Case No. 21-13663-JJ

In the United States Court of Appeals for the Eleventh Circuit

JARROD JOHNSON,
individually, and on behalf of
a class of persons similarly situated,
Plaintiff-Appellee,

v.

THE CITY OF DALTON, GEORGIA, acting through its
Board of Water, Light and Sinking Fund Commissioners,
d/b/a DALTON UTILITIES,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia, Rome Division
Civil Action No. 4:20-cv-0008-AT

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-4, the undersigned counsel for Appellee Jarrod Johnson, hereby certifies that the following persons and entities have or may have an interest in the outcome of this appeal:

1. 3M Company (NYSE: MMM)
2. Aladdin Manufacturing Corporation
3. Americhem, Inc.
4. Arrowstar, LLC
5. Chem-Tech Finishers, Inc.
6. The City of Dalton, Georgia, Acting Through Its Board of Water, Light and Sinking Fund Commissioners, d/b/a Dalton Utilities – Defendant-Appellant
7. Color Express, Inc.
8. Columbia Recycling Corp.
9. Cory Watson, P.C. – Counsel for Plaintiff-Appellee
10. Cycle Tex, Inc.
11. Daikin America, Inc.
12. Dalton-Whitfield Solid Waste Authority
13. Davis, Gary A. – Counsel for Plaintiff-Appellee
14. Davis & Whitlock, P.C. – Counsel for Plaintiff-Appellee
15. DyStar, L.P.
16. E.I. du Pont de Nemours and Company

17. Engineered Floors, LLC
18. Fibro Chem, LLC
19. Herring, Nina Towle – Counsel for Plaintiff-Appellee
20. IMACC Corporation
21. INV Performance Surfaces, LLC
22. JB NSD, Inc.
23. Johnson, Jarrod – Plaintiff-Appellee
24. Kelleher, Christopher J. – Counsel for Defendant-Appellant
25. Lutz, III, Hirlye R. "Ryan"– Counsel for Plaintiff-Appellee
26. Mann, Lindsey B. – Counsel for Defendant-Appellant
27. MFG Chemical, LLC
28. Milliken & Company
29. Mohawk Carpet, LLC
30. Mohawk Industries, Inc. (NYSE: MHK)
31. Oriental Weavers USA, Inc.
32. Polyventine LLC
33. Secoa Technology, LLC
34. Shaner, J. Houston – Counsel for Defendant-Appellant
35. Shaw Industries, Inc.
36. Shaw Industries Group, Inc.
37. Smith, Brooks M. – Counsel for Defendant-Appellant
38. Stone, Ryals D. – Counsel for Plaintiff-Appellee
39. Stone, William S. – Counsel for Plaintiff-Appellee

40. Tarkett USA, Inc.

41. The Chemours Company (NYSE: CC)

42. The Dixie Group, Inc. (NASDAQ: DXYN)

43. The Stone Law Group – Trial Lawyers, LLC – Counsel for Plaintiff-Appellee

44. Tapley, F. Jerome – Counsel for Plaintiff-Appellee

45. Thompson, Brett C. – Counsel for Plaintiff-Appellee

46. Totenberg, The Honorable Amy M. – District Judge, United States District Court for the Northern District of Georgia

47. Troutman Pepper Hamilton Sanders LLP – Counsel for Defendant-Appellant

48. Veira, E. Fitzgerald – Counsel for Defendant-Appellant

49. Watson, R. Akira – Counsel for Plaintiff-Appellee

50. Whitlock, James S. – Counsel for Plaintiff-Appellee

The undersigned counsel hereby certifies pursuant to 11th Cir. R. 26.1-3(b) that, other than as reflected above, no other publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee Jarrod Johnson ("Plaintiff") respectfully submits that oral argument in this appeal by Dalton Utilities is unnecessary, because "the dispositive issue or issues have been authoritatively decided." FED. R. APP. P. 34(a)(2)(B); 11th Cir. R. 34-3(b)(2). In particular, the Georgia Supreme Court's recent "consider[ation of] the contours of municipal immunity with respect to nuisance claims" and reaffirmation of the longstanding nuisance doctrine set out therein, are authoritative and decisive of this appeal, whether on jurisdictional grounds or its merits. *See Gatto v. City of Statesboro*, 860 S.E.2d 713 (Ga. 2021).

As demonstrated by *Gatto* and the long line of precedent it affirmed, Plaintiff's claim for abatement of a nuisance falls squarely within the nuisance doctrine, which holds that "a municipal corporation cannot, under the guise of performing a governmental function, create a nuisance dangerous to life or health or take or damage private property for public purpose, without just and adequate compensation first being paid." *Id*. at 717 (quoting *City of Thomasville v. Shank*, 437 S.E.2d 306, 307 (Ga. 1993), in turn quoting *Delta Air Corp. v. Kersey*, 20 S.E.2d 245, 250 (Ga. 1942) (compiling cases); *see also Gatto* 860 S.E.2d at 717-720 (compiling cases).

Contrary to Dalton Utilities' contention, the District Court's decision in reliance on *Gatto* reflects Plaintiff's arguments on Dalton Utilities' motion to

dismiss—namely, that municipal immunity did not bar Plaintiff's nuisance abatement claim because both "'municipal immunity from tort liability and municipal responsibility for nuisance are historic principles of Georgia law.'" *Id*. (quoting *Shank*, 437 S.E.2d at 307). While the *Gatto* Court later clarified that the phrase "nuisance exception" was a "misnomer" more aptly called the "nuisance doctrine," the District Court did not make any "*sua sponte*" holdings but instead applied the law that Plaintiff presented on issues that Dalton Utilities failed to either raise or respond to below.

Nonetheless, Plaintiff welcomes oral argument to the extent this Court finds that its decisional process will be significantly aided thereby.

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STATEMENT OF JURISDICTION

For the reasons articulated in Plaintiff's Motion to Dismiss Appeal for Lack of Jurisdiction and Reply in Support thereof, this Court has no jurisdiction over Dalton Utilities' appeal pursuant to the collateral order doctrine[1] first recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). As a result, the Court should dismiss Dalton Utilities' appeal for lack of jurisdiction.

The collateral order doctrine has "very narrow" confines in which only a "limited category of cases" fit. *SmileDirectClub,* 4 F.4th 1274, 1278 (11th Cir. 2021) (citations omitted). It imposes three "stringent" criteria, all of which must be met independently: the appealed order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Id.* (citation omitted); *see also Plaintiff A v. Shair,* 744 F.3d 1247, 1253 (11th Cir. 2014) ("If any one criteria is not met, jurisdiction cannot be invoked.") (cleaned up) (citations omitted).

[1] Dalton Utilities appeals from the District Court's September 20, 2021 Order denying Dalton Utilities' motion to dismiss Plaintiff's nuisance abatement claim, a non-final order over which this Court generally lacks jurisdiction. *See SmileDirectClub v. Battle*, 4 F.4th 1274, 1277 (11th Cir. 2021) ("As a circuit court, we generally only have jurisdiction over appeals from 'final decisions of the district courts.'") (quoting *Mohawk Indus., Inc. v. Carpenter,* 558 U.S. 100, 103 (2009), in turn quoting 28 U.S.C. § 1291)).

The collateral order doctrine is inapplicable to Dalton Utilities' appeal because Georgia's nuisance doctrine affords no immunity to municipalities for nuisance claims, and Dalton Utilities thus cannot establish immunity "from suit" where municipal nuisance immunity does not exist. Likewise, this purported immunity is inseparable from the merits. In fact, as anticipated, Dalton Utilities' brief only reinforces that this appeal does not seek resolution of "an important issue completely separate from the merits of the action . . . ." *SmileDirectClub*, 4 F.4th at 1278 (emphasis added).

While Dalton Utilities claims entitlement to sovereign immunity, it does so not on grounds that are separate from Plaintiff's claim, but on the merits themselves. Its arguments include: that (1) Plaintiff failed to sufficiently allege damage to his property, (Appellant Br. at 29-30); (2) the District Court erred in finding that Plaintiff has a property right in the water he purchases, (at 30-31); (3) Plaintiff's public nuisance claim is based only on shared harm with the public and do not "affect the special property rights" of Plaintiff and the putative class, (at 32-33); (4) Plaintiff fails to allege requisite affirmative acts by which Dalton Utilities created a nuisance, (at 45-49); and (5) Plaintiff fails to allege that Dalton Utilities had a duty to remove chemicals from its wastewater. (at 52-53).[2] As such, Dalton Utilities' arguments do

[2] As discussed herein, many of these arguments were not raised by Dalton Utilities before the District Court and instead are impermissibly raised for the first time on appeal to this Court.

not merely intertwine with or implicate the merits of Plaintiff's nuisance claim; they are on the merits—directly. Dalton Utilities' appeal also challenges the District Court's findings on the economic loss rule, (at 30-31) and Plaintiff's standing to sue for public nuisance (at 32-33)—making this appeal bear upon several of Plaintiff's common law claims against all Defendants.

STATEMENT OF THE ISSUES

Over the course of nearly 200 years, the principle of municipal immunity from tort and municipal responsibility for creating or maintaining a nuisance injurious to life, health, property, or the use and enjoyment thereof coexisted under Georgia common law. In 1974, the Georgia Constitution preserved these common law principles, while at the same time granting the Legislature the exclusive ability to waive sovereign immunity from that point forward. Plaintiff does not allege a statutory waiver of sovereign immunity, but instead that Dalton Utilities, a municipal entity, has created a nuisance injurious to life, health, his property, and his use and enjoyment thereof, as defined by Georgia common law and preserved in the Georgia Constitution. Does Dalton Utilities enjoy municipal immunity from Plaintiff's nuisance claim?

STATEMENT OF THE CASE

This is an individual and putative class action to redress unlawful environmental contamination and pollution in northwest Georgia; specifically, the ongoing pollution of surface waters in Upper Coosa River Basin, and the City of Rome's domestic water supply with toxic per- and polyfluoroalkyl substances. Plaintiff alleges that Defendants, including Dalton Utilities, have caused and contributed to this toxic water pollution. App'x I.418.

I. Course of Proceedings Below

Pursuant to FED. R. APP. P. 28(b) and 11th Cir. R. 28-2, Plaintiff adopts Section I of Dalton Utilities' Statement of the Case.

II. Statement of the Facts

A. Plaintiff's Allegations and Claims Against Dalton Utilities

Dalton Utilities operates the City of Dalton publicly owned treatment works ("POTW"), including three Water Pollution Control Plants ("WPCPs") that provide conventional treatment to wastewater before it is pumped to the 9,800-acre Riverbend Land Application System ("LAS") for land application and disposal. App'x I.418 at 14, 32-33. According to the Environmental Protection Agency ("EPA"), approximately 90% of the wastewater that enters the treatment facilities for disposal at the LAS originates from industrial sources, primarily carpet manufacturers. App'x I.418 at 32-33.

Other Defendants own and/or operate carpet manufacturing and related facilities in Dalton and use (or have used) per- and polyfluoroalkyl substances ("PFAS") in their industrial processes. App'x I.418 at 4-6, 11-21. PFAS are a large group of man-made chemicals that are extremely stable, heat resistant, and repel both oil and water. App'x I.418 at 22. Defendants and other members of the carpet industry in Dalton[3] have long utilized PFAS to impart water, stain, and grease resistance to carpet or other textile products. App'x I.418 at 5, 22. These processes generate industrial wastewater containing PFAS, which these carpet manufacturers and related entities discharge to the Dalton POTW operated by Dalton Utilities. App'x I.418 at 5, 32-34.

PFAS chemicals have no known environmental breakdown mechanisms, rendering them persistent in the environment. App'x I.418 at 22. Due to their persistence, PFAS resist degradation during treatment at Dalton Utilities' WPCPs and increase in concentration as these toxic chemicals accumulate in the LAS. App'x I.418 at 22, 34. Dalton Utilities has long known that its conventional treatment processes and land application will not remove PFAS prior to their discharge to the Conasauga River and its tributaries in and around the LAS. App'x I.418 at 34. Even

[3] Dalton, Georgia is known as the "Carpet Capital of the World," as over 90% of the world's carpet comes from manufacturing plants in Dalton, and large percentage of PFAS produced worldwide are used in Dalton to treat carpet, rugs, and other home textiles. App'x I.418 at 21.

historical applications of PFAS at the LAS continue to be discharged from the LAS, polluting the Conasauga River, its tributaries, and downstream waters for decades or longer after their initial application. App'x I.418 at 34-35. PFAS have been detected at dangerously high levels in Dalton Utilities' compost and sewage sludge, the soil, groundwater, and wastewater effluent at the LAS. App'x I.418 at 34.

Based on years of sampling and analysis, EPA, the Georgia Environmental Protection Division ("EPD"), and the University of Georgia, among others, have all directly linked untreated industrial wastewater discharged from the LAS as the source of PFAS contamination of the Conasauga River, the downstream Oostanaula River, and the City of Rome, Georgia's ("Rome" or "the City") public drinking water supply. App'x I.418 at 34-38. EPA has found that a "significant amount" of the wastewater effluent sprayed onto the Riverbend LAS "leaves" [the LAS] via surface waters and enters the Conasauga River," App'x I.418 at 33, where it then flows into and contaminates the Oostanaula River. App'x I.418 at 4-5, 32-37.

Rome uses a water intake on the Oostanaula River as its primary water source, and the City's drinking water supply has been contaminated with PFAS since at least 2009, if not decades earlier. App'x I.418 at 38. Rome has incurred great expense in attempting to partially filter PFAS from the City's drinking water supply through a temporary measure of granular activated carbon filtration. App'x I.418 at 4, 38-39. The City requires a new and permanent filtration system to completely remove all

PFAS chemicals, and the costs of both these temporary and permanent measures have been, and continue to be, passed on to water ratepayers in the form of increased rates. App'x I.418 at 39. The City estimates that ratepayers will receive 2.5% annual rate increases for the foreseeable future to address the PFAS contamination. App'x I.418 at 39.

Plaintiff Jarrod Johnson and the members of the putative class are owners and occupiers of property in Rome, Georgia and Floyd County who receive domestic water service through the Rome Water and Sewer Division ("RWSD") or Floyd County Water Department ("FCWD").[4] App'x I.418 at 4, 10. Based on the foregoing factual allegations, Plaintiff asserted state law claims against Dalton Utilities for Abatement of a Public Nuisance arising from the PFAS contamination of his and the class members' domestic drinking water originating from the Dalton Utilities LAS. App'x I.418 at 60-65. Plaintiff alleges the contamination of Rome's drinking water has caused he and the class members damage in multiple ways, including interference with the use and enjoyment of their property, damage to their property, endangering their health and well-being, and the payment of increased rates to cover the costs of removing the contamination. App'x I.418 at 4-5, 10, 40, 49, 62-63.

Plaintiff also states an individual claim against Dalton Utilities under the federal Clean Water Act's ("CWA") citizen suit provision, 33 U.S.C. § 1365(a), for

[4] The FCWD purchases its water from the City of Rome. App'x I.418 at 4.

the unlawful discharge of pollutants to surface waters of the United States without a permit. App'x I.418 at 2-3, 40-44. This claim is not the subject of Dalton Utilities' present appeal and remains pending before the District Court. *See* App'x IV.629 at 20-53 (denying Dalton Utilities' motion to dismiss Plaintiff's CWA claim).

B. The Parties' Arguments on Dalton Utilities' Motion to Dismiss

Despite conceding that "[t]raditionally, Georgia courts have not extended sovereign immunity to nuisance claims", Dalton Utilities moved to dismiss Plaintiff's nuisance abatement claim on sovereign immunity grounds. App'x II.474-1 at 37. Relying on *Ga. Dept. of Nat'l Res. v. Ctr. for a Sustainable Coast*, 755 S.E.2d 184 (Ga. 2014), Dalton Utilities asserted the Georgia Supreme Court held the 1974 amendment to the Georgia Constitution abrogated municipal liability for all nuisance claims except those that "implicate the 'just compensation for takings' concerns" of the Georgia Constitution, *See* App'x II.474-1 at 37-39, and that *Sustainable Coast* foreclosed the availability of injunctive relief for nuisance claims against municipalities. App'x II.474-1 at 39.

Plaintiff responded that *Sustainable Coast* did not involve municipal nuisance liability or overturn over a century of Georgia case law holding municipalities liable for maintaining a nuisance injurious to life, health and property, or in seeking injunctive relief. App'x III.511 at 35-36. In fact, the *Sustainable Coast* Court expressly left intact the "'longstanding principle'" observed in *City of Thomasville*

v. Shank, 437 S.E.2d 306, 307 (Ga. 1993) "that a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property." App'x III.511 at 35-36 n.22 (quoting *Sustainable Coast*, 755 S.E.2d at 190 (in turn quoting *Shank*, 437 S.E.2d at 307)).

The Parties presented similar arguments at the District Court's hearing, centering on the implications of the 1974 constitutionalization of sovereign immunity and its effects on municipal nuisance liability. App'x III.571 at 54-71, 98. Dalton Utilities argued that, while *Sustainable Coast* did not overrule *Shank*, the 1974 amendment to the Georgia Constitution nonetheless abrogated, even retroactively, all "judicially-created" exceptions to sovereign immunity, including all aspects of the "nuisance exception" but for those nuisances "that result[] in a taking." App'x III.571 at 55. Accordingly, Dalton Utilities contended that nuisances constituting "a danger to life and health" never implicated the takings clause and were also abrogated. App'x III.571 at 98. Indeed, Dalton Utilities argued that the Georgia Court of Appeals decision in *Gatto v. City of Statesboro*, 834 S.E.2d 623 (Ga. Ct. App. 2019) "foreclosed" any nuisance claim predicated on "danger to life and health." App'x III.571 at 98.

Plaintiff explained that *Sustainable Coast* could not have abrogated any aspect of the so-called "nuisance exception," including municipal liability for nuisances that constitute "a danger to health and life," because the 1974 amendment to the

Georgia Constitution preserved the common law on sovereign immunity as it stood in 1974. App'x III.571 at 68-70.

C. The District Court's Denial of Dalton Utilities' Motion to Dismiss

In the interim between the hearing and the District Court's order, the Georgia Supreme Court decided *Gatto v. City of Statesboro*, 860 S.E.2d 713 (Ga. 2021), which "directly confronted" the implications of *Sustainable Coast*—including the scope of municipal immunity and nuisance liability. App'x IV.629 at 85-86.

The District Court acknowledged that—far from "foreclosing" nuisances causing a danger to life and health—the *Gatto* Court reaffirmed the *Shank* court's holding:

> A municipality[,] like any other individual or private corporation[,] may be liable for damages it causes to a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or ministerial function. This exception to sovereign immunity is based on the principle that a municipal corporation cannot, under the guise of performing a governmental function, create a nuisance dangerous to life and health or take or damage private property for public purpose, without just and adequate compensation being first paid.

App'x IV.629 at 86-87 (quoting *Gatto* 860 S.E.2d at 717) (in turn quoting *Shank*, 437 S.E.2d at 306).

Thus, the District Court held that *Gatto* first reaffirmed the "traditional" scope of municipal nuisance liability under the common law, which was "'limited to situations where the alleged injury related to the physical condition of the plaintiff's

property or the plaintiff's use and enjoyment thereof.'" App'x IV.629 at 87-88 (quoting *Gatto*, 860 S.E.2d at 718) (compiling cases). In addition, the District Court echoed the *Gatto* Court's acknowledgment that these limits were expanded "to situations involving personal injury that did not involve any corresponding property injury" in *Town of Fort Oglethorpe v. Phillips*, 165 S.E.2d 141 (Ga. 1968) and subsequent cases. App'x IV.629 at 88 (citing *Gatto*, 860 S.E.2d at 719).

The District Court found that, when "sovereign immunity was 'enshrined in the Georgia Constitution'" in 1974, it "'preserved the common law doctrine as previously understood by Georgia courts.'" App'x IV.629 at 88 (cleaned up) (quoting *Bd. of Comm'rs of Lowndes Cty. v. Mayor & City Council of Valdosta*, 848 S.E.2d 857, 859 (Ga. 2020)), in turn citing *Sheley v. Bd. of Pub. Ed. for Savannah*, 212 S.E.2d 627 (Ga. 1975)). This included *Phillips*' 1968 expansion of the "traditional" understanding of municipal nuisance liability. The District Court acknowledged the *Gatto* Court's "concern about this reality," but that *Gatto* nonetheless left *Phillips* intact. App'x IV.629 at 89.

The District Court held that Plaintiff sufficiently alleged a nuisance claim against Dalton Utilities, both "for nuisance claims based on injury to property or the use and enjoyment thereof, and also under the more expansive post-*Phillips* notion, allowing for claims based on personal injury." App'x IV.629 at 91. The District Court reasoned that "Plaintiff has adequately alleged injury to property or the use

and enjoyment thereof, as well as additional personal injury harm." App'x IV.629 at 91.

III. Standard of Review

To the extent jurisdiction exists, Plaintiff agrees that this Court generally reviews a District Court's denial of both an immunity defense and a motion to dismiss *de novo*. *See McCullough v. Finley,* 907 F.3d 1324, 1330 (11th Cir. 2018). As Dalton Utilities' assertion of sovereign immunity equates to contending Plaintiff fails to state a claim for nuisance, this Court should 'accept the factual allegations in the complaint as true,' and [it] must view them 'in the light most favorable to [P]laintiff.'" *Speaker v. U.S. Dep't of Health and Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010)). "A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint against the legal standard set forth in Rule 8: "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Acosta v. Campbell*, 309 F. App'x 315, 317 (11th Cir. 2009) (quoting FED. R. CIV. P. 8(a)).[5]

[5] While Dalton Utilities asserts that the burden of demonstrating a waiver of sovereign immunity falls on the party seeking to benefit from it, Appellant Br. at 10, Plaintiff asserts no such waiver. Instead, pursuant to the nuisance doctrine, immunity is wholly non-existent. "[I]n the case of nuisance we are dealing not with a waiver . . . ." *Shank,* 437 S.E.2d at 308. *See Gatto,* 860 S.E.2d at 717 (Georgia Constitution "cannot . . . be understood to afford immunity" in the context of municipal liability for nuisance).

However, review should be limited to "legal theories and arguments . . . raised squarely before the district court." *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009). "This Court has repeatedly held that 'an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.'" *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (quoting *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994)) (add'l citations omitted). As explained by the *Access Now* Court:

> The reason for this prohibition is plain: as a court of appeals, [this Court] review[s] claims of judicial error in the trial courts. If [it] were to regularly address questions—particularly fact-bound issues—that district courts never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court.

Id. at 1331.

This Court should not consider the new arguments[6] raised by Dalton Utilities on appeal concerning the viability of Plaintiff's nuisance abatement claim that it failed to raise in the District Court.

[6] Plaintiff identifies each new argument raised for the first time on appeal by Dalton Utilities below.

SUMMARY OF THE ARGUMENT

Dalton Utilities contends that it is immune from suit for its toxic pollution of the drinking water for Plaintiff and the putative class members. But it is well settled Georgia law that municipalities do not enjoy immunity for creating or maintaining a nuisance that constitutes either a danger to life or health, or a taking or damaging of property. Moreover, Plaintiff's nuisance claim does not rest on a stale statement of Georgia law; to the contrary, the Georgia Supreme Court reaffirmed its viability only last year in recognizing that municipal entities, like any other individual or private corporation, may be liable for damages it causes to a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or ministerial function.

Despite the Georgia Supreme Court's recent and clear reaffirmation of municipal nuisance liability, which it named the "nuisance doctrine," Dalton Utilities argues that the doctrine's common law foundation was removed by the 1974 amendment to the Georgia Constitution. Not by any means. The Georgia Supreme Court's continued application of the nuisance doctrine speaks as loudly as its own words that pre-1974 caselaw "is the only way we can discern the nature of the sovereign immunity that the Georgia Constitution now preserves."

Dalton Utilities argues that it can only be liable if the nuisance it created and maintains constitutes a taking under the Georgia Constitution's just compensation

provision. Georgia law concerning municipal nuisance is not bound by these contours, but traditionally encompassed injuries related to the physical condition of the plaintiff's property or the plaintiff's use and enjoyment thereof. In decision after decision for over a century, these contours encompassed nuisances dangerous to life and health, or taking or damaging private property for public purpose.

Now that the District Court correctly recognized that Plaintiff's nuisance claim fits squarely within Georgia's traditional nuisance doctrine, Dalton Utilities also raises multiple arguments it never made below concerning the nature of Plaintiff's property interests that this Court need not reach. But if this Court does so in its discretion, the new arguments nonetheless lack merit.

First, Plaintiff clearly alleges that, by contaminating the water that Plaintiff and other ratepayers purchase at their properties, Dalton Utilities has damaged the water they purchase, has interfered with the use and enjoyment of the properties they own and occupy, and has endangered their health. This claim is well recognized in Georgia law.

Second, it is equally clear that Plaintiff and the class members have a property interest in their household water. While Dalton Utilities never argued otherwise, other defendants did in relation to Georgia's economic loss rule. And as it did on their motions to dismiss, this argument also strains credulity here. Dalton Utilities' non-binding authority that Plaintiff lacks a property interest in his groundwater is in

stark contradiction to Georgia law that holds the direct opposite, and Dalton Utilities does not even address the fact that Plaintiff's household water has been both purchased and reduced to his possession. Whether as groundwater or through its purchase and possession, Plaintiff's household water is plainly his property under Georgia law.

Third, Plaintiff's public nuisance claim rests not only on rights common to the public, but also special damage to their private property interests. Under controlling Georgia law, anything that damages a particular plaintiff's property, or renders it unfit for use, is not lost in a public nuisance, and he has standing to recover this special damage in public nuisance. Indeed, no matter how numerous those specially damaged may be, each is entitled to compensation for his or her injury.

Finally, the District Court also correctly applied parameters applicable to the "more expansive" arm of the nuisance doctrine arising in and after *Town of Oglethorpe v. Phillips*—which although Plaintiff addressed in response to its motion to dismiss, Dalton Utilities never responded to below. As the District Court correctly held, Plaintiff's Complaint sufficiently alleges that for many years, Dalton Utilities itself discharged toxic PFAS chemicals onto its LAS, despite knowing it was contaminated and reaching the Conasauga River. In no tortured analysis can Dalton Utilities' own, informed PFAS discharges be construed as "inaction" or "nonfeasance" for which only other parties or nature itself can be blamed. Because

Plaintiff states a claim under the traditional contours of the nuisance doctrine, this issue is not determinative, but the District Court's analysis is nonetheless correct.

ARGUMENT

I. The Nuisance Doctrine, a longstanding principle of Georgia common law enshrined in the Georgia Constitution, forecloses Dalton Utilities' claim to municipal immunity.

Dalton Utilities devotes a significant portion of its brief to a discussion of the purportedly limitless scope of municipal sovereign immunity under Georgia law. However, noticeably absent from this discussion—and fatal to Dalton Utilities' appeal on the merits—is any recognition of Georgia's common law "nuisance doctrine,"[7] under which a municipality has long been liable for creating or maintaining a nuisance which constitutes either a danger to life or health or a taking of property. *See, e.g.*, *Shank*, 437 S.E.2d at 307; *Delta Air Corp. v. Kersey*, 20 S.E.2d 245 (1942); *see also Gatto*, 860 S.E.2d at 717-720 (compiling cases). This historic principle was preserved by the 1974 amendment to the Georgia Constitution, and the District Court thus correctly found that Dalton Utilities is not entitled to sovereign immunity for Plaintiff's nuisance abatement claim.

A. Municipal liability for nuisance is a longstanding principle of Georgia common law.

"Both municipal immunity from tort liability and municipal responsibility for nuisance are historic principles of Georgia law." *Shank*, 437 S.E.2d at 307 (quoting

[7] In *Gatto*, the Georgia Supreme Court clarified that the moniker "nuisance exception"—used by Dalton Utilities throughout its brief—was a "misnomer," and found it was more apt to refer to the "nuisance doctrine" when analyzing whether municipal liability for nuisance may be imposed in a given case. 860 S.E.2d at 718.

Sentell, *Municipal Liability in Georgia: The "Nuisance" Nuisance,* 12 GA. ST. B.J. 11, 59 (1975) (emphasis added). In *Shank*, the Georgia Supreme Court "reaffirm[ed] the longstanding principle that a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property." *Id.* at 307 (emphasis added); *see also, e.g., Rouse v. City of Atlanta*, 839 S.E.2d 8, 13 (Ga. Ct. App. 2020) ("[A] municipality, whether exercising its governmental or its ministerial functions, is liable for … operating or maintaining a nuisance").

"[T]he doctrine of sovereign immunity and the nuisance [doctrine] which makes municipalities liable for maintaining a nuisance have co-existed for many years in this state." *Shank*, 437 S.E.2d at 307. In fact, Georgia courts have applied this limitation on municipal sovereign immunity for over a century, and often in the context—like here—of municipal wastewater operations. *See* Sentell, *The Law of Municipal Tort Liability in Georgia,* 117 (4th ed. 1998) (the municipal nuisance doctrine "has received its greatest application" in the sewer and drainage context); *City of Columbus v. Myszka*, 272 S.E.2d 302, 305-06 (Ga. 1980) (affirming nuisance judgment against city for property damage caused by leaking municipal sewer/drainage system)[8]; *City of Rome v. Turk*, 219 S.E.2d 97, 99 (Ga. 1975) (plaintiff could maintain nuisance claim against city for construction of sewage

[8] disapproved on other grounds, *DeKalb Cty. v. Orwig*, 402 S.E.2d 513, 514 (Ga. 1991).

drainage ditch); *Bass Canning Co. v. MacDougald Constr. Co.*, 162 S.E. 687, 689-90 (Ga. 1932) (city could be liable in nuisance for damage caused faulty municipal drainage system); *Loughridge v. City of Dalton*, 143 S.E. 393, 395 (Ga. 1928) (plaintiff stated claim for to enjoin nuisance caused by city's pollution of stream); *Massengale v. City of Atlanta*, 39 S.E. 578 (Ga. 1901) (permitting sewer to become a nuisance gives cause of action against municipality); *City of Waycross v. Houk*, 39 S.E. 577 (Ga. 1901) (holding that "[a] general grant of power to establish in a city a sewerage system does not carry with it any right on the part of a municipality to create and maintain a nuisance dangerous to life or health"); *City of Atlanta v. Warnock*, 18 S.E. 135 (Ga. 1892) ("there can be no doubt of the power to restrain the city from continuing the nuisance" it created with defective sewerage system); *see also Kersey*, 20 S.E.2d at 250 (city not immune to nuisance and abatement claim concerning city airport); *City of Washington v. Harris*, 86 S.E. 220, 221 (Ga. 1915) (city could be liable for nuisance caused by power plant operation).

Just last year, the Georgia Supreme Court again upheld the continuing viability of the nuisance doctrine, finding that "[e]ven in the exercise of its governmental functions, . . . a municipality does not enjoy immunity from all liability." *Gatto*, 860 S.E.2d at 717 (emphasis in original). More specifically, the *Gatto* Court reaffirmed the nuisance doctrine's establishment of municipal liability for nuisance as set forth in *Shank*, holding that "[a] municipality[,] like any other

individual or private corporation[,] may be liable for damages it causes to a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or ministerial function." *Id.* at 717 (quoting *Shank*, 437 S.E. 2d at 306) (emphasis in original).

Therefore, as the District Court correctly held, Georgia law "allows for a nuisance claim against a municipality for injury to property (or the use and enjoyment thereof)" like that alleged by Plaintiff. App'x IV.629 at 89. And that Plaintiff seeks injunctive relief, as opposed to damages, is of no import because Georgia courts have also long allowed an injured plaintiff to seek injunctive relief for nuisance claims against a municipality. *See, e.g.*, *Myszka*, 272 S.E.2d at 305–06; *Baranan v. Fulton County*, 209 S.E.2d 188, 191 (Ga. 1974); *Loughridge*, 143 S.E. 2d at 395.

B. The 1974 amendment to the Georgia Constitution preserved the common law nuisance doctrine as it existed in 1974.

Plaintiff agrees with Dalton Utilities that the 1974 amendment to the Georgia Constitution "gave sovereign immunity constitutional status," Appellant Br. at 15-16; however, that amendment preserved both sovereign immunity and the nuisance doctrine as they had evolved in common law up until 1974. It did not set the clock back 200 years to 1784 when English common law was first carried over into Georgia common law.

Dalton Utilities acknowledges that the "constitutionalization of sovereign immunity had the effect of 'reserv[ing] constitutionally the common-law doctrine of sovereign immunity as traditionally understood by Georgia courts.'" Appellant Br. at 31 (quoting *Dep't of Transp. v. Mixon*, 864 S.E.2d 67, 70 (Ga. 2021) (emphasis in original)). However, Dalton Utilities simultaneously takes an untenable position wholly without support in Georgia jurisprudence: that the "traditional understanding" preserved in 1974 is the English common law as it stood in 1784—not the common law of Georgia developed over nearly 200 years before the 1974 amendment. Appellant Br. at 16, 38 (arguing "the legislature . . . reserve[ed] … the bright-line version of sovereign immunity—without any judge-made exceptions that may have arisen in the interim. . . .").

The Georgia Supreme Court squarely rejected Dalton Utilities' proposition in *Gatto*, where it "granted certiorari to consider the contours of municipal immunity with respect to nuisance claims." *Gatto*, 860 S.E.2d at 715. To determine these contours, the Court examined pre-1974 precedent and concluded that the scope of municipal immunity had always been limited under the nuisance doctrine. *Id.* at 717-21. Even concerning the "outer limits of municipal nuisance liability" under Georgia common law, the *Gatto* Court again emphasized that "[t]his Court now has no authority to alter these outer limits of municipal nuisance liability," *id.* at 720-21 (emphasis added), because "[o]nce the doctrine of sovereign immunity attained

constitutional status in 1974, courts no longer had the authority to abrogate or modify the doctrine." *Id.* at 721 (emphasis added) (quoting *Sustainable Coast*, 755 S.E.2d at 187).

The 1974 amendment thus preserved all pre-1974 appellate decisions applying municipal immunity under the common law, including over a hundred years of precedent in which Georgia courts have repeatedly affirmed the nuisance doctrine—that a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or damaging or taking of property. *Id.* at 718-721; *see also Shank*, 437 S.E.2d at 307 (observing that the Georgia Supreme Court had "upheld the well-settled validity of the nuisance [doctrine] in suits against municipal corporations" after passage of the 1974 amendment).

Aside from the obvious practical difficulties of ascertaining the scope and substance of the common law doctrine of sovereign immunity constitutionalized in 1974 without reference to the preceding judicial decisions that crafted that doctrine, Dalton Utilities fails to offer any controlling or apposite authority to support the radical proposition that the common law of England in 1784—the year Georgia adopted it—determines the scope of municipal immunity under Georgia law, as opposed to the decisions of Georgia courts during the intervening two centuries.

Moreover, Dalton Utilities' own authority undercuts its argument. In one of the first post-amendment decisions on the subject, the Georgia Supreme Court held

that the common law doctrine of sovereign immunity "as it has heretofore existed in this state cannot be abrogated or modified by this court." *Sheley v. Bd. of Pub. Ed. for Savannah*, 212 S.E.2d 627, 628 (Ga. 1975) (emphasis added). Revisiting this issue in 2017, the Court confirmed *Sheley*'s "acknowledge[ment] … that sovereign immunity at common law, as it long had been understood by Georgia courts, and the sovereign immunity reserved by the 1974 amendment were one and the same." *Lathrop v. Deal*, 801 S.E. 2d 867, 876 (Ga. 2017).

Dalton Utilities relies primarily on the Georgia Supreme Court's 2014 statement in *Sustainable Coast* that "[o]pinions of Georgia appellate courts dealing with the judicial application of sovereign immunity prior to the 1974 constitutional amendment are not applicable to claims against the State arising after the 1974 amendment because the 1974 amendment created 'an entirely new ball game' with regard to sovereign immunity." *Sustainable Coast*, 755 S.E.2d at 190-91 (quoting *S. LNG, Inc. v. MacGinnitie*, 719 S.E.2d 473 (Ga. 2011) (Benham, J., dissenting)); Appellant Br. at 36-37. However, the Court's subsequent decisions demonstrate that this statement did not have the sweeping effect that Dalton Utilities contends.

First, the Georgia Supreme Court clarified that the 1974 amendment created a "new ball game" only "[i]n the sense that [it] divested the courts of any authority they might previously have had to abrogate or modify the doctrine of sovereign

immunity" after that point. *Lathrop*, 801 S.E.2d at 876, n.14. It further explained three years later:

> [T]o the extent that we ever had the authority to alter the parameters of sovereign immunity or recognize new exceptions, the constitutionalization of sovereign immunity took away any such authority. But that does not mean that our pre-1974 case law is irrelevant; indeed, it is the only way that we can discern the nature of the sovereign immunity that the Georgia Constitution now preserves.

Valdosta, 848 S.E.2d at 861 n.2 (emphasis added) (citation omitted). The Court continued,

> The 1974 amendment did not change the scope of sovereign immunity; it merely gave it a new constitutional status that put changes beyond the reach of the courts.

Id. (emphasis in original).[9]

Therefore, the Georgia Supreme Court has been clear in a consistent line of cases between 1975 and 2021 that the 1974 constitutional amendment preserved

[9] That the *Sustainable Coast* court overturned *Int'l Bus. Machines Corp. v. Evans*, 453 S.E.2d 706 (Ga. 1995), in no way "illustrates" that pre-1974 caselaw is inapplicable to municipal nuisance liability. *See* Appellant Br. at 36-37. Not only has the Georgia Supreme Court expressly held otherwise in subsequent cases, but *IBM* relied on pre-1974 cases for the proposition that it could create new exceptions to sovereign immunity after the 1974 amendment. *See Sustainable Coast*, 755 S.E.2d at 190-91; *Evans*, 453 S.E.2d at 708. As the *Lathrop* court clarified, "[i]n the sense that the 1974 amendment divested the courts of any authority they might previously have had to abrogate or modify the doctrine of sovereign immunity, it 'created an entirely new ball game.'" 801 S.E.2d at 876 (quoting *Sustainable Coast*, 755 S.E.2d at 876 n.14). It is unremarkable that courts cannot rely on pre-amendment case law to create new, post-amendment exceptions.

common law as it had evolved until 1974, including the nuisance doctrine establishing municipal liability for nuisance.

II. The District Court correctly held that Plaintiff's claim for abatement of a nuisance falls within the nuisance doctrine.

Plaintiff's alleged injuries fit within the nuisance doctrine, as it was traditionally understood, which encompasses damage to property and the interference—e.g., through offensive odors, sewage overflows, or noise and dust from low-flying aircraft—with the use and enjoyment of one's property. *See, e.g.*, *Gatto*, 860 S.E.2d at 718 (compiling cases); *Myszka*, 272 S.E.2d at 305-06; *Kersey*, 20 S.E.2d at 247; *MacDougald*, 162 S.E. at 688. Thus, the District Court correctly held that:

> Plaintiff's Complaint sufficiently alleges a nuisance claim against Dalton Utilities under [] the more constrained understanding of the nuisance doctrine, allowing only for nuisance claims based on injury to property or the use and enjoyment thereof. . . .

App'x IV.629 at 91; *see also id.* at 13-14, 71-72 (setting out Plaintiff's allegations of property damage and interference with the use and enjoyment of his property), at 84-88 (walking through contours of traditional municipal nuisance liability as discussed in *Gatto*).

A. Plaintiff is not required to allege a taking of property to state a claim for nuisance against a municipality.

Dalton Utilities argues that the traditional (or in the District Court's view, "more constrained") nuisance doctrine establishing municipal nuisance liability

requires a taking under the Georgia Constitution's just compensation provision. But the preserved, traditional understanding of the nuisance doctrine is not so narrow.

The Georgia Supreme Court articulated this clearly in *Gatto*, stating, "[t]raditionally, a municipality's liability in nuisance was limited to situations where the alleged injury related to the physical condition of the plaintiff's property or the plaintiff's use and enjoyment thereof." 860 S.E.2d at 718. This includes nuisances "dangerous to life and health or tak[ing] or damag[ing] private property for public purpose. . . ." *Id.* at 717 (quoting *Shank*, 437 S.E.2d at 307, in turn quoting *Kersey*, 20 S.E.2d at 250).

Dalton Utilities nevertheless insists that Plaintiff's nuisance claim must "implicate the takings prohibition" by alleging an actual taking under *Sustainable Coast*, which, Defendant claims, "significantly limited the application of the 'nuisance exception' to municipal sovereign immunity" by essentially equating it to a taking. Appellant Br. at 25. However, *Sustainable Coast*'s application is not so broad.

First, *Sustainable Coast* did not even involve a nuisance claim against a municipality but a challenge to state administrative actions. 755 S.E.2d at 186-87. And municipal immunity has always been treated differently from state or county immunity when it comes to nuisance claims. *See, e.g.*, *Stanfield v Glynn Cty.*, 631 S.E.2d 374, 377 (Ga. 2006) ("Counties, unlike municipalities, can be liable for

conditions created on private property only under the constitutional eminent domain provisions against taking or damaging such property for public purposes without just and adequate compensation. . . ."); *Duffield v. DeKalb Cty.*, 249 S.E.2d 235, 237 (Ga. 1978) ("A county, unlike a municipality, is not, however, generally liable for creating nuisances.") (citations omitted); *see also Pribeagu v. Gwinnett Cty.*, 785 S.E.2d 567, 569 (Ga. Ct. App. 2016) (same) (citations omitted); *Liberty Cty. v. Eller*, 761 S.E.2d 164, 167 (Ga. Ct. App. 2014) (same) (citations omitted).

Although Dalton Utilities argues that cities enjoy the same immunity as the state, this is true only insofar as they are immune from suit for negligence in the performance of their governmental functions. *See Gatto*, 860 S.E.2d at 716 ("Municipalities performing their governmental functions have long been afforded immunity from civil liability akin to the immunity afforded to the State."). Georgia courts have always treated municipal immunity distinctly when it comes to nuisance, reflecting also their separate basis in the state constitution. *See id.* at 716 n.3 ("[W]e have held squarely that the current version of Article I, Section II, Paragraph IX does not apply to municipalities.") (referencing GA. CONST. Art. 9, § 2 ¶ IX); *see also Beasley v. Georgia Dep't of Corr.*, 861 S.E.2d 106, 112, n.14 (Ga. Ct. App. 2021), (acknowledging, "as our Supreme Court [in *Gatto*] recently noted (albeit with some degree of skepticism)—that there may be recovery for personal injuries sustained by the maintenance of a nuisance in the municipality context under certain

circumstances," and distinguishing this aspect of municipal immunity from state sovereign immunity) (citing, among others, *State Highway Dep't v. Barrett*, 185 S.E.2d 624, 625 (Ga. Ct. App. 1971) (declining to apply *Phillips*, which dealt with the liability of a municipality, because the State Highway Department "cannot be equated to a municipality" as "[i]t is an agency of the State and a part of the sovereign"), *cert. denied* (Nov. 2, 2021)).

The Georgia Supreme Court's recent decision in *Gatto* (which, unlike *Sustainable Coast*, addressed the scope of municipal liability for nuisance) also forecloses Defendant's argument. The *Gatto* Court quoted the same language from *Shank* echoed in *Sustainable Coast*, but it did not adopt the interpretation that Dalton Utilities advances here. Replacing the "misnomer" of "nuisance exception" employed in *Shank* with the correct "moniker" of "nuisance doctrine," the *Gatto* Court instead observed that the doctrine traditionally limited municipal nuisance liability "to situations where the alleged injury related to the physical condition of the plaintiff's property or the plaintiff's use and enjoyment thereof." *Id*. at 718.

In concluding that the limitation imposed by the nuisance doctrine "reflected [its] roots in our Constitution's Takings Clause," the *Gatto* Court cited *Kersey*, 20 S.E.2d at 250, which itself demonstrates that a plaintiff is not required to allege an unconstitutional taking to also state a nuisance claim. While the *Kersey* plaintiff alleged both, the Georgia Supreme Court did not even reach his takings claim—

instead holding that he stated a claim for nuisance based on the operation of an airport that "constitute[d] an unreasonable interference with the health of petitioner and his family." *Id.* at 250.

Dalton Utilities' insistence that *Sustainable Coast* "revisited *Shank* and . . . significantly limited the nuisance exception" (at 25) ignores the *Gatto* Court's examination of the nuisance doctrine as developed by Georgia courts for over a century. Indeed, its entire argument attempts to resurrect the exact type of confusion the Georgia Supreme Court dispelled in clarifying that, although *Shank* used the term "exception," the Court was referencing entrenched, common law principles limiting the scope of municipal immunity that were preserved in the 1974 amendment.

B. Dalton Utilities' new arguments concerning Plaintiff's property interests should not be considered but nonetheless lack merit.

For the first time on appeal, Dalton Utilities argues that Plaintiff's nuisance claim "does not implicate the Just Compensation Provision" based on multiple new grounds related to Plaintiff's alleged property interests that it did not raise below.[10]

[10] Dalton Utilities' motion to dismiss consisted of two arguments based on *Sustainable Coast*; first, that it precluded all injunctive relief against municipalities, even for nuisance—an argument seemingly abandoned on appeal. *See* App'x II.474-1 at 39. Second, it contended that, post-*Sustainable Coast*, only nuisance claims that "implicate the 'just compensation for takings' concerns" of the Georgia Constitution were actionable against municipalities. Given the Supreme Court's subsequent decision in *Gatto*, which expressly rejected its interpretation of *Sustainable Coast*, Dalton Utilities now resorts to new arguments to this Court. Indeed, Dalton Utilities' briefing and oral argument below is devoid of any challenge to the substantive validity, pleading sufficiency, or constitutional implications of Plaintiff's allegations

See Appellant Br., § II.2 at 27-33. This Court should not decide arguments raised for the first time on appeal. *See, e.g., Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). But even if this Court does so in its discretion, these new arguments lack merit.

1. The District Court correctly found Plaintiff sufficiently alleged a nuisance based on injury to property or the use and enjoyment thereof.

Dalton Utilities first argues the District Court's ruling is "inconsistent with the nuisance-based allegations" in Plaintiff's complaint, which it contends are limited solely to "increased risk of physical harm" and having to "pay the added costs" of removing PFAS from the drinking water. Appellant Br. at 29 (citing App'x I.418 at 62-64). According to Dalton Utilities, neither of these alleged harms "implicated the taking or damaging of Plaintiff-Appellee's private property" and thus "failed to trigger application of the narrow exception to municipal sovereign immunity for takings-based nuisance claims." Appellant Br. at 29 (emphasis in original).

Dalton Utilities distorts both the District Court's decision as well as Plaintiff's allegations.[11] The Complaint makes it clear that Plaintiff has alleged interference

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that the alleged nuisance caused "property damage" to, or "interfere[d] with the property rights of[,] Plaintiff and the Proposed Class." *Compare* App'x I.418 *with* App'x II.474-1 at 1-40.

[11] Dalton Utilities also misrepresents the District Court's holding as a "*sua sponte*" ruling that Plaintiff "'allege[d] a nuisance claim against Dalton Utilities under the

with his use and enjoyment of property. Plaintiff alleges that he and the class members are owners and occupiers of property, whose household water supply that they purchase has been contaminated with PFAS. App'x I.418 at 4-5, 60. In that capacity, he alleges the water contamination:

> cause[d] interference with the property rights of Plaintiff and the Proposed Class Members and would place, have placed, and continue to place, them at increased risk of physical harm, as well as cause them to incur additional, otherwise unnecessary expense to acquire drinking water for themselves and their family[;]
>
> . . .
>
> caused "losses for the increased rates and surcharges incurred as ratepayers for the costs of filtering PFAS from their drinking water[; and that]
>
> . . .
>
> Plaintiff has been, and will continue to be, directly and substantially injured in use and enjoyment of his property as a direct result of Dalton Utilities' . . . violations of the [CWA], and the contamination of the Rome water supply in particular

App'x I.418 at 10, 62-64.

Just Compensation Provision" that Plaintiff "never argued below." Appellant Br. at 28. That's not what the District Court held; instead, applying the correct framework set out in *Gatto* and *Shank*, the District Court held Plaintiff stated a claim under the "more constrained understanding of the nuisance doctrine" discussed therein, "allowing only for nuisance claims based on injury to property or the use and enjoyment thereof. . . ." App'x IV.629 at 91. Again, Dalton Utilities failed to address below any of Plaintiff's property-related allegations that were relevant to the court's ruling and the nuisance doctrine, and its attempt to flip the script now is as obvious as it is baseless.

While Dalton Utilities acknowledges Plaintiff's allegations of property damage and interference with its use and enjoyment, it argues for the first time on appeal that the allegations are "vague," "conclusory," and do not affect "private" property interests.[12] Appellant Br. at 30 (emphasis in original). The opposite is true: Plaintiff alleges that, by contaminating the water that Plaintiff and other ratepayers purchase at their properties, Dalton Utilities has damaged the water they purchase, has interfered with the use and enjoyment of the properties they own and occupy, and has endangered their health. App'x I.418 at 10, 62-63. As the *Gatto* Court recognized, all of these harms are "related to the physical condition of the plaintiff's property or the plaintiff's use and enjoyment thereof." 860 S.E.2d at 718 (citing examples, including *Kersey*, 20 S.E.2d at 250 (plaintiff stated claim for nuisance alleging the city constructed and operated airfield "as to constitute an unreasonable

[12] In multiple instances, Dalton Utilities selectively cites oral argument for the proposition that Plaintiff "conceded" that his nuisance claim did not involve a "taking" and, by extension, does not allege damage to property or interference with its use and enjoyment. *See* Appellant Br., at 7, 27, 30. This mischaracterizes Plaintiff's position. First, the complaint plainly alleges contamination of Plaintiff's household water and interference with the use and enjoyment of his property. And minutes later at oral argument, Plaintiff's counsel maintained that, "[u]nder Georgia law anything that damages a particular plaintiff's property is special damages for purposes of standing. And I believe the defendants seem to have conceded that the water the class purchases is, of course, theirs. And because it is contaminated, that damage is special—no matter how many persons it affects." App'x III.571 at 76-77. To the extent Dalton Utilities could manufacture a "concession" inconsistent with Plaintiff's complaint, it is belied by the same source that Dalton Utilities selectively cites.

interference with the health of petitioner and his family"); *Langley v. City Council of Augusta,* 45 S.E. 486, 489 (Ga. 1903) ("The power to construct and maintain a system of drainage does not carry with it the right to maintain it in such a way as to endanger the health of the inhabitants or injure their property."); *Reid v. Atlanta,* 73 Ga. 523, 525 (1885) ("Surely it is a nuisance to keep up a sewer which, when it rains, throws upon one's lot, and near the house where she resides, too, excrement, disagreeable in smell and hurtful to health.")));[13] *cf. Double Branches Ass'n, Inc. v. Jones,* 770 S.E.2d 252, 255 (Ga. Ct. App. 2015) (holding that access to running water is "necessary for the use and enjoyment of" landowners' property).

[13] *See also Kea v. Dublin,* 89 S.E. 484 (Ga. 1916) ("Although municipal authorities may have plenary power in the matter of collection, removal, and disposition of garbage, yet they cannot lawfully create, in connection therewith, a nuisance dangerous to health or life; and where such a nuisance is created, and its effect is specially injurious to an individual by reason of its proximity to his home, he has a cause of action for damages."); *City of Waycross v. Houk,* 39 S.E. 577 (Ga. 1901) (plaintiff entitled to equitable relief for city-maintained nuisance that caused "'noxious gases, noisome odors, pestilential stenches, poisonous vapors,' etc., which were dangerous to health, and caused sickness among her tenants"); *Smith v. Atlanta,* 75 Ga. 110, 111-12 (1886) ("[City's] grading and drainage must be done so that the same will not prove a nuisance to the citizens, impairing the health of families and producing noxious scents, thereby rendering the enjoyment of their property impossible. If it be so done, the city will be liable for damages."); *Butler v. Mayor of Thomasville,* 74 Ga. 570, 574 (1885) ("The discharge of filthy sewage upon the land of another, which may probably cause injury to the health and sickness in the family of such person, and where the nuisance is continuing and likely to be permanent, and where the consequences are not barely possible, but to a reasonable degree certain, a court of equity may interpose to arrest such nuisance before completed.").

2. The District Court correctly held Plaintiff and class members have a property interest in the water they purchase.

Dalton Utilities also argues the district court erroneously found that Plaintiff and the class members have a private property interest in the water they purchase. *See* Appellant Br., at 30-31. While Dalton Utilities made no argument concerning Plaintiff's alleged property interests below, other defendants contended that "allegations of harm to the water supply do not constitute harm to the Plaintiff but instead only potentially constitutes harm to the City of Rome." App'x IV.629 at 73 (emphasis in original). As the district court properly characterized this argument, it "assumes without justification or legal support, that plaintiff never has a property right in the household water he has paid for, even when it comes out of the faucet in his kitchen." App'x IV.629 at 73 (emphasis in original).

Dalton Utilities complains that the district court cross-referenced this "unrelated" analysis in finding Plaintiff "adequately alleged injury to property" (at 28), but it made no argument of its own to reference. *See* App'x II.474-1. But just like the economic loss rule arguments raised by other defendants, Dalton Utilities' contention that Plaintiff has no property interest in the water he purchases and pours from his faucets "strains credulity." App'x IV.629 at 73. And, like the other defendants, Dalton Utilities here provides no "justification or legal support" for this radical position, and it "provid[es] no basis for differentiating between on-site

groundwater and on-site household water found in sewers and pipes." App'x IV.629 at 73-74. Instead, it cites several non-binding decisions on takings claims concerning groundwater or riparian rights in other jurisdictions where, unlike in Georgia, property owners have no right in groundwater. Appellant Br. at 31-32 (citing *Bd. of Water Works Trustees of Des Moines v. SAC Cty. Bd. of Supervisors*, 890 N.W.2d 50, 72 (Iowa 2017); *In re Town of Nottingham*, 904 A.2d 582, 592-93 (N.H. 2006); *Smith v. Summit Cty.*, 721 N.E.2d 482, 488 (Ohio Ct. App. 1998)).

Dalton Utilities fails to address the District Court's correct reliance on Georgia law, *see* App'x IV.629 at 73-74, which flatly contradicts its non-binding authority—*Nottingham* and *Summit County* in particular. *See* Appellant Br. at 31-32. *Compare Nottingham*, 904 A.2d at 592-93 (relying on Florida law to hold property owners have no property interest in groundwater under New Hampshire law) *and Summit County*, 721 N.E.2d at 485 (citing Florida law and holding no groundwater ownership under Ohio law) *with Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 498 S.E.2d 492, 495 (Ga. 1998) (distinguishing Georgia from Florida law: "In contrast, Georgia law provides that a property owner owns everything that is above and below his real estate" and holding "contamination of on-site groundwater alone is damage to the insured's own property."). In light of

controlling Georgia law, *Nottingham* and *Smith* only demonstrate why Dalton Utilities is wrong.[14]

Nor does Dalton Utilities address the inescapable fact that Plaintiff's household water has been reduced to possession. *See* App'x IV.629 at 74 n.12. Its own non-binding authority concedes that, even in jurisdictions where groundwater is not property, it becomes so when "'reduced to actual possession and control.'" *Summit County*, 721 N.E.2d at 486 (quoting *Chino Valley v. Prescott*, 638 P.2d 1324, 1328 (Ariz. 1981)). So too in Georgia. *Cf. Reynolds v. State*, 115 S.E.2d 214, 217 (Ga. Ct. App. 1960) (holding that water in pipes was the object of larceny); *Stull v. State*, 196 S.E.2d 7, 9 (Ga. 1973) ("Theft or larceny is the taking of the property of another. . . .") (emphasis added); *see also Strawberry Water Co. v. Paulsen*, 207 P.3d 654, 660 (Ariz. Ct. App. 2008) (citing *Reynolds* and other cases for the proposition that "[o]ther jurisdictions similarly adopt the view that once water is reduced to possession and control within pipes, it transforms into personal property").

[14] For its part, *Des Moines* is distinguishable on its facts and applicable law. Although *Des Moines* involved a takings claim between two public entities, the court held that "[e]ven if we regarded the [plaintiff] as a private entity and accepted its factual allegations as true, no compensable takings claim is alleged" based on its riparian right to the Raccoon River that was contaminated with nitrates. 890 N.W.2d at 72. Needless to say, Plaintiff doesn't allege a taking of property based on a riparian right. He alleges a nuisance as an owner and occupant of real property serviced with water contaminated by Dalton Utilities. App'x I.418 at 60-65.

Whether as groundwater or by nature of its purchase and possession—or both—the district court correctly held Plaintiff's household water is his property, and its contamination likewise interferes with the use and enjoyment of the property he owns and occupies. App'x IV.629 at 73-74.

3. Dalton Utilities incorrectly reduces Plaintiff's nuisance claim to "harm that is common to and shared by the public as a whole."

Finally, in another new argument raised for the first time on appeal, Dalton Utilities contends that Plaintiff's nuisance claim does not involve "taking or damaging of 'private property'" because it is based on the right to "safe drinking water," which is a "right common to the general public." Appellant Br. at 32. While this public right is certainly an aspect of the alleged public nuisance, *see* App'x I.418 at 62, Dalton Utilities erroneously isolates this component from the special harm suffered by Plaintiff and the class members in their capacities as water purchasers and owners and occupants of property. *See* App'x I.418 at 61-64.

Beyond reference to two inapposite inverse condemnation cases, Dalton Utilities cites non-binding authority for the proposition that, merely by seeking to represent a class, Plaintiff "undercuts any argument that he has suffered a <u>specific</u> injury to his <u>private</u> property." Appellant Br. at 33 n.9 (emphasis in original).[15]

[15] Citing *Mays v. Tennessee Valley Auth.*, 274 F.R.D. 614, 625 (E.D. Tenn. 2011) (dealing with denial of class certification because of lack of typicality, not the question of specific injury to property for nuisance claims)).

Georgia law forecloses Dalton Utilities' attempt to conflate public and private harm. In holding that private citizens can always redress special damage to person or property, even where the public suffers similarly, the Georgia Supreme Court explained:

> If one should obstruct a highway, it would be a public nuisance, to be abated as such; but if an individual, in going along the road at night, should drive over the obstruction, and suffer injury as a result, he would be entitled to compensation for the damage done. If another should be specially damaged, he would likewise be entitled to recover. If a dozen individuals in turn were injured, they would each be authorized to sue the wrongdoer for the particular injury inflicted upon them. And for the reason that the defendant had not only created a public nuisance, but that he had likewise specially damaged particular individuals. It may have been that the nuisance here complained of could have been abated by the public, but if, before such action was taken, it could be clearly shown that plaintiff and his family had suffered, he would not lose his right to sue though others in the neighborhood had likewise suffered. The private special injury was not merged and lost in the general public injury, of which only the public could complain. If the nuisance results in the impairment of a common right which everyone may exercise-such as the use of a street-then the deprivation of that use hinders all persons alike from the enjoyment of the common right; and when it does not cause any special or peculiar damage it furnishes no cause of action in favor of a particular individual, although he may be greatly inconvenienced. The public at large suffer, and he suffers as a member of the public. The wrong must be righted by the public, instead of by many separate suits at the instance of each member of the body politic who has been inconvenienced. But the public cannot be said to enjoy health or suffer sickness. In the very nature of things, that can only be predicated of the individual. Whatever affects his health affects him specially, and him alone. Such damage is special damage within the meaning of the Code, and the fact that other citizens suffer similar special damages does not convert his injury into the nature of public damages. So, too, anything which damages a particular plaintiff's property, or renders it unfit for use, is not lost in the general and public nuisance.

Savannah, F. & W. Ry. Co. v. Parish, 45 S.E. 280 (Ga. 1903) (emphasis added). Indeed, "[n]o matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury." *Id.* at 281.

In other words, Dalton Utilities' contention that "any harm to alleged 'private property' rights in [his] drinking water[] is shared with every member of the proposed class" (at 32) is wholly irrelevant because, under Georgia law, "anything which damages a particular plaintiff's property, or renders it unfit for use, is not lost in the general and public nuisance." *Parish*, 45 S.E. at 280.[16] Its reliance on a concurring opinion in *City of Albany v. Stanford* (at 33) is misplaced for the same reason: Even if "the rationale for the municipality exception [is] that the government may not unreasonably interfere with private property rights," 815 S.E.2d 322, 329 (Ga. Ct. App. 2018) (Gobeil, J., concurring), *Parish* makes clear that "interfere[ence] with private property rights" may coexist with a public nuisance—a fact demonstrated by numerous Georgia appellate decisions.[17]

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[16] Dalton Utilities' citations to inverse condemnation cases are also distinguishable on these grounds, among others. *See Metro. Atlanta Rapid Trans. Auth. v. Fountain*, 352 S.E.2d 781, 782 (Ga. 1987) (because transit authority did not cut off plaintiff's access to public roads adjoining his property, he did not have a "special property [right] which entitles him to damages") (citation omitted); *Dep't of Transp. v. Robinson*, 580 S.E.2d 535, 538 (Ga. Ct. App. 2003) (referencing non-compensable "shared inconveniences" in inverse condemnation cases that do not rise to a property right) (citing *Dep't of Transp. v. Taylor,* 440 S.E.2d 652, 655 (Ga. 1994)).

[17] Despite the fact the *Stanford* court was not "shown" otherwise, *see* 817 S.E.2d at 329 (Gobeil, J. concurring), Georgia appellate courts have, in fact, permitted public nuisance claims against municipalities. *See, e.g., City of Dublin v. Hobbs*, 126 S.E.2d

III. While not determinative, the District Court correctly held that Plaintiff sufficiently alleged a nuisance under the "more expansive" arm of the nuisance doctrine.

In addition to the traditional, "more constrained understanding of the nuisance doctrine," the District Court also held that "Plaintiff's Complaint sufficiently alleges a nuisance claim against Dalton Utilities . . . under the more expansive" notion developed in and after *Town of Fort Oglethorpe v. Phillips*, 165 S.E.2d 141 (Ga. 1968). App'x IV.629 at 88-91.

The District Court's holding is not determinative of Plaintiff's nuisance claim because, as set out above, it rests on traditional nuisance injuries such as interference with the use and enjoyment of property and damage to property. Even so, Dalton

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655, 657 (Ga. 1962) (court did not err in refusing to charge jury on municipal immunity or in authorizing jury to hold city created a public nuisance in the maintenance of a drainage ditch from which the plaintiff was specially injured); *City of Savannah v. Herrera*, 808 S.E.2d 416, 427-28 (Ga. Ct. App. 2017) (affirming denial of summary judgment on municipal immunity grounds where fact issues precluded summary judgment on whether city maintained a public nuisance), *cert. dismissed as improvidently granted*, No. S18G0481 (Dec. 10, 2018); *City of Atlanta v. Broadnax*, 646 S.E.2d 279, 283-84 (Ga. Ct. App. 2007) (court did not err in denying city's motion for directed verdict on nuisance claim by multiple homeowners arising from flooding to their properties due to sewer overflow), disapproved on other grounds in *Royal Capital Development LLC v. Maryland Cas. Co.*, 728 S.E.2d 234 (Ga. 2012); *Anderson v. Columbus*, 264 S.E.2d 251, 252-53 (Ga. Ct. App. 1979) (city-county government not immune to nuisance claim by multiple residents arising from silt, sedimentation, and flooding onto their properties); *see also Gatto*, 860 S.E.2d at 718 (citing *Kersey*, 20 S.E.2d at 250-51, for the proposition that "city could be held liable for constructing and operating an operating an airport in such a way to endanger the life and health of adjoining landowners").

Utilities' arguments that later Georgia Supreme Court cases implicitly overruled or acknowledged *Phillips*' constitutional abrogation, and that the District Court erred in applying the "more expanded" nuisance doctrine framework, both lack merit.

A. The District Court correctly held that the "more expansive" nuisance doctrine survived the 1974 amendment.

Dalton Utilities criticizes the District Court's finding that *Gatto* "acknowledged" the 1974 amendment preserved the common law application of sovereign immunity and municipal nuisance liability as it stood in 1974, including its expansion in *Phillips*. Appellant Br. at 38-39 (citing App'x IV.629, at 85-86, 88-89). It argues this finding "directly conflicts" with binding precedent of the Georgia Supreme Court in *Sustainable Coast*, in which the Court stated pre-1974 caselaw "dealing with the judicial application of sovereign immunity" is "not applicable to claims against the State arising after the 1974 amendment because the 1974 amendment created an entirely new ball game with regard to sovereign immunity." 755 S.E.2d at 190-91.

As discussed above, the *Sustainable Coast* Court's statement did not erase all pre-amendment caselaw concerning sovereign immunity. Simply put, this would result in the preposterous conclusion that *Sustainable Coast* overruled the nuisance doctrine almost in its entirety, despite the Georgia Supreme Court's subsequent holdings and express clarifications. *See Valdosta*, 848 S.E.2d at 904 n.2 (Pre-1974 caselaw "is the only way that we can discern the nature of the sovereign immunity

that the Georgia Constitution now preserves. The 1974 amendment did not change the scope of sovereign immunity; it merely gave it a new constitutional status that put changes beyond the reach of the courts.") (emphasis in original); *see also Lathrop*, 801 S.E.2d at 876 n.14. Indeed, instead of recognizing *Phillips*' abrogation last year, the *Gatto* Court recognized that, after the amendment, it "now has no authority to alter the[] outer limits of municipal nuisance liability" as extended by *Phillips*. *Gatto*, 860 S.E.2d at 720-21 (emphasis added).

To be sure, the *Gatto* Court acknowledged that "some of us have doubts about the legal foundations of *Phillips*" and "[h]ow [it] relates to the subsequent constitutionalization of sovereign immunity." *Id.* at 719 n.6. But Dalton Utilities' contention that "some" justices' "doubts" "signaled that the continuing viability of [*Phillips*] is far from the 'reality'", Appellant Br. at 42, is an overreach. *Gatto* presented opportune occasion to recognize that *Sustainable Coast* signaled *Phillips*' abrogation—indeed, that is precisely what the Court of Appeals did. *See Gatto v. City of Statesboro*, 834 S.E.2d 623, 628 (Ga. Ct. App. 2019) (finding the city immune from personal injury claims in nuisance based on the holdings of *Sustainable Coast* and *City of Albany v. Stanford*, 815 S.E.2d 322 (Ga. Ct. App. 2018)). The Georgia Supreme Court's refusal to follow suit speaks volumes; indeed, it refused to do exactly what Dalton Utilities asks of this Court. *See* Appellant Br. at 36-37.

Bound by "the views of the state's highest court with respect to state law," *Wainwright v. Goode*, 464 U.S. 78, 84 (1983), the District Court spoke to *Phillips*' current validity, and it did so correctly. *See Gatto*, 860 S.E.2d at 720-21; *see also Beasley*, 861 S.E.2d at 111 n.14 ("We acknowledge—as our Supreme Court recently noted . . . that there may be recovery for personal injuries sustained by the maintenance of a nuisance in the municipality context under certain circumstances.") (citing *Gatto*, 860 S.E.2d at 718-719). Those views are binding here as well.[18]

B. The District Court correctly applied parameters of the "more expansive" nuisance doctrine to Plaintiff's allegations.

Taking instruction from *Gatto*, the District Court observed "parameters for th[e] more expansive notion of municipal liability" developed post-*Phillips*:

> "To be held liable for maintenance of a nuisance, the municipality must be chargeable with performing a continuous or regularly repetitious act, or creating a continuous or regularly repetitious condition, which causes hurt, inconvenience or injury; the municipality must have knowledge or be chargeable with notice of the dangerous condition; and, if the municipality did not perform an act creating the dangerous

[18] For the reasons explained above, Dalton Utilities' request to certify the question of *Phillips*' validity is inappropriate because it is not "determinative of the case." O.C.G.A. § 15-2-9; *see also Thai Mediation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 838 (11th Cir. 2020). *Phillips*' validity is not determinative of Plaintiff's nuisance claim, much less the remainder of his case against Dalton Utilities that remains pending in the District Court under the CWA. And to the extent it even constitutes a "key legal issue," that is insufficient. *See Thai Mediation*, 980 F.3d at 838; *see also Davis O'Leary VI, LTD v. Peterson Contractors, Inc.*, 2018 WL 10761924, at *3 (N.D. Ga. Dec. 7, 2018) (refusing to certify question to Georgia Supreme Court under O.C.G.A. § 15-2-9 because issues were not "determinative of the case" but only a "substantial component of Plaintiff's claims")

> condition . . . the failure of the municipality to rectify the dangerous condition must be in violation of a duty to act."

App'x IV.629 at 89 (citing *Gatto*, 860 S.E.2d at 719). As the District Court observed, the Georgia Supreme Court later reduced its instruction to three guidelines: "'the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence'; (2) 'the act must be of some duration'; and (3) the municipality failed to act 'within a reasonable time after knowledge of the defect or dangerous condition.'" App'x IV.629 at 89-90 (cleaned up) (quoting *City of Bowman v. Gunnells*, 256 S.E.2d 782, 784 (Ga. 1979)).[19]

Then applying these parameters, the District Court held Dalton Utilities was not entitled to sovereign immunity given Plaintiff's allegations that it:

> since as early as 2006, and every day since at least June of 2015, discharged PFAS from the LAS into the Conasauga River and its tributaries, and has also discharged raw sewage containing PFAS from its collection system into these waters on numerous occasions[; and it] has long known of these dangerous discharges of toxic chemicals, yet has taken no action whatsoever to address them but instead has continued to operate and maintain the Dalton POTW and the LAS in a manner where PFAS cannot be treated or removed, allowing these illegal discharges to be continuous and ongoing.

[19] Plaintiff argued below that his allegations satisfied these elements in his opposition to Dalton Utilities' motion to dismiss, App'x III.511 at 35, 37, which Dalton Utilities did not address. *See* App'x II.474-1, App'x III.533, App'x III.571 at 54-61, 98-99. Nor did Dalton Utilities argue that its alleged conduct could only be construed as nonfeasance. *See* App'x III.533 at 12-14, App'x III.571 at 54-61, 98-99. This Court should not address its new argument here. *See, e.g.*, *Bryant*, 575 F.3d at 1308.

App'x IV.629 at 90 (quoting App'x I.418 at 61). Based on this allegation, the District Court held Plaintiff alleged Dalton Utilities "perform[ed] the 'continuous or regularly repetitious act' of discharging PFAS into the Conasauga River for years, with full knowledge and awareness of its consequences, and failing to act to remedy this dangerous situation.'" App'x IV.629 at 90.

In the face of these allegations, Dalton Utilities nonetheless maintains that the district court erred in finding its conduct amounted to anything more than "mere nonfeasance in which it did not "perform[] a positive act that created the dangerous condition." Appellant Br. at 45 (emphasis in original). Instead, Dalton Utilities construes the Third Amended Complaint as alleging that only carpet manufacturers and other users of PFAS in Dalton "created" the nuisance by discharging the PFAS to the Dalton Utilities POTW. *See id.* at 47. And according to Dalton Utilities, this is "[a]t most," a theory of "nonfeasance." *Id.*

Dalton Utilities relies on a line of Georgia cases in which courts distinguished (a) actionable nuisances where municipalities created a dangerous condition by negligently maintaining traffic controls, from (b) those where the city merely failed to implement traffic controls to address a dangerous condition the city did not create. *See* Appellant Br. at 50-51 (citing *Tamas v. Columbus,* 259 S.E.2d 457, 458 (Ga. 1979) (city's failure to erect barriers or warnings of cliff nearby road not actionable in nuisance); *City of Alpharetta v. Vlass*, 861 S.E.2d 249 (Ga. Ct. App. 2021) (same

for failure to prohibit left turns at intersection); *Bowen v. Little*, 228 S.E.2d 159, 160 (Ga. Ct. App. 1976) (same for failure to install traffic light at intersection); *Hancock v. City of Dalton*, 205 S.E.2d 470, 472 (Ga. Ct. App. 1974) (same for failure to install traffic signals at railroad crossing)).

These cases "not[ed] 'a clear line between a discretionary nonfeasance and the negligent maintenance of something erected by the city in its discretion, in such manner as to create a dangerous nuisance.'" *Vlass*, 861 S.E.2d at 253 (cleaned up) (quoting *Tamas*, 259 S.E.2d at 458). Despite Dalton Utilities' arguments to the contrary, the district court correctly held that Plaintiff alleges the latter. *See* App'x I.418 at 32-38, 61. Dalton Utilities' own caselaw confirms it.

Dalton Utilities contends that *City of Atlanta v. Demita*, 762 S.E.2d 436 (Ga. Ct. App. 2014) resolved "similar" factual allegations and legal theories against nuisance liability. Appellant Br. at 48. The *Demita* plaintiff purchased a newly constructed home alongside a pre-existing city street that had no storm water sewer or drainage system. 762 S.E.2d at 439. Because the plaintiff's home rested on the low point of the street, it frequently experienced water pooling in front of her property. *Id.* The *Demita* court rejected two theories of nuisance liability, first that the street itself was a drainage system under the city's control that constituted a nuisance. *Id.* at 437, 439-440. It also rejected the plaintiff's alternate theory that the

city could be liable for the mere fact it erected the street. *Id.* at 440. The court explained,

> This is not a case where the City's conduct in maintaining a street diverted or changed the flow of water so that it flooded adjacent property. Rather, the builder placed new construction adjacent to an existing city street and natural forces did the rest.

Id. at 441.

Dalton Utilities argues that Plaintiff's claim against it resembles the *Demita* plaintiff's failed alternate theory, but that *Demita* "makes clear" its "fail[ure] to remove the PFAS from the water as it passed through Dalton Utilities' treatment system" is "insufficient to foist liability on it" because the PFAS contamination "originated from the acts of third-party chemical suppliers and carpet manufacturers." Appellant Br. at 49.

But this mischaracterizes Plaintiff's complaint. Dalton Utilities' POTW is a wastewater collection and disposal system constructed, maintained and operated by the utility, and the LAS is subject to a permit prohibiting any discharge to surface waters. App'x I.418 at 34. The LAS exists and operates on the condition that Dalton Utilities prevent any pollutant discharges to the Conasauga River (or other waters of the United States)—much less those it knows are toxic. App'x I.417 at 34. Nonetheless, Dalton Utilities itself takes the "positive acts" of continually applying PFAS-contaminated water to the LAS every day, despite knowing its treatment plants cannot remove PFAS from industrial wastewater and knowing that the

contaminated wastewater sprayed on the LAS will discharge to the Conasauga River. App'x I.418 at 61. As such, "natural forces" carry the toxic chemicals downstream to the Oostanuala River and Plaintiff's drinking water only after Dalton Utilities takes its informed, "positive" actions. *Demita,* 762 S.E.2d at 441.

Dalton Utilities' reliance on *City of Toccoa v. Pittman*, 648 S.E.2d 733 (Ga. Ct. App. 2007) is similarly misplaced. *See* Appellant Br. at 51. It says *Pittman* is an example of unsuccessful nuisance claims where a city "merely exercised its discretion not to abate a then-existing nuisance when it had no duty to do so," Appellant Br. at 50-51, but the relevant *Pittman* facts are reversed here. Dalton Utilities—not some private non-party—owns, operates, and controls the POTW, including the LAS. *Compare Pittman*, 648 S.E.2d at 737 *with* App'x I.418 at 32-34, 61. And in continuing to knowingly discharge PFAS chemicals to the Conasauga River via its LAS, Dalton Utilities "created, continued, or maintained" the contamination of the Upper Coosa River Basin.[20] *Pittman,* 648 S.E.2d at 737; *cf. Duffield,* 249 S.E.2d at 236-37 (county could be liable in nuisance from operation of

[20] Likewise, the City of Toccoa could not be said to "continue" the nuisance originating at the billiard room because there was "no evidence," either that the billiard room was regularly used for criminal activity like what caused the decedent's death, or that any serious injuries or deaths had previously occurred at the billiard room or at the restaurant after the crowd migrated there. *Id.* at 737. This forecloses Dalton Utilities' blame-shifting to industrial dischargers, *see* Appellant Br. at 47, because the Complaint alleges it knew for years that PFAS were toxic, that its conventional treatments did not remove them, and that its contaminated discharges to the LAS were contaminating the Conasauga River. App'x I.418 at 61.

water treatment plant causing noxious odors to endanger nearby landowners' health); *Ingram v. City of Acworth*, 84 S.E.2d 99, 101-02 (Ga. Ct. App. 1954) (city could be liable in nuisance for operating sewer disposal plant so to cause noxious vapors and endanger life and health of nearby residents).

Plaintiff's allegations place this case directly "into the category of cases in which the municipality has chosen to act." *See, e.g.*, *Myszka*, 272 S.E.2d at 304 (rejecting city's argument that "knowingly . . . allow[ing] human sewage from its sewerage system to flow across [the plaintiff]'s property for many months" amounted to "'d[oing] nothing rather than 'doing something'"). In fact, this case is more akin to the "most common municipal nuisance scenario" involving "maintenance of municipal sewer and drainage systems" that are thoroughly embedded in the nuisance doctrine and preserved in the Constitution. *See Gatto*, 860 S.E.2d at 718 (compiling cases).

Plaintiff clearly alleges that, in its operation and maintenance of the POTW, Dalton Utilities has created and continued a nuisance, placing its conduct far beyond mere nonfeasance. The District Court correctly held as much.

CONCLUSION

For the foregoing reasons, the Court should either (1) dismiss Dalton Utilities' appeal for a lack of jurisdiction or (2) uphold the District Court's Order denying Dalton Utilities' motion to dismiss Plaintiff's nuisance abatement claim.

Respectfully submitted this the 1st day of February, 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32 because it contains 12,065 words, excluding portions exempted under 11th Cir. R. 32-4.

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CERTIFICE OF SERVICE

I certify that the foregoing Brief of Appellee was electronically filed with the Clerk of Court using the ECF system.

This the 1st day of February, 2022.

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