's Bill Jacket, L 1986, ch 682). The mischief CPLR 214-c is designed to relieve, namely the injustice experienced by those suffering from latent injuries, is not present here. Furthermore, defendants' reliance on Moore v Smith Corona Corp. (___ AD2d ___ [July 18, 1991]) is misplaced because that case did not deal with the question here at issue, but rather with the relationship between CPLR 214-c (2) and (4). In sum, plaintiffs' causes of action in continuing trespass and continuing nuisance are not time barred and, not having been

clearly abrogated by the Legislature, they continue as at common law to accrue so long as the alleged trespass and nuisance continue (see, Arbegast v Board of Educ. of S. New Berlin Cent. School, 65 NY2d 161, 169; McKinney's Cons Laws of NY, Book 1, Statutes § 301 [b]; see also, McKinney's Cons Laws of NY, Book 1, Statutes §§ 95, 321).

Weiss, P.J., Mikoll and Levine, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted the motions to dismiss the causes of action in continuing trespass and continuing nuisance; motions regarding said causes of action denied; and, as so modified, affirmed.

ENTER:

/s/ Michael J. Novack

Michael J. Novack
Clerk

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J. K. BOATWRIGHT, III,	)	
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GASLIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following in the foregoing matter with a copy of Appellants' Reply to Brief of Appellee Atlanta Gas Light Company by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon:

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This 21st day of May, 1992.

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IN THE COURT OF APPEALS
STATE OF GEORGIA

DEC 4 1992

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, AND J. K. BOATWRIGHT, III, Appellants, v. ATLANTA GAS LIGHT COMPANY AND PLANTATION PIPE LINE COMPANY, Appellees.	COPY APPEALS CASE NO. A92A1352

MOTION FOR RECONSIDERATION BY APPELLEE ATLANTA GAS LIGHT COMPANY

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IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, AND J. K. BOATWRIGHT, III,	:	
Appellants,	:	
	:	**APPEALS CASE**
v.	:	**NO. A92A1352**
ATLANTA GAS LIGHT COMPANY AND PLANTATION PIPE LINE COMPANY,	:	
Appellees.	:	

MOTION FOR RECONSIDERATION BY APPELLEE ATLANTA GAS LIGHT COMPANY

I. INTRODUCTION

Appellee Atlanta Gas Light Company ("AGL") moves this Court to reconsider its decision to reverse the Trial Court's order granting Summary Judgment to AGL on all counts of Appellants' Complaint. In support of this Motion to Reconsider, AGL respectfully shows that the Court:

1. Overlooked material facts and controlling authority that mandates, as a matter of law, a holding that AGL could not have defrauded Appellants;
2. Overlooked material facts and controlling authority that mandates, as a matter of law,

a holding that AGL did not cause a nuisance or trespass;

3. Misapplied and misconstrued the controlling authority that mandates, as a matter of law, a holding that AGL did not maintain a nuisance or trespass;

4. Overlooked material facts and controlling authority that mandates, as a matter of law, a holding that AGL did not breach any contract with Appellants;

5. Overlooked material facts and controlling authority that mandates, as a matter of law, a holding that Appellants are not entitled to an injunction or to punitive damages.

In light of these errors and omissions, AGL moves that the Court of Appeals grant the Motion to Reconsider and reinstate the Trial Court's Order granting Summary Judgment in favor of AGL on all counts of Appellants' Complaint.

II. BACKGROUND

Between 1941 and April 1970, Appellee Plantation Pipeline Company ("PPL") installed a four-inch pipeline that ran from Macon, Georgia, to LaGrange, Georgia, for the

purpose of transporting gasoline, kerosene, and other refined petroleum products. [R. 834; R. 716-717]

In 1941, Appellants' predecessor in title granted an easement and right-of-way to PPL for a pipeline to cross his property. The portion of land through which the easement was granted will hereinafter be referred to as "the Property." [R. 6]

Between approximately 1954 and 1956, PPL discovered leaks of an unknown quantity of gasoline in the section of the pipeline that traversed the Property. [R. 855-866; R. 940; R.942; and R. 945]

There is no evidence of any leak from the pipeline after 1956. [R. 383-385]

PPL transferred and assigned its easement rights to AGL on or about December of 1970. [R. 30-38]

Before the pipeline was delivered to AGL, it was purged and filled with water. [R. 716]

AGL never used the segment of the pipeline that crossed over the Property. [R. 382; R. 315]

The contamination on the Property consists of gasoline, kerosene, and other refined petroleum products. [R. 315-316; R. 367]

AGL has never transported gasoline, kerosene, or refined petroleum products through the pipeline. [R. 316; R. 382]

AGL had no knowledge about the existence of hydrocarbons on the Property until so informed by Appellants in 1989 [R. 315-316; R. 383-385; R. 389-391; R. 394-395]

There is no evidence that AGL intended to deceive Appellants. [R. 405]

III. ARGUMENT AND CITATION OF AUTHORITY

A. Reconsideration Is Required By Rule 48 Of The Rules Of The Court Of Appeals Of Georgia.

A Motion for Reconsideration will be granted when it appears that the Court of Appeals:

1. Overlooked a material fact in the record; or
2. Overlooked a statute or decision that is controlling as authority and which would require a different ruling; or
3. Erroneously construed or misapplied a provision of law or a controlling authority.

Rule 48(f), Rules of the Court of Appeals for the State of Georgia.

B. The Court Should Grant The Motion For Reconsideration Because It Overlooked Material Facts And Controlling Authority That Mandates, As A Matter Of Law, A Holding That AGL Could Not Have Defrauded Appellants.

With regard to Appellants' fraud claim, the Court of Appeals' decision simply states that "[a]ppellees were not entitled to summary judgment on the question of concealment of the existence of the contamination from appellants, as alleged in the fraud counts." [Opinion at p.11] This statement ignores material facts in the record as well as controlling authority that demonstrate unequivocally that AGL could not have fraudulently concealed the existence of contamination from Appellants.

Under well-settled, binding authority, concealment constitutes a fraud where:

(1) the defendant is aware of information;

(2) the defendant has a duty to disclose;

(3) the concealment concerns a material, integral fact that the plaintiff could not discover by the exercise of ordinary care;

(4) the defendant concealed the material, integral fact with the intent to deceive and mislead;

(5) the plaintiff was harmed by the failure to disclose.

See O.C.G.A. § 23-2-53; O.C.G.A. § 51-6-23; Southern Intermodal Logistics, Inc. v. Smith & Kelly Co., 190 Ga. App. 584, 379 S.E.2d 612 (1989). There is no evidence in the record to support any of the elements of a claim for fraudulent concealment by AGL.

As a threshold issue, AGL is entitled to Summary Judgment on the fraudulent concealment claim because it is unsupported by any fact in the record. The only "support" Appellants cite for the false assertion that AGL fraudulently withheld information is an allegation in the Complaint [Appellants' Brief at p. 23]. Appellants cannot rely on the mere allegations of a complaint when rebutting a Motion for Summary Judgment. See O.C.G.A 9-11-56(e); Hinkley v. Building Material Merchants Association of Ga., Inc., 187 Ga. App. 345, 370 S.E.2d 201 (1988). Since Appellants have failed to come forward with any fact in support of the fraudulent concealment claim, AGL is entitled to Summary Judgment as a matter of law.

Appellants' fraudulent concealment claim also fails because it is rebutted by the undisputed facts of record:

1. It is undisputed that AGL had no knowledge about the existence of any contamination on Appellants' Property until so informed by

Appellants in 1989. [R. 315-316; R. 383-385; R. 389-391; R.394-395];

2. It is undisputed that the pressure tests about which Appellants complain had nothing to do with Appellants' Property. Thus, the results of those tests could not be material or intrinsic to the decision to acquire the Property. AGL has never conducted a pressure test of the pipeline on Appellants' Property. The tests were conducted on portions of the pipeline west of the Property. [R. 1031-1033.];

3. It is undisputed that there is no evidence (nor could there be) that AGL had any special relationship with Appellants that would mandate the disclosure of pressure tests on unrelated property;

4. It is undisputed that even if AGL had a duty to disclose the results of pressure tests on unrelated property, AGL could not have done so because Appellants did not own the Property when the tests were performed. [R. 689; R.161];

5. It is undisputed that there is no evidence of an intent on the part of AGL to deceive Appellants. [R. 405]

Since there is no evidence in the record to support any of the elements of a claim for fraudulent concealment, AGL is entitled to Summary Judgment as a matter of law.

C. The Court Should Grant AGL's Motion For Reconsideration Because It Overlooked Material Facts And Controlling Authority That Mandate, As A Matter Of Law, A Holding That AGL Did Not Cause A Nuisance Or Trespass.

This Court should grant AGL's Motion for Reconsideration because it overlooked or ignored Citizens & Southern Trust Co. v. Phillips Petroleum Co., Inc., 192 Ga. App. 499, 385 S.E.2d 426 (1989) [hereinafter "C&S"], a factually indistinguishable case that would mandate Summary Judgment in favor of AGL on the nuisance and trespass claims.[1] Appellants have conceded that AGL did not cause or contribute to the presence of contamination on the Property. [Appellants' Brief at 11.] Under the C&S case, absent a showing of causation of the contamination, AGL cannot be held liable for nuisance or trespass.

---

[1] C&S is controlling authority and binding on this panel. See Rule 35(b), Rules of the Court of Appeals of the State of Georgia.

In C&S, the plaintiffs claimed that they were harmed by contamination that leaked from underground storage tanks located at a nearby service station. The evidence showed that the tanks did not leak during the period of ownership by the current service station owners, Mr. and Mrs. Tyson. The Court of Appeals ruled that the Tysons could not be held liable for the Plaintiff's injury:

> A party is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failure of duty. If such consequences were caused by the acts of others, so operating as to produce the injury, he would not be liable.

C&S, 192 Ga. App. at 55, 385 S.E.2d at 428 (quoting Brimberry v. Savannah Florida, et. al., 78 Ga. 641, 3 S.E. 274 (1887)).

The C&S case is factually indistinguishable because, like the Tysons, AGL did not cause or contribute to the presence of contamination, having obtained the easement after the contamination was released onto the Property. Thus, pursuant to C&S, AGL is entitled to Summary Judgment as a matter of law on the nuisance and trespass claims.

This Court should also grant the Motion for Reconsideration because it overlooked material facts regarding Appellants' nuisance and trespass claims. The Court's decision regarding the viability of Appellants' nuisance and trespass claims is apparently based on an erroneous assumption that the hydrocarbon contamination on Appellants' Property is spreading and worsening:

> [T]he nuisance is the continuing exudation and leaching of chemicals into the ground from the contaminants deposited long ago through the leaks. The question in this case does not revolve around what day the holes appeared in the pipe or what day they were fixed. The question is whether the contaminating hydrocarbon pollution which began in 1956 is a continuing nuisance or a permanent nuisance. Appellees contend this is a "completed act" and it is too late for appellants to get redress. But, appellants say the contamination is spreading. If that is so, the contamination is not a "completed act."

Opinion at p. 6. However, there is no evidence in the record that the contamination is spreading or worsening. Therefore, even if the spread of contamination would constitute a continuing nuisance or trespass (which it would

not, see Part D below), the failure of Appellants to present any evidence[2] on this point mandates the entry of summary judgment in favor of AGL. See O.C.G.A. § 9-11-56(e);

---

[2] The only evidence in the record bearing on whether materials have migrated since AGL acquired the pipeline and easement in 1970 is Mr. Bilkert's deposition, which states in relevant part:

> Q: It's also been suggested, perhaps alleged, that the extent or degree of contamination on Mr. Hoffman's property is growing worse over time. Have you heard that allegation before?
>
> A: No, I have not.
>
> Q: Did you investigate that?
>
> A: No, we did not.
>
> Q: It's my understanding that BTEX and TPH, in fact all organic materials, have a certain half life in soil.
>
> A: That will be degrading as time goes on, yes.
>
> Q: So wouldn't it be a reasonable conclusion that the contamination will dissipate and decrease over time?
>
> A: Yes, I think that's a reasonable conclusion at a particular point. [. . . Answer continues . . .]

Bilkert Deposition pp. 73-74 [R. at 794-795].

Hinkley v. Building Material Merchants Association of Ga., Inc., 187 Ga. App. 345, 370 S.E.2d 201 (1988).

D. The Court Should Grant The Motion For Reconsideration Because It Misapplied And Misconstrued The Controlling Authority That Mandates, As A Matter Of Law, A Holding That AGL Did Not Maintain a Nuisance.

The Court should also grant this Motion for Reconsideration because the Court has misconstrued and misapplied the law regarding the "maintenance" of a nuisance. The Court suggested that, if the contamination were spreading, AGL could be held liable for "maintaining" a nuisance. [Opinion at pp. 8-10.] The Court based this assertion on O.C.G.A. 41-1-5(b), which provides that "[p]rior to the commencement of an action by the alienee of the property injured against the alienee of the property causing the nuisance, there must be a request to abate the nuisance." [Emphasis supplied] The Court also cited a number of cases in which a court held that the alienee of property causing a nuisance could be held liable for nuisance. [Opinion at pp. 8-10.] The Court has misapplied this statute and the cases cited regarding maintenance of a nuisance.

Section 41-1-5 creates liability for the alienee of property that is "causing" a nuisance. Here, there is no evidence that AGL is the alienee of property "causing" a nuisance. The only property that AGL acquired in 1970 was

not then and is not now "causing" a nuisance. AGL acquired the easement, which was an incorporeal interest in land, and a pipeline that was purged and filled with water. [R. 716] Neither the easement nor the pipeline is "causing" a nuisance. Since AGL did not acquire property that is now or was at the time of the acquisition causing a nuisance, § 41-1-5 is inapplicable.

Likewise, the cases cited by the Court in support of its decision are inapplicable because each decision concerns the alienee of property that was causing a nuisance. In each case, the plaintiff was complaining about property that, by its presence or misuse, was working a harm to the plaintiff. In this case, there is no evidence that the pipeline or the easement is harming Appellants. Put another way, removal of the pipeline or the extinguishment of the easement will not "cure" the Appellants' injury. Thus, AGL is not "maintaining" a nuisance. Since the statute and cases in support of the Court's opinion regarding the maintenance of a nuisance are inapposite, the Court should grant AGL's Motion For Reconsideration.

E. The Court Should Grant AGL's Motion For Reconsideration Because It Overlooked Material Facts And Controlling Authority That Mandates, As A Matter Of Law, A Holding That AGL Did Not Breach Any Contract With Appellants.

The Court's Opinion notes that Appellants contend that the easement agreement "guarantees" that Appellants will have full use and enjoyment of the Property and the Court states, without explanation, that breach of the easement agreement by PPL and AGL is a jury question. However, this Court should grant AGL's Motion for Reconsideration because Appellants' contract claim is not supported by the facts or the law.

First, the "full use and enjoyment" clause is a reservation of rights for the easement. It does not create an affirmative duty for the easement holder.

Second, as set forth above, AGL has not caused or contributed to the existence of the contamination on the Property. AGL did not acquire property that was "causing" harm to the Appellant and has not used the pipeline or the easement in a way that has harmed Appellees. (In fact, AGL has not even used the portion of the pipeline that crosses over the Property.) Thus, AGL has not independently breached the easement agreement.

In the absence of any independent breach of the easement, AGL will be held liable, if at all, only if AGL assumed the liability for any breach of the easement

agreement by PPL. However, the record is clear that AGL has not assumed liability for any previous breach of the easement agreement by PPL.

AGL simply purchased an asset from PPL in 1970. Under Georgia law, when one corporation purchases the assets of another, the purchasing corporation does not assume the obligations of the seller unless there is an agreement to assume liabilities, the transaction is a merger, the transaction is a fraudulent attempt to avoid liabilities, or the purchaser is a mere continuation of the predecessor corporation. See Howard v. APAC-Georgia, Inc., 192 Ga. App. 49, 383 S.E.2d 617 (1989). Here, there is no evidence in the record that AGL agreed to assume PPL's liabilities, merged with PPL, purchased the pipeline or easement in an attempt to avoid liabilities, or acted as a mere continuation of PPL. Thus, AGL has not assumed PPL's preexisting liabilities and AGL is entitled to Summary Judgment as a matter of law.

Finally, AGL is entitled to Summary Judgment on the contract claim because it is stale. As set forth above, the pipeline leaks occurred not later than 1956 and there is no evidence that the hydrocarbons have spread or worsened since 1956. Under either a six year statute of limitations or a twenty year statute of limitations, the contract claims are barred and AGL is entitled to judgment as a matter of law.

F. The Court Should Grant AGL's Motion For Reconsideration Because It Overlooked Material Facts And Controlling Authority That Mandates, As A Matter of Law, A Holding That Appellant Is Not Entitled To An Injunction For Punitive Damages.

Since AGL is entitled to Summary Judgment on the Appellant's Fraud, Nuisance, Trespass and Contract Claims as set forth in Parts A through E above, AGL is entitled to Summary Judgment, as a matter of law, on Appellant's claims for an injunction and for punitive damages.

IV. CONCLUSION

The Trial Court's decision to grant Summary Judgment to AGL on all counts of Appellants' Complaint was supported by undisputed evidence and well-established law which was overlooked by the Court of Appeals. Moreover, the statutes and cases that were cited by the Court of Appeals in support of its decision to reverse the entry of Summary Judgment for AGL were misapplied and misconstrued with respect to AGL. AGL therefore requests that the Court grant AGL's Motion to Reconsider and reinstate the Trial Court's entry of Summary Judgment in favor of AGL.

A Certificate of Counsel in Support of AGL's Motion for Reconsideration is attached hereto as Exhibit "A".

Respectfully submitted this 4th day of December, 1992.

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IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, AND J. K. BOATWRIGHT, III,	:	
Appellants,	:	**APPEALS CASE NO. A92A1352**
v.	:	
ATLANTA GAS LIGHT COMPANY AND PLANTATION PIPE LINE COMPANY,	:	
Appellees.	:	

CERTIFICATE OF COUNSEL FOR APPELLEE ATLANTA GAS LIGHT COMPANY IN SUPPORT OF MOTION FOR RECONSIDERATION

The undersigned counsel for Appellee Atlanta Gas Light Company ("AGL") hereby certify that, upon careful examination of the Opinion of the Court, counsel believes that the Court of Appeals overlooked material facts and controlling authority which would require affirmation of the entry of summary judgment in favor of AGL. Moreover, after careful examination of the Court's Opinion, counsel for AGL have concluded that the Court erroneously construed and

misapplied authority, the effect of which was to improperly reverse the trial court's entry of summary judgment in favor of AGL.

Respectfully submitted this 4th day of December, 1992.

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Exhibit "A"

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Motion for Reconsideration by Appellee Atlanta Gas Light Company, upon all parties by placing a copy of same in the United States Mail with adequate postage affixed thereon and addressed as follows:

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IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J.K. BOATWRIGHT, III Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

APPELLEE PLANTATION PIPE LINE COMPANY'S MOTION FOR RECONSIDERATION

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IN THE COURT OF APPEALS
STATE OF GEORGIA

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IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J.K. BOATWRIGHT, III Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

I. INTRODUCTORY STATEMENT

Appellee Plantation Pipe Line Company ("PPL") moves this Court to reconsider its November 24, 1992 decision to reverse the trial court's order granting summary judgment to PPL on all counts of Appellants' complaint. Through this Motion, Appellee PPL respectfully shows that the Court:

1. Overlooked the material fact that there is no record evidence supporting the assumption that there is continuing exudation or leaching of chemicals from the alleged contamination.

2. Overlooked material facts and controlling authority which establish that the nuisance and trespass claims are not continuing torts and that, in any event, the statute of limitations has run on any nuisance or trespass claim against PPL.

3. Overlooked material facts and controlling authority which establish that any claim based on the alleged contamination would have been held by Appellants' predecessor in title and not by Appellants as to PPL.

4. Overlooked material facts and controlling authority which establish that PPL did not breach the Easement Agreement and that the statute of limitations has run on any such claim.

5. Overlooked controlling authority by reversing the trial court's summary judgment to PPL on Appellants' fraud claim when that issue was not appealed as to PPL.

II. FACTUAL BACKGROUND

1. Appellants are the owners of certain real property lying and being in Land Lot 103, Troup County, Georgia, having obtained same in title.

2. During the period from 1941 to 1970, PPL installed and operated a 4-inch pipeline (the "Pipeline") from Macon, Georgia to LaGrange, Georgia for the purpose of transporting

refined petroleum products. A portion of the Pipeline traverses Land Lot 103 ("the Pipeline Segment"). (R.142).

3. PPL originally obtained an easement across Land Lot 103 in 1941 (the "Easement"). The Easement was transferred, together with all of its rights and obligations, to Atlanta Gas Light Company ("AGL") in 1970 (R.262).

4. The only evidence of any leak from the Pipeline Segment on Land Lot 103 is contained in Spill, Repair and Leak Reports maintained by PPL. These records indicate that 4 leaks occurred between 1954 and 1956. There is no evidence of any subsequent leaks from the Pipeline Segment during PPL's ownership. (R.142-143).

5. There is no evidence to suggest that the contamination is growing worse over time. The Appellant's expert even testified that it was reasonable to conclude that any contamination will dissipate and decrease over time (R.794-795).

III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

In accordance with Rule 48, a Motion for Reconsideration should be granted if it appears that the Court has (1)

overlooked a material fact in the record, a statute or a decision, which is controlling and which would require a different judgment from that rendered; or (2) has erroneously construed or misapplied a provision of law or a controlling authority.

As set forth in detail below, the circumstances of this case clearly indicate that PPL's Motion for Reconsideration should be granted.

B. The Court of Appeals Overlooked Material Facts in the Record Which Would Require a Different Judgment From That Rendered.

In reversing the trial court's summary judgment to PPL on Appellants' nuisance and trespass claims, the Court of Appeals apparently relied on the assumption that there is "... continuing exudation and leaching of chemicals into the ground from the contaminants deposited long ago through the leaks." (Opinion p. 6) This assumption, however, is insufficient as a basis for reversing summary judgment because there is absolutely no record evidence to support it. In fact, the testimony of Mr. Bilkert, Appellants' own expert witness, suggests the contrary. On page 73-74 of his deposition (R.794-795), Mr. Bilkert indicates that it is a reasonable conclusion that any contamination would dissipate and decrease

over time. Appellants cannot rely on mere allegations or assumptions to rebut a motion for summary judgment. See O.C.G.A. § 9-11-56(e). Thus, even if the exudation of the contamination could constitute a continuing nuisance or trespass (which PPL denies) Appellants failed to present any fact to support the assertion that the contamination is getting worse. PPL therefore is entitled to summary judgment.

C. The Court of Appeals Overlooked or Misapplied Controlling Authority as to Appellant's Nuisance and Trespass Claims Against the PPL.

Having relied upon the foregoing factual assumption, the Court then proceeded to examine the question of whether the tort in question was of a continuing or permanent nature. In addressing this issue, the Court of Appeals misapplied the cases cited by the Court in support of its decision and overlooked controlling Georgia authority, including the following cases: R.P. Chatham v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589 (1972); Bainbridge Power Co. v. Ivey, 41 Ga. App. 193, 152 S.E. 306 (1929); Smith v. Central of Georgia Railway Co., 22 Ga. App. 572, 96 S.E. 570, 571 (1918); and Smith v. Dallas Utility Co., 27 Ga. App. 22, 107 S.E. 381 (1921). PPL submits that these cases establish that the alleged nuisance or trespass at issue is of a permanent

nature. Accordingly, Appellants' nuisance and trespass claims are barred by the statute of limitations and the trial court's granting of summary judgment was correct.

Moreover, the Court apparently failed to consider Citizens and Southern Trust Co. v. Phillips Petroleum Co., 192 Ga. App. 499, 385 S.E.2d 426 (1989) and Rowe v. Steve Allen & Assocs., Inc., 197 Ga. App. 453, 398 S.E.2d 717 (1990). In C&S, the allegations of the complaint stated that gasoline had leaked from underground storage tanks at nearby service stations and that gasoline had eventually invaded appellants' property. In partially reversing the trial court's granting of summary judgment, the C&S court held that an action could be maintained only against those defendants who "were shown to have committed any act or omission or to have maintained any control over the underground storage tanks within the four-year period prior to the filing of appellants' suit." 385 S.E.2d at 428.

In determining whether the four-year statute of limitations had run for the maintenance of a continuing nuisance, the C&S court did not look to the existence or period of contamination. Rather, the C&S court examined whether the defendants had owned or maintained the underground storage tanks within the four years prior to suit. This

analysis is reaffirmed by the Court of Appeals' decision in Rowe. The Rowe Court held that the plaintiff's nuisance claim was time-barred because the defendant developer could not be "deemed to have maintained, controlled or continued the alleged nuisance created by the landfill pit subsequent to Appellants' purchase of the property in 1981," which was more than four years prior to suit. 398 S.E.2d at 718.

Here, the undisputed facts establish that PPL did not own, operate or maintain control over the Pipeline or Easement during the four years prior to the filing of Appellants' lawsuit. In fact, PPL did not maintain, control or operate the Pipeline or Easement after PPL's transfer of the Pipeline and Easement in 1970, approximately 20 years prior to the filing of Appellants' lawsuit. Accordingly, PPL cannot be deemed to have maintained, controlled or continued the alleged nuisance or trespass within the four years prior to the filing of Appellants lawsuit. In sum, the C&S and Rowe decisions are factually indistinguishable and establish that PPL is entitled to summary judgment on Appellants' claims against PPL for nuisance or trespass.[1/]

1/ The C&S and Rowe decisions are controlling authority and binding on this panel. See Rule 35(b), Rules of the Court of Appeals of the State of Georgia.

D. The Court Overlooked Facts and Controlling Authority in That Any Claim Would Have Been Held by Appellants' Predecessor in Title.

The Court also overlooked the material fact that PPL did not own, operate or maintain the Pipeline or Easement at any time during Appellants' ownership of the property. Thus, even if the contamination constitutes a continuing nuisance or trespass, any right of action against PPL was held solely by Appellants' predecessor in title. See Central of Ga., 96 S.E.2d at 571. Under Georgia law, a right of action involving property does not "run with the land" and does not pass to a subsequent purchaser by deed in the absence of a specific assignment thereof. See Dougherty County v. Pylant, 104 Ga. App. 468, 122 S.E.2d 117 (1961); Rome Kraft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571, 574 (1958). PPL submits that the Court of Appeals failed to properly consider these cases which establish that any right of action against PPL for nuisance or trespass was extinguished when Appellants purchased the property without any assignment of a right of action against PPL.

The same analysis applies to Appellants' claim for breach of the Easement Agreement. PPL was not a party to the Easement Agreement at any time during Appellants' ownership of

the Property. Any claim for breach of the Easement Agreement by PPL was held solely by Appellants' predecessor in title.

E. The Court of Appeals Overlooked Controlling Authority in Reversing Summary Judgment on Appellants' Claim That PPL Breached the Easement Agreement.

The construction of a contract is a question of law for the Court. In reversing the trial court's summary judgment to PPL on breach of the Easement Agreement, the Court overlooked controlling authority concerning interpretation of the Easement Agreement. Appellants rely on language in the Easement Agreement reserving to Appellants the right to "fully use and enjoy" the property. First, this language is a mere reservation of rights. It does not confer any duty or obligation upon PPL to perform any act. Second, under Georgia law, even if this provision did obligate PPL to perform some act, it is unenforceable because it does not sufficiently specify PPL's obligations. See Atlantic Coastline Ry. v. Georgia, Ashburn, Sylvester & Camilla Ry., 91 Ga. App. 698, 87 S.E.2d 92, 94 (1955); Wittke v. Horne's Enterprises, Inc., 118 Ga. App. 211, 162 S.E.2d 898, 901 (1968).

Finally, PPL is entitled to summary judgment on the contract claim based on the statute of limitations. It is

undisputed that no leaks occurred after 1956 and there is no record evidence that the contamination is growing worse over time. Under either a six year or twenty year statute of limitations, PPL is entitled to summary judgment.

F. Appellants Did Not Appeal the Summary Judgment in Favor of PPL on Their Fraud Claim.

In its opinion, the Court of Appeals stated that: "Appellees were not entitled to summary judgment on the question of concealment of the existence of the contamination from Appellants, as alleged in the fraud counts." The trial court's granting of summary judgment in favor of PPL on Appellants' fraud claim, however, was not appealed. While Appellants' enumeration of errors specifically included an enumeration of error with respect to Appellants' fraud claim against AGL, Appellants did not enumerate error in the trial court's granting PPL's motion for summary judgment with respect to their fraud claim. (Count VII of Appellants' Complaint) Moreover, Appellants did not include any argument in their brief concerning their fraud claim against PPL. See Rule 15(c)(2), Rules of the Court of Appeals of Georgia. (unsupported claim of error treated as abandoned). Thus, the Court of Appeals did not have jurisdiction to reverse the granting of summary judgment to PPL on the fraud count. See

MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980) (court cannot consider any attempt to amend or enlarge an enumeration of error).

CONCLUSION

For the reasons stated above and in PPL's Appellate Brief, PPL respectfully requests that the Court of Appeals reconsider its November 24, 1992 opinion and affirm the trial court's granting of summary judgment to PPL on all counts.

Respectfully submitted,

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IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J.K. BOATWRIGHT, III Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

CERTIFICATE OF COUNSEL FOR APPELLEE
PLANTATION PIPELINE COMPANY IN SUPPORT
OF MOTION FOR RECONSIDERATION

The undersigned counsel for Appellee Plantation Pipeline Company ("PPL") hereby certify that, upon careful examination of the opinion of the Court, counsel believes that the Court of Appeals overlooked material facts and controlling authority which would require affirmation of the entry of summary judgment in favor of PPL. Moreover, after careful examination of the Court's Opinion, counsel for PPL have concluded that the Court erroneously construed and misapplied authority in reversing the trial court's entry of summary judgment in favor of PPL.

Respectfully submitted this 4th day of December, 1992.

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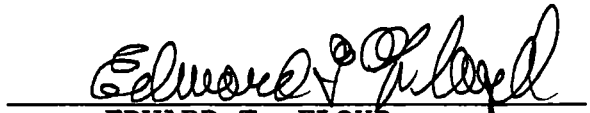

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CERTIFICATE OF SERVICE

This is to certify that on the 4th day of December, 1992, a true and accurate copy of the foregoing APPELLEE PLANTATION PIPE LINE COMPANY'S MOTION FOR RECONSIDERATION was placed in the United States mail, postage prepaid, addressed to the following:

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APPEAL SUMMARY PAGE

CASE NUMBER: A92A1352 DATE OF DOCKETING: MARCH 31, 1992

STYLE: PETER F. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

FULTON County Superior Court
TRIAL JUDGE: Honorable William H. Alexander

ATTORNEY REGISTER:

ATTORNEYS FOR APPELLANT:

MR. EDWIN HALLMAN, JR.
DECKER & HALLMAN
SUITE 1200, MARQUIS II TOWER
285 PEACHTREE CENTER AVENUE
ATLANTA GA 303030000

MR. DAVID C. MOSS
DECKER & HALLMAN
SUITE 1200 MARQUIS II TOWER
285 PEACHTREE CENTER AVENUE
ATLANTA GA 303030000

ATTORNEYS FOR APPELLEE:

MR. EDWARD A. KAZMAREK
LONG, ALDRIDGE & NORMAN
1500 MARQUIS TWO TOWER
285 PEACHTREE CENTER AVENUE, N.E.
ATLANTA, GA 303031257

MS. CAROL R. GEIGER
LONG, ALDRIDGE & NORMAN
SUITE 1500 MARQUIS II TOWER
285 PEACHTREE CENTER AVENUE
ATLANTA GA 303031257

OTHER PARTY REPRESENTATION:

MR. CHARLES A. PERRY
HUNTON & WILLIAMS
2500 ONE ATLANTA PLAZA
950 EAST PACES FERRY ROAD
ATLANTA GA 303260000

COURT OF APPEALS OF GEORGIA

433 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CLASSIFICATION: SJ/NEGLIGENCE/PROPERTY DAMAGE

CASE NUMBER: A92A1352 DATE OF DOCKETING: MARCH 31, 1992

STYLE: PETER F. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

LOWER COURT SUMMARY INFORMATION:

FULTON County Superior Court

TRIAL JUDGE: Honorable William H. Alexander

DATE OF JUDGMENT: 01-06-92 NOTICE OF APPEAL DATE: 01-30-92

D81331

RECORDS DESCRIPTION:	PARTS:
RECORDS	03
TRANSCRIPTS	00

COURT OF APPEALS CODE: 93-088
JUN/92

COURT OF APPEALS OF GEORGIA

433 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450

NOTICE OF DOCKETING

MR. DAVID C. MOSS
DECKER & HALLMAN
SUITE 1200 MARQUIS II TOWER
285 PEACHTREE CENTER AVENUE
ATLANTA GA 303030000

APPEAL CASE NUMBER: A92A1352 DATE OF DOCKETING: MARCH 31, 1992
STYLE: PETER F. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

IMPORTANT RULE REQUIREMENTS AND INFORMATION

APPELLANT'S AND CROSS APPELLANT'S BRIEFS AND ENUMERATIONS OF ERROR along with $80.00 filing fee shall be filed within 20 days after the date of docketing of the appeal or cross appeal in this Court. FAILURE TO FILE WITHIN THAT TIME, unless extended for good cause shown, SUBJECTS THE OFFENDER TO CONTEMPT. THE COURT MAY ORDER THE FILING OF SUCH ENUMERATIONS OF ERROR AND BRIEFS AND, UPON APPELLANT'S FAILURE TO COMPLY WITH SUCH ORDER, SHALL IN CIVIL CASES, AND MAY IN CRIMINAL CASES, CAUSE THE APPEAL TO BE DISMISSED AND MAY ALSO SUBJECT THE OFFENDER TO CONTEMPT. [RULE 14, 23]. APPELLEE'S AND CROSS APPELLEE'S BRIEFS shall be filed within 40 days after the dockeing date or 20 days after the filing of the brief of appellant, whichever is later. FAILURE TO TIMELY FILE responsive briefs may result in non-consideration and may in addition subject the offender to contempt. TO DETERMINE DUE DATES FOR FILING, START COUNTING THE DAY AFTER DOCKETING. ALL DOCUMENTS MUST BE FILED IN TRIPLICATE (original and two copies). ALL DOCUMENTS AND COMMUNICATIONS RELATING TO APPEALS PENDING IN THIS COURT MUST BE DIRECTED TO THE CLERK OF THE COURT AND NOT TRANSMITTED TO ANY JUDGE DIRECTLY NOR TO ANY MEMBER OF A JUDGE STAFF, and shall show that copies have been furnished to the opposing counsel or pro se party. [RULE 1(A)]. ALL ORIGINALS AND COPIES OF DOCUMENTS FILED WITH THE CLERK SHALL BE SIGNED, SHALL BEAR THE STATE BAR OF GEORGIA MEMBERSHIP NUMBER OF THE SUBMITTING ATTORNEY AND BE BACKED WITH MANUSCRIPT COVER.

With the exception of motion for reconsideration and filing pursuant to Rule 51, the contents of properly addressed registered or certified mail shall be deemed filed on the official U.S. Postal Service hand stamped postmark date. Motion for reconsideration are deemed filed on the date received in the Clerk's Office of this Court. [Rule 4] Briefs may be served personally or by mail and MUST SHOW SERVICE BEFORE OFFERED FOR FILING unless it is shown service is impossible. [RULE 14] IF YOU REQUEST ORAL ARGUMENT IN WRITING PURSUANT TO RULE 8[A] WITHIN 20 DAYS OF DOCKETING, THIS CASE WILL BE ON THE CALENDAR FOR: JUN 02, JUN 03, _____, , 1992. A printed calender will be mailed to counsel of record showing the exact date of argument pursuant to RULE 24(b).

IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.

VICTORIA MCLAUGHLIN, CLERK

COURT OF APPEALS OF GEORGIA

433 STATE JUDICIAL BUILDING
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NOTICE OF DOCKETING

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285 PEACHTREE CENTER AVENUE
ATLANTA GA 303030000

APPEAL CASE NUMBER: A92A1352 DATE OF DOCKETING: MARCH 31, 1992
STYLE: PETER F. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

IMPORTANT RULE REQUIREMENTS AND INFORMATION

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VICTORIA MCLAUGHLIN, CLERK

COURT OF APPEALS OF GEORGIA

433 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450

NOTICE OF DOCKETING

MS. CAROL R. GEIGER
LONG, ALDRIDGE & NORMAN
SUITE 1500 MARQUIS II TOWER
285 PEACHTREE CENTER AVENUE
ATLANTA GA 303031257

APPEAL CASE NUMBER: A92A1352 DATE OF DOCKETING: MARCH 31, 1992
STYLE: PETER F. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

IMPORTANT RULE REQUIREMENTS AND INFORMATION

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VICTORIA MCLAUGHLIN, CLERK

COURT OF APPEALS OF GEORGIA

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ATLANTA, GA 303031257

APPEAL CASE NUMBER: A92A1352 DATE OF DOCKETING: MARCH 31, 1992
STYLE: PETER F. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

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NOTICE OF DOCKETING

MR. CHARLES A. PERRY
HUNTON & WILLIAMS
2500 ONE ATLANTA PLAZA
950 EAST PACES FERRY ROAD
ATLANTA GA 303260000

APPEAL CASE NUMBER: A92A1352 DATE OF DOCKETING: MARCH 31, 1992
STYLE: PETER F. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

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VICTORIA MCLAUGHLIN, CLERK

COURT OF APPEALS OF GEORGIA
433 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450

NOVEMBER 25, 1992

TO: TRIAL COURT JUDGE

ALL ATTORNEYS OF RECORD

FROM: VICTORIA MCLAUGHLIN, CLERK

COURT OF APPEALS OF GEORGIA

RE: A92A1352. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

PLEASE SUBSTITUTE THE ATTACHED PAGES 7 AND 8 FOR PAGES 7 AND 8 OF THE ORIGINAL OPINION DATED NOVEMBER 24, 1992.

REMITTITUR

Court of Appeals

of the State of Georgia

ATLANTA, NOVEMBER 24, 1992

The Honorable Court of Appeals met pursuant to adjourment.

The following judgment was rendered:

COURT OF APPEALS CASE NO. A92A1352
PETER F. HOFFMAN ET AL V. ATLANTA GAS LIGHT COMPANY ET AL

This case came before this court on appeal from the Superior Court of Fulton County; it is considered and adjudged that

THE JUDGMENT OF THE COURT BELOW BE REVERSED.

BIRDSONG, P.J., BEASLEY AND ANDREWS, JJ., CONCUR.

LC NUMBERS: D81331

BILL OF COSTS, $80.00

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUN 3 1993

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Victoria B. Lagatta **Clerk.**

93-088

Case No. S93C0542

SUPREME COURT OF GEORGIA

ATLANTA MAY 03, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

PLANTATION PIPE LINE COMPANY V. PETER F. HOFFMAN ET AL.

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

All the Justices concur, except Benham and Fletcher, JJ., who dissent.

G17466
BILL OF COSTS, $80.00

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta JUNE 02, 1993

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Sharon M. Welch, Clerk.

Case No. A92A1352

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office

JUN 3 1993

Clerk Court of Appeals of Georgia.

93-088

Case No. S93C0532 see S93C0542

SUPREME COURT OF GEORGIA

ATLANTA APRIL 08, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ATLANTA GAS LIGHT CO. V. PETER F. HOFFMAN ET AL.

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

All the Justices concur, except Benham and Fletcher, JJ., who dissent.

D81331 G17466
BILL OF COSTS, $80.00

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta JUNE 02, 1993

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Sharon M. Mulloch, Clerk.

Case No. A92A1352

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office

JUN 3 1993 Clerk Court of Appeals of Georgia.

93_088

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Case No. S93C0542 DKT DATE: JANUARY 04, 1993

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day a petition to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of

PLANTATION PIPE LINE COMPANY V. PETER F. HOFFMAN ET AL.

Clerk, Supreme Court of Georgia

Case No. A92A1352

Court of Appeals of Georgia

Notice of Petition for Certiorari

filed in office JAN 7 1993

Clerk, Court of Appeals of Georgia

Kurt A. Powell
Hunton & Williams
2500 One Atlanta Plaza
950 East Paces Ferry Road
Atlanta, GA 30326

This 31st day of December 1992.

Mary Donne Peters
Georgia Bar No. 573595

Long, Aldridge & Norman
1500 Marquis Two Tower
285 Peachtree Center Avenue, NE
Atlanta, GA 30303-1257
(404) 527-4000

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J.K. BOATWRIGHT, III, Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Certificate of Atlanta Gas Light Company's Application for Certiorari to the Supreme Court of Georgia upon all parties by placing a copy of same in the United States Mail with adequate postage affixed thereon and addressed as follows:

F. Edwin Hallman
Decker & Hallman
Marquis II Tower, Suite 1200
285 Peachtree Center Avenue
Atlanta, GA 30303

DEC 31 1992

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J.K. BOATWRIGHT, III,	)	ORIGINAL
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

CERTIFICATE OF ATLANTA GAS LIGHT COMPANY'S APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF GEORGIA

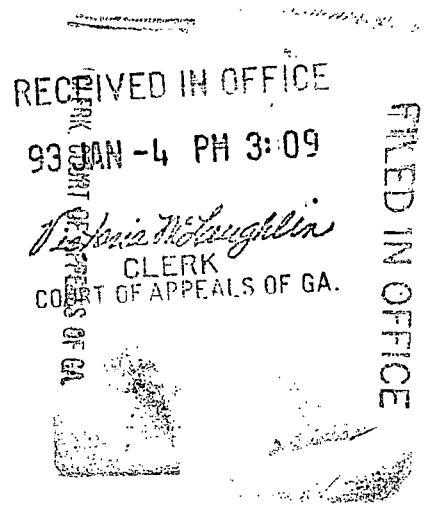
Pursuant to Rule 16 of the Rule of the Court of Appeals of Georgia, Petitioner-Appellee, Atlanta Gas Light Company, hereby certifies to the Court of Appeals that it has today filed an application for certiorari with the Supreme Court of Georgia.

Respectfully submitted this 31 day of December 1992.

LONG, ALDRIDGE & NORMAN
1500 Marquis Two Tower
285 Peachtree Ctr. Ave., NE
Atlanta, Georgia 30303-1257
(404) 527-4160

EDWARD A. KAZMAREK
Georgia Bar No. 409467

MARY DONNE PETERS
Georgia Bar No. 573595
Attorneys for Appellee,
Atlanta Gas Light Company


RECEIVED IN OFFICE
93 JAN -4 PM 3:09
CLERK
COURT OF APPEALS OF GA.
CLERK COURT OF APPEALS OF GA.
FILED IN OFFICE

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing CERTIFICATE OF PLANTATION PIPE LINE COMPANY'S APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF GEORGIA via United States mail, postage prepaid, upon all known parties as follows:

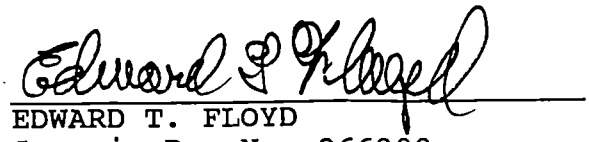
F. Edwin Hallman, Jr., Esq.
DECKER AND HALLMAN
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303

Edward A. Kazmarek, Esq.
Mary Donne Peters, Esq.
LONG, ALDRIDGE & NORMAN
1500 Marquis Tower
285 Peachtree Center Avenue, N.W.
Atlanta, Georgia 30303-1257

This 4th day of January, 1993.

CHARLES A. PERRY

HUNTON & WILLIAMS
2500 One Atlanta Plaza
950 East Paces Ferry Road
Atlanta, Georgia 30326
(404) 841-2700



EDWARD T. FLOYD
Georgia Bar No. 266300

PLANTATION PIPE LINE COMPANY
2000 Resurgens Plaza
945 East Paces Ferry Road, N.E.
Post Office Box 18616
Atlanta, Georgia 30326
(404) 364-5912

Attorneys for the Appellee,
Plantation Pipe Line Company

IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J.K. BOATWRIGHT, III, Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	APPEAL CASE NO: A92A1352

JAN 04 1993

CERTIFICATE OF PLANTATION PIPE LINE COMPANY'S
APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF GEORGIA

Pursuant to Rule 16 of the Rules of the Court of Appeals of Georgia, Petitioner-Appellee, Plantation Pipe Line Company, hereby certifies to the Court of Appeals that it has today filed an application for certiorari with the Supreme Court of Georgia.

This 4th day of January, 1993.

Respectfully submitted,

Charles A. Perry

CHARLES A. PERRY
Georgia Bar No. 572504

HUNTON & WILLIAMS
2500 One Atlanta Plaza
950 East Paces Ferry Road
Atlanta, Georgia 30326
(404) 841-2700

IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, AND J. K. BOATWRIGHT, III,	:	
Appellants,	:	
	:	**APPEALS CASE**
v.	:	**NO. A92A1352**
ATLANTA GAS LIGHT COMPANY AND PLANTATION PIPE LINE COMPANY,	:	
Appellees.	:	

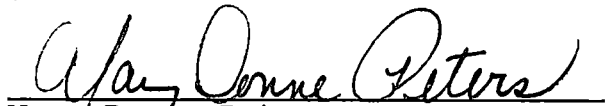
CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Notice of Intention to File Application to The Supreme Court of Georgia for Petition for Writ of Certiorari upon all parties by placing a copy of same in the United States Mail with adequate postage affixed thereon and addressed as follows:

F. Edwin Hallman
Decker & Hallman
Marquis II Tower, Suite 1200
285 Peachtree Center Avenue
Atlanta, GA 30303

Kurt A. Powell
Hunton & Williams
2500 One Atlanta Plaza
950 East Paces Ferry Road
Atlanta, GA 30326

This 21st day of December, 1992.



Mary Donne Peters
Georgia Bar No. 573595

Long, Aldridge & Norman
1500 Marquis Two Tower
285 Peachtree Center Avenue, NE
Atlanta, GA 30303-1257
(404) 527-4000

93-084

DEC 22 1992

IN THE COURT OF APPEALS
STATE OF GEORGIA

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, AND J. K. BOATWRIGHT, III,	:	
Appellants,	:	
v.	:	APPEALS CASE NO. A92A1352
ATLANTA GAS LIGHT COMPANY AND PLANTATION PIPE LINE COMPANY,	:	
Appellees.	:	

NOTICE OF INTENTION TO FILE APPLICATION TO THE SUPREME COURT OF GEORGIA FOR PETITION FOR WRIT OF CERTIORARI

Defendant Appellee, Atlanta Gas Light Company, hereby notifies this Court of its intention to File an Application to The Supreme Court of Georgia for a Writ of Certiorari in the above-captioned case.

Respectfully submitted this 21 day of December, 1992.

LONG, ALDRIDGE & NORMAN

Edward A. Kazmarek
Georgia Bar No. 409467

Mary Donne Peters
Georgia Bar No. 573595

Attorneys for Appellee
Atlanta Gas Light Company

285 Peachtree Center Avenue, N.E.
1500 Marquis Two Tower
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CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing APPELLEE PLANTATION PIPE LINE COMPANY'S NOTICE OF INTENTION TO APPLY FOR CERTIORARI via hand delivery upon all known parties as follows:

F. Edwin Hallman, Jr., Esq.
DECKER AND HALLMAN
Suite 1200 Marquis II Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303

Edward A. Kazmarek, Esq.
Carol R. Geiger, Esq.
LONG, ALDRIDGE & NORMAN
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Dated this 23 day of December, 1992.

CHARLES A. PERRY

HUNTON & WILLIAMS
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Plantation Pipe Line Company
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Attorneys for the Defendant,
Plantation Pipe Line Company

93-088

IN THE COURT OF APPEALS
STATE OF GEORGIA

DEC 23 1992

PETER F. HOFFMAN, MARIE BOATWRIGHT HOFFMAN, ELIZABETH BOATWRIGHT BELL, and J.K. BOATWRIGHT, III Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	APPEAL CASE NO: A92A1352

APPELLEE PLANTATION PIPE LINE COMPANY'S
NOTICE OF INTENTION TO APPLY FOR CERTIORARI

Notice is hereby given that Plantation Pipe Line Company hereby intends to apply for Certiorari to the Supreme Court of Georgia. The original opinion of this Court was entered on November 24, 1992, case number A92A1352. A Motion for Rehearing was filed with this Court and overruled on December 15, 1992.

This 23 day of December, 1992.

CHARLES A. PERRY
Georgia Bar No. 572504

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Edward T. Floyd by CAP
Edward T. Floyd
Georgia Bar No. 266300 with permission

2. Dooley v. Berkmer, 113 Ga App. 162, 147 S.E.2d 685, 686 (1966) ("Vendee accepts property as it is and assumes full responsibility for defects").

Finally, Plantation notes that on page 4 of their Reply Brief to Appellee Plantation Pipe Line Company, Appellants cited the district court opinion in Philadelphia Electric Co. v. Hercules, Inc., et al., 587 F. Supp 144 (E.D. Penn 1984) for the proposition that a vendor could be held accountable for the continuation of a nuisance after he transfers the land. In fact, the Third Circuit Court of Appeals reversed the district Court and held that the rule of caveat emptor barred a private nuisance cause of action against a remote vendor for environmental contamination. Philadelphia Electric Co. v. Hercules, Inc. et al., 762 F.2d 303, 313-14 (3d Cir. 1984).

Very truly yours,

KURT A. POWELL

KAP/cdr

cc: F. Edwin Hallman, Jr., Esq.
Edward A. Kazmarek, Esq.

fences and timber," 28 C.J.S. Easements § 114(d) (1941 & Supp. 1991) states:

> When a landowner grants a right-of-way for a pipe line under a contract providing for the payment of certain damages due to the construction or maintenance of the line, he cannot recover for any other damage. Thus, where a pipe line company agreed to be liable for damages to crops, timber, fences, and buildings, the company, by so specifying, denied liability for other damage.

The following authorities provide further support for this proposition:

1. Phillips Petroleum Company v. Morris, 518 S.W.2d 444 (Tex App. 1975) (oil company which agreed to pay for damage to "crops or improvements" under the lease agreement not liable for loss of future crops caused by damage to soil).

2. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N.W. 728 (1954) (where defendant contracted to pay for damages to "crops, surfaces, fences or other improvements", court interpreted contract to exclude all other damages).

3. Shell Pipe Line Corporation v. Coston, 35 S.W.2d 1056 (Tex. App. 1931) (pipe line company agreed in easement to be liable for damages to crops, timber, fences and buildings and by so specifying denied liability for other damages).

4. Lone Star Gas Co. v. Baccus, 11 S.W.2d 355 (Tex. App. 1928) (arbitration award for injury to land unenforceable where contract specified payment for damage to crops or fences).

With regard to the doctrine of caveat emptor which was discussed during oral argument, Plantation provides the following authorities:

1. Sosebee v. Hoitt, 157 Ga App. 768, 278 S.E.2d 700, 702 (1981) (rule of caveat emptor strictly applied in context of real property).

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June 10, 1992

JUN 12 1992

Ms. Victoria McLaughlin, Clerk
Georgia Court of Appeals
433 State Judicial Building
Atlanta, Georgia 30334

Re: Peter F. Hoffman, et al. v. Atlanta Gas Light Co., et al. (Case No. A92A1352)

Dear Ms. McLaughlin:

Under Rule 12 of the Georgia Court of Appeals, the Appellee, Plantation Pipe Line Company (Plantation), wishes to provide the Court with additional pertinent and significant authority. The authority concerns the doctrine of caveat emptor and the following language of the Easement Agreement (R.687) cited by the Appellant in oral argument on June 3, 1992:

> The Grantee, by the acceptance hereof, agrees to bury the pipelines so that they will not interfere with the cultivation of the land, and also to pay any damage to crops, fences and timber, which may arise from laying, maintaining, operating or removing such pipelines.

During oral argument, Appellants asserted that the term "cultivation" in the Easement Agreement should be interpreted to include sale of the property for commercial development and that this language supported Appellants' claim for breach of the Easement Agreement. The following citation is relevant to this contention which was first raised by Appellants at oral argument. In Cowart v. State, 62 Ga. App. 559, 8 S.E.2d 7289, 730 (1940), the court limited the meaning of "cultivated land" to growing crops, the preparation of land for a crop or the intent to devote the land to growing crops in due season where the land was used for growing crops in the past.

As to the remaining portion of the above-quoted language in the Easement Agreement concerning payment for damage to "crops,

2. Dooley v. Berkmer, 113 Ga App. 162, 147 S.E.2d 685, 686 (1966) ("Vendee accepts property as it is and assumes full responsibility for defects").

Finally, Plantation notes that on page 4 of their Reply Brief to Appellee Plantation Pipe Line Company, Appellants cited the district court opinion in Philadelphia Electric Co. v. Hercules, Inc., et al., 587 F. Supp 144 (E.D. Penn 1984) for the proposition that a vendor could be held accountable for the continuation of a nuisance after he transfers the land. In fact, the Third Circuit Court of Appeals reversed the district Court and held that the rule of caveat emptor barred a private nuisance cause of action against a remote vendor for environmental contamination. Philadelphia Electric Co. v. Hercules, Inc. et al., 762 F.2d 303, 313-14 (3d Cir. 1984).

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June 10, 1992

JUN 12 1992

Ms. Victoria McLaughlin, Clerk
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Re: Peter F. Hoffman, et al. v. Atlanta Gas Light Co., et al. (Case No. A92A1352)

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As to the remaining portion of the above-quoted language in the Easement Agreement concerning payment for damage to "crops,

Edward T. Floyd, Esq.
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This 10th day of December, 1992.

F. Edwin Hallman

F. EDWIN HALLMAN, JR.
State Bar of Georgia #319800

For DECKER & HALLMAN
Attorneys for Appellants

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IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN; MARIE BOATWRIGHT HOFFMAN; ELIZABETH BOATWRIGHT BELL; and J. K. BOATWRIGHT, III,	)	
Appellants,	)	
v.	)	APPEAL CASE NO. A92A1352
ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY,	)	
Appellees.	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following counsel in the foregoing matter with a copy of Appellants' Response to Appellee Plantation Pipe Line Company's Motion for Reconsideration by placing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to:

Edward A. Kazmarek, Esq.
Carol R. Geiger, Esq.
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Charles A. Perry, Esq.
Hunton & Williams
2500 One Atlanta Plaza
950 East Paces Ferry Road
Atlanta, Georgia 30326

III. CONCLUSION

PPL's Motion for Reconsideration fails to meet the requirements of Georgia Court of Appeals Rule 48 and should be denied.

Respectfully submitted this 10th day of December, 1992.

F. EDWIN HALLMAN, JR.
State Bar of Georgia #319800

DAVID C. MOSS
State Bar of Georgia #526565

For DECKER & HALLMAN
Attorneys for Appellants

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App. 407, 203 S.E.2d 597 (1973). See, Appellants' Reply to PPL, pp. 20 through 21.

This Court correctly applied controlling authority and was correct in reversing the trial court's grant of summary judgment.

E. PPL Failed to Set Forth a Fact or Controlling Authority Which was Misapplied or Overlooked by this Court.

PPL's Motion for Reconsideration is a condensed restatement of PPL's arguments contained in PPL's Appellate Brief. PPL continues to misapply the law and misconstrue the facts in this case.

The presence of the contamination is a continuing nuisance because it continues to spread, which increases the expense of abatement and removal. The presence of the contamination is a continuing trespass because it is uncontroverted that: (1) PPL placed the 42,000 gallons of contamination on Appellants' property; (2) the contamination can be removed; and (3) Appellants will be able to use and enjoy fully their property when the contamination is removed. Further, a jury should be allowed to determine if PPL complied with its obligations under the Easement Agreement.

that this Court misapplied or overlooked a point of law. See, PPL Appellate Brief, pp. 16 through 17.

D. PPL Breached its duty to Maintain the Easement to Prevent Interference with Appellants' Property Rights.

PPL failed to demonstrate that this Court overlooked controlling authority in reversing summary judgment of Appellants' claims for breach of the Easement Agreement. The argument that PPL is not liable for a breach of the Easement Agreement was briefed extensively in PPL's Appellate Brief. See, PPL's Appellate Brief, pp. 17 through 23. Further, PPL failed to cite to any controlling authority other than the cases of Atlantic Coastline Ry. v. Georgia, Ashburn, Sylvester & Camilla Ry., 91 Ga. App. 698, 87 S.E.2d 92, 94 (1955) and Wittke v. Horne's Enterprises, Inc., 118 Ga. App. 211, 162 S.E.2d 898, 901 (1968), which were cited and argued in PPL's Appellate Brief. See, PPL's Appellate Brief, p. 19. Appellants addressed PPL's argument in detail, and specifically, PPL's misapplication of the above two cases in Appellants' Reply to PPL. See, Appellants' Reply to PPL, pp. 19 through 20. Appellants correctly argued the application of the court's holding in Lincoln Land Co. v. Palfery, 130 Ga.

Similarly, the court in Rowe addressed dirt that was deposited and presumed to be permanent in nature by the court. The court's decision in Rowe has no application in the case sub judice where it is uncontroverted that the contamination continues to migrate, but is abatable.

This Court, therefore, did not overlook any facts or misapply any provision of law to the facts of the case sub judice. PPL failed to address any mistake in the Court's opinion with regard to facts or law. PPL only restated its arguments which were set forth it PPL's Appellate Brief. PPL's Motion for Reconsideration is not supportable as a matter of law and should be denied.

C. Appellants have been Damaged and are Entitled to Seek an Award of Damages Against PPL.

PPL's argument with respect to Appellants' claims being held by Appellants' predecessor in title is contrary to Georgia law as it applies to the facts of this case. See, Appellants' Reply to PPL, pp. 15 through 16. The damages which Appellants seek are those which accrued during the four-year period prior to the date of Appellants' Complaint, not damages suffered by a predecessor in title. PPL has provided only a recitation of its earlier argument, not an indication

In the case sub judice, it is uncontroverted that: (1) PPL released over 42,000 gallons of contamination into Appellants' property; (2) the contamination continues to exude and leach from the Easement into the soils and groundwater of Appellants' surrounding property; (3) the contamination can be removed and abated; (4) the expense of removal and abatement increases with the continued spread of the contamination; and (5) Appellants will be able to use and enjoy fully their property when the contamination is abated. The above facts are not addressed by PPL. Therefore, PPL has failed to apply properly the cases cited in PPL's Motion for Reconsideration.

Specifically, the court in Citizens held that liability could attach if the defendant committed an act or omission resulting in a nuisance. See, Appellants' Reply to PPL, pp. 15 through 16. It is uncontroverted that PPL released the 42,000 gallons of contamination, which is the source of the continuing, abatable nuisance in the case sub judice. PPL fails to understand the application of a statute of limitations to damages arising from a continuing nuisance which are not barred if they occurred within four years prior to filing of the complaint. Appellants suffered damages in the four years prior to filing suit against PPL as a direct result of an act or omission on the part of PPL.

B. The Court Correctly Applied Existing Nuisance and Trespass Law to the Facts of this Case.

PPL erroneously assumed that the contamination is not a continuing nuisance and trespass. PPL's subsequent argument based upon its assumption, which is without factual support, is equally flawed. PPL has not established that this Court misapplied or overlooked controlling authority in this case. See, PPL's Motion for Reconsideration, pp. 6 through 8. PPL has offered nothing new for this Court to consider.

PPL's arguments with respect to the application of R.P. Chatham v. Clark Laundry, Inc., 126 Ga. App. 652, 191 S.E.2d 589 (1972), Citizens and So. Trust Co. v. Phillips Petroleum Co., 192 Ga. App. 499, 385 S.E.2d 426 (1989) and Rowe v. Steve Allen & Assoc., Inc., 197 Ga. App. 453, 398 S.E.2d 717 (1990) are the same as set forth by PPL in its Brief of Appellee Plantation Pipe Line Company ("PPL's Appellate Brief). See, PPL's Appellate Brief pp. 8 through 11 and, specifically, 13 through 16. PPL's arguments have not changed; they only have been restated. Appellants addressed completely PPL's arguments in Appellants' Reply to Brief of Appellee Plantation Pipe Line Company (Appellants' Reply to PPL"). See, Appellants' Reply to PPL, pp. 9 through 15.

PPL also erroneously states that Appellants "failed to present any fact to support the assertion that the contamination is getting worse." (Emphasis added). See, PPL's Motion for Reconsideration, p. 6. Again, it is uncontroverted that as the contamination continues to exude and leach into the surrounding property from the Easement, the expense of remediation increases.[2] Accordingly, this Court was correct in reversing the trial court's grant of summary judgment.

---

equilibrium is established.") (Emphasis added).

[2] Q I just have a couple of follow-up questions. As a general principle, is it true that as contamination migrates it becomes more expensive to remediate?

A As a general rule, that's correct because you're dealing with greater volumes of materials, greater volumes of materials that have become contaminated.

Deposition of Jeffrey N. Bilkert, June 6, 1991, p. 104, (R. 825).

Plantation Pipe Line Company ("PPL"), has failed to set forth a justifiable basis for this Court to reconsider the November 24, 1992, Order and, therefore, PPL's Motion for Reconsideration should be denied.

II. ARGUMENT AND CITATION OF AUTHORITY

A. PPL'S Factual Background is Disingenuous.

The factual background set forth by PPL is correct until PPL's stated fact No. 5, which is blatantly incorrect and disingenuous. PPL did not cite to the record in support of the alleged "fact," because there is no support for this allegation in the record. Conversely, the uncontroverted testimony of Appellants' expert, Jeffrey N. Bilkert, establishes that the contamination is exuding and leaching from the Easement into the surrounding soils and groundwater. Further, Mr. Bilkert's uncontroverted testimony was that the expense of remediation increases with time as the quantity of contaminated soils and groundwater increases with time.[1]

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[1] Deposition of Jeffrey N. Bilkert, June 6, 1991, pp. 73-74, (R. 794-95) ("With groundwater movement, in particular, you will get some outward migration, if you will, of the contaminant front until a point of

IN THE COURT OF APPEALS

STATE OF GEORGIA

PETER F. HOFFMAN; MARIE BOATWRIGHT HOFFMAN; ELIZABETH BOATWRIGHT BELL; and J. K. BOATWRIGHT, III, Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

APPELLANTS' RESPONSE TO APPELLEE PLANTATION PIPE LINE COMPANY'S MOTION FOR RECONSIDERATION

COME NOW Appellants, Peter F. Hoffman, Marie Boatwright Hoffman, Elizabeth Boatwright Bell, and J.K. Boatwright, III, and respond to Appellee Plantation Pipe Line Company's Motion for Reconsideration and respectfully show this Court as follows:

I. INTRODUCTORY STATEMENT

This Court did not: (1) overlook a material fact in the record, a statute or a decision, which is controlling and which would require a different judgment from that rendered; or (2) erroneously construe or misapply a provision of law or a controlling authority. This Court's Order of November 24, 1992, which reversed the trial court's order of summary judgment was correct on all points of fact and law. Appellee,

IN THE COURT OF APPEALS

STATE OF GEORGIA

DEC 10 1992

PETER F. HOFFMAN; MARIE BOATWRIGHT HOFFMAN; ELIZABETH BOATWRIGHT BELL; and J. K. BOATWRIGHT, III, Appellants, v. ATLANTA GAS LIGHT COMPANY and PLANTATION PIPE LINE COMPANY, Appellees.	)	APPEAL CASE NO. A92A1352

APPELLANTS' RESPONSE TO APPELLEE PLANTATION PIPE LINE COMPANY'S MOTION FOR RECONSIDERATION

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December 10, 1992