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Kevin Michael James

Kim Windle James, Clerk  
Chattooga County, Georgia

**IN THE STATE COURT OF CHATTOOGA COUNTY**  
**STATE OF GEORGIA**

**THE TOWN OF LYERLY, GEORGIA,**

*Plaintiff,*

**V.**

**3M COMPANY, et al.,**

*Defendants.*

**-X**

**Case No.: 24SCA4052**

**REPLY IN SUPPORT OF  
DEFENDANT DAIKIN AMERICA, INC.'S MOTION TO DISMISS**

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## INTRODUCTION

Lyerly’s “omnibus” response to the motions to dismiss filed by Daikin America, Inc. (“Daikin”) and other Defendants highlights the deferential standard of review applicable to consideration of the *factual allegations* of complaints, which this Court must accept as true. But the Court is not required to accept the *legal conclusions* that Lyerly asserts that those facts dictate. *See Small v. Chatham County*, 360 Ga. App. 500, 500–01 (2021); *Bankston v. RES-GA Twelve, LLC*, 334 Ga. App. 302, 303–04 (2015). Whether the facts as alleged support a cause of action is a question of law for this Court to decide (with the Court’s decision accordingly reviewed *de novo* by an appellate court, *see Small*, 360 Ga. App. at 500). In this case, all of the causes of action asserted are governed by Georgia law, which is established by Georgia statutes and the decisions of the Georgia Court of Appeals and the Georgia Supreme Court. *See Ga. Const. of 1983*, Art. III, Sec. 1, Par. 1; Art. VI, Sec. V, Par. III; Art. VI, Sec. VI, Par. VI. Those controlling authorities provide no support for Lyerly’s claims against Daikin.

Indeed, Lyerly betrays the weakness of its claims by relying heavily—often exclusively—on federal district court decisions in cases involving PFAS. But federal courts cannot establish or properly extend Georgia law, and those orders are persuasive only to extent that they accurately rely on Georgia statutes and appellate precedent. *See Matamoros v. Broward Sheriff’s Office*, 2 F.4th 1329, 1333–34 (11th

Cir. 2021) (reiterating that “state courts are the ultimate expositors of state law,” and “[i]t is not the function of the federal court to expand the existing scope of state law.” (citation omitted)). Lyerly also cites a number of trial court orders in cases involving PFAS, but none of those orders is binding precedent—many are from other states and do not even apply Georgia law, and the orders from one other Georgia court carry little persuasive force because they include little or no pertinent reasoning or citation of appellate precedent. The bottom line is that *Georgia law* does not support any of Lyerly’s claims against Daikin for PFAS Daikin never manufactured, land Daikin never controlled, and wastewater Daikin never discharged. Lyerly’s complaint should therefore be dismissed.

## **ARGUMENT**

### **I. Lyerly’s Negligence Claim Fails (Count One).**

Daikin outlined the basic reason why Lyerly’s ordinary negligence claim does not work—Lyerly’s allegations fail to establish a pre-existing duty owed by Daikin to Lyerly. Mot. 4–8. In response, Lyerly first offers a list of decisions it agrees with, Resp. 9–11, ignoring that none of them are “reported decisions of [Georgia] appellate courts” as required to establish a common-law duty for a negligence claim under Georgia law. *Sheaffer v. Marriott Int’l, Inc.*, 349 Ga. App. 338, 340 (2019) (citation omitted). After tallying up its non-Georgia-appellate-court decisions,

Lyerly offers two further contentions, neither of which can survive scrutiny.<sup>1</sup>

*First*, Lyerly contends that it alleged a recognized duty under Georgia law. Resp. 11–15. For that, Lyerly points primarily to the Georgia Water Quality Control Act (“GWQCA”) and regulations thereunder. Resp. 11–12. But Daikin is not subject to the GWQCA or its regulations, because Lyerly does not (and could not in good faith) allege that Daikin specifically discharged anything, and certainly no pollutants, anywhere in Georgia.<sup>2</sup> See Section IV below. Moreover, while the

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<sup>1</sup> Lyerly also has no meaningful response to the reality that *Johnson*—a decision it otherwise lauds—rejected arguments about duty for negligence claims against chemical suppliers under Georgia law like the ones Lyerly makes here. See *Johnson v. 3M Co.*, 563 F. Supp. 3d 1253, 1323–25 (N.D. Ga. 2021). Lyerly points out that it is a public water system, not a putative class of residents like in *Johnson*. Resp. 11 n.22. But Lyerly never explains why that distinction could be material, and the reasoning in *Johnson* applies equally to cities and their residents. See *Johnson*, 563 F. Supp. 3d at 1325 (explaining that there is no “authority from Georgia establishing a duty on the part of a chemical supplier to protect an unknown third-party, rather than its consumer, from harm resulting from the negligent use or disposal of the chemical”). Instead, Lyerly block-quotes (Resp. 10–11) a passage from another federal opinion, *Parris*, but that opinion was not addressing an ordinary-negligence duty but a supposed duty to warn based on Restatement (Second) of Torts § 389, which Judge Thrash believed differentiated his decision from Judge Totenberg’s in *Johnson* (and which Daikin addresses below). See *Parris v. 3M Co.*, 595 F. Supp. 3d 1288, 1330 n.10 (N.D. Ga. 2022). Lyerly also notes that Judge Johnson in *Rome* denied a motion to dismiss that made duty-based arguments. Resp. 11 n.22. But *Rome*’s one-paragraph discussion of duty does not cite a single authority, so it is far from a persuasive exposition of Georgia law. Resp. App’x E at 2.

<sup>2</sup> Lyerly argues that the GWQCA’s implementing regulations create duties, and claims that *Parris* reached that conclusion. But Lyerly selectively quotes the regulations to obscure the fact that they merely announce that “All waters shall be free from” various conditions, rather than create a duty (which Lyerly seems to think would be owed by *everyone* in Georgia and beyond) to “keep waters of the State free from” those conditions. Compare Ga. Comp. R. & Regs. § 391-3-6-.03(5)(b), (c), (e), with Resp. 12–13. And Lyerly ignores that *Parris* actually rejected the same argument with respect to the first two regulations it cites, and considered the third in the context of a defendant textile mill that actually discharged PFAS. See *Parris*, 595 F. Supp. 3d at 1333–34. Neither the regulations nor *Parris* help Lyerly with respect to Daikin.

GWQCA provides its own cause of action, its language precludes it from being the foundation for a free-standing negligence claim. The statute ties liability to discharges done “intentionally or negligently.” O.C.G.A. § 12-5-51(a). It would be nonsensical to base a negligence claim on such a statute—that is, to say that there is a duty to not act negligently when you are acting intentionally, or that there is a duty to not act negligently when you are acting negligently.

The other statute Lyerly cites, O.C.G.A. § 51-9-7, is even further afield—it establishes that those who pollute “nonnavigable watercourses” flowing “through” land “owne[d]” by the plaintiff commit a trespass. But Lyerly never alleges that Daikin “polluted” anything in Georgia, or that the town’s water source—the Conasauga Aquifer, Am. Compl. ¶ 26—is a “nonnavigable watercourse” that flows “through” land owned by Lyerly. And trespass is an intentional tort, which must be based on “an intended act as opposed to a negligent act.” *Lanier v. Burnette*, 245 Ga. App. 566, 570 (2000). Even if certain conduct could be the basis for an *intentional* tort, that does not establish the existence of a *negligence* duty. Moreover, Lyerly cites no authority for the proposition that a municipality has a cause of action for civil trespass. *See* O.C.G.A. § 51-9-1 (core civil trespass statute, creating a cause of action to protect “[t]he right of enjoyment of *private* property [which is] an absolute right of every *citizen*” (emphasis added)).

Lyerly also invokes § 389 of the Restatement (Second) of Torts. Resp. 13–14.



Section 389 (which is not a Georgia *statute*) recommends extending a duty to warn only to “a *use* which the supplier should expect [a product] to be put.” But here, under Lyerly’s theory, liability supposedly stems not from the *use* of any PFAS-containing products allegedly sold by Daikin, but from the *disuse* of such products—their disposal by third parties occurring separate from and well after any product use. None of the Georgia precedents that Lyerly cites applied the principle set forth in § 389 beyond harm immediately resulting from the use of a dangerous product. The federal court in *Parris* acknowledged that “no Georgia court has ever applied section 389 in an environmental pollution case,” and instead relied improperly on a decision from another federal district court applying U.S. Virgin Islands law. 595 F. Supp. 3d at 1329 (citing *Henry v. St. Croix Alumina, LLC*, No. 1999/0036, 2007 WL 6030275 (D.V.I. Aug. 10, 2007)).

That leaves Lyerly’s invocation of a “general common law duty of ordinary diligence or care” as the supposed source of a duty owed to Lyerly by Daikin. Resp. 13. But generally invoking the duty of care does not work, because the Georgia Supreme Court has made clear that there is no “general legal duty to all the world not to subject others to an unreasonable risk of harm.” *Dep’t of Labor v. McConnell*, 305 Ga. 812, 816 (2019) (citation and punctuation omitted); *see also New Star Realty, Inc. v. Jungang PRI USA, LLC*, 346 Ga. App. 548, 560 n.7 (2018) (explaining that OCGA § 51-1-2, which Lyerly quotes at length at Resp. 13, “simply defines

ordinary negligence; it does not itself create a substantive legal duty”). Instead, there must be a *specific* duty recognized in the common law and owed by the defendant to the plaintiff. Lyerly lacks that here.

*Second*, unable to point to any specific and recognized duty, Lyerly contends that Defendants owed duties to Lyerly “due to the foreseeability of Lyerly’s injuries to the Defendants,” and then spends a couple pages arguing that it has adequately alleged that its injuries were foreseeable. Resp. 16–17. This is no substitute for the lack of any recognized duty. Daikin already explained that duty must come first—Georgia precedent makes clear that a negligence claim requires a pre-existing duty the breach of which gives rise to a foreseeable injury to the plaintiff. Mot. 6–7. Put another way: foreseeability is necessary, but not sufficient, for duty. So Lyerly’s reliance on foreseeability cannot establish the duty.

Because Lyerly has not shown that Daikin owed it a specific and valid duty under controlling Georgia law, Lyerly’s ordinary negligence claim cannot proceed. *Johnson*, 563 F. Supp. 3d at 1323–25.

## **II. Lyerly’s Nuisance Claims Fail (Counts Two and Three).**

Daikin moved to dismiss Lyerly’s nuisance claims on two grounds: first, and most fundamentally, because Lyerly fails to allege that Daikin took any action on land over which it ever had control, Mot. 8–12; second, because Lyerly fails to allege that Daikin engaged in unlawful conduct or in lawful conduct in an inappropriate

location, Mot. 12–13. Lyerly has no persuasive response to either point.<sup>3</sup>

**No action on land Daikin controlled.** Lyerly’s theory of nuisance is incompatible with Georgia nuisance law. As Daikin explained, Georgia’s appellate courts have affirmed and re-affirmed that a nuisance claim requires the defendant to have some form of control over the *land* from which the alleged nuisance emanates. Mot. 8–10 (citing cases). When a complaint fails to allege such control, it fails to allege a nuisance. Lyerly’s claims make just that mistake, so Daikin cannot be liable in nuisance.

Lyerly points out that Georgia courts have said a defendant need be only a “concurrent cause” of the “creation, continuance, or maintenance of the nuisance.” Resp. 26–27 (quoting *Sumitomo Corp. of Am. v. Deal*, 256 Ga. App. 703, 707 (2002)). True enough. Control does not necessarily require *ownership* of the nuisance property, or *exclusive* control over that property. *See Sumitomo*, 256 Ga. at 707. But Georgia precedent has always required that a defendant exercise some form of control over *land*, not merely *products* that later make their way onto land. For example, in *Sumitomo*, the precedent on which Lyerly principally relies, a corporate defendant that was a major shareholder in the real estate development on which a

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<sup>3</sup> Daikin joins the replies of other Defendants to the extent applicable to the claims against Daikin, including 3M’s reply in support of its argument that Lyerly’s private nuisance claim fails because the private nuisance as alleged harms more than “one or a few individuals.” O.C.G.A. § 41-1-2.

nuisance-creating detention pond was constructed, and whose director decided to maintain rather than modify the pond after the lawsuit was filed, was held to have “exercised enough control in the decision to maintain the detention pond without modifications to hold it liable for the damage to the [neighboring] land.” *Id.* That is, the defendant (concurrently with others) controlled the relevant real property—precisely what Daikin has explained is necessary for nuisance liability in Georgia, and what Lyerly fails to allege as to Daikin. *Sumitomo* supports Daikin, not Lyerly.

Lyerly offers little beyond this misuse of *Sumitomo*. It notes that two federal district courts have allowed nuisance claims to advance based solely on alleged sales of products containing PFAS, without allegations that the defendants controlled any relevant land. Resp. 26–29 (citing *Johnson* and *Parris*). Daikin already explained why both decisions misconstrue Georgia law (and that they contradict two other federal court decisions). Mot. 12 n.5. What matters is not what two (of four) *federal judges* have said but rather what *Georgia appellate courts* have held in case after case for generations: Nuisance is a *property*-based tort. *See, e.g., Gatto v. City of Statesboro*, 312 Ga. 164, 171 (2021) (nuisance liability must be grounded on “dominion or control over the property giving rise to the alleged nuisance, whether by virtue of ownership or the assumption of responsibility for its maintenance or operation”); *Wilson v. Evans Hotel Co.*, 188 Ga. 498, 504 (1939) (“nuisance” is limited to the “class of wrongs that arise from . . . use by a person of his own

property”). Like *Johnson* and *Parris*, Lyerly cites no Georgia *precedent* for a product-sale-based nuisance, because there is none.

Lyerly finally turns to quips, commenting that Daikin “ironically” cites *Citizens & Southern Trust Co. v. Phillips Petroleum Co.*, 192 Ga. App. 499, 500 (1989), even though that case was decided at summary judgment. Resp. 29. There is no irony. Nuisance has the same essential legal elements—including the defendant’s control over the land from which the alleged nuisance emanates—at trial, at summary judgment, and at the pleading stage. And the failure to allege an essential element, just like the failure to offer evidence of the element at summary judgment or to prove it at trial, defeats the claim.<sup>4</sup>

As Daikin explained, there are good reasons for Georgia’s control rule for nuisance liability. Mot. 11–12. Lyerly attempts no response to those good reasons. But regardless of the reasons for the rule, it is the settled law of Georgia, and it means

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<sup>4</sup> Lyerly inaccurately asserts that *Phillips Petroleum* reversed summary judgment for the gasoline supplier in that case merely because of the supplier’s alleged actual knowledge that the underground gas storage tanks on the nuisance property were defective, “despite no control or ownership of property.” Resp. 29–30. But as Daikin explained, Mot. 11, the supplier delivered its gasoline onto the property, which apparently satisfied the control element, 192 Ga. App. at 500—whereas summary judgment was affirmed for four other defendants that did nothing on the relevant property within the four-year period prior to the lawsuit. *Id.* at 499. The other case Lyerly cites (without noting that it is only physical precedent), *Fielder v. Rice Constr. Co.*, 239 Ga. App. 362, 365 (1999), also follows the Georgia rule. The plurality opinion there held that the defendant could be liable in nuisance because it had “control over whether or not the lot was approved for septic tank use,” including entering the property to test its soil and terrain for suitability and again when the defendant “oversaw and participated in several unsuccessful attempts to fix the septic system.” *Id.* at 363–66. Neither case suggests that selling lawful products whose residue allegedly ends up on land the seller had nothing to do with can be the basis for nuisance liability in Georgia.

the end of the nuisance claims against Daikin.

**No unlawful action or lawful action in an inappropriate location.** Lyerly does no better with Daikin’s second ground for dismissal—that Lyerly has failed to plead that Daikin’s products sales were unlawful or occurred at a location inappropriate for the sale of lawful products. Mot. 12–14. Much of Lyerly’s response attacks a strawman, claiming that Daikin ignores that lawful conduct can give rise to a nuisance. Resp. 24–26. But Daikin agreed that “lawful conduct can be the cause of a nuisance.” Mot. 12. Lyerly never responds to the argument Daikin actually made, which is that lawful conduct must be *done in an inappropriate location* to constitute a nuisance. *See, e.g., McBrayer v. Governors Ridge Office Park Ass’n, Inc.*, 359 Ga. App. 741, 744–46 (2021) (citing numerous cases). Lyerly does not allege that Daikin did anything in any place in Georgia, much less at an unsuitable location. So lawful conduct by Daikin cannot be the basis for nuisance liability against Daikin.

Nor does anything else in Lyerly’s response undercut Daikin’s argument. Lyerly says Daikin’s actions were unlawful because they violated the GWQCA. Resp. 25–26. But that is wrong. *See* Section IV below.

For these reasons—putting aside the many other problems with Lyerly’s case against Daikin—Lyerly’s nuisance claims cannot proceed against Daikin.

### **III. Lyerly's Trespass Claim Fails (Count Four).**

Lyerly's efforts to support its trespass claim are likewise unpersuasive.

First, Lyerly says (Resp. 32 n.66) that Daikin argued that Lyerly failed to directly infringe on its property rights, citing page 22 of Daikin's motion to dismiss. But Daikin's motion to dismiss did not have a page 22. To the extent Lyerly means to respond to Daikin's argument that Lyerly has not alleged Daikin's presence on its property, its argument that it owns its water and water treatment facilities is nonresponsive. Lyerly did not allege that Daikin was ever present in its water or its water treatment facilities, either.

Second, Lyerly's flat denial (Resp. 36–37) that a trespassing act must be unlawful in and of itself ignores Georgia caselaw to the contrary. *See* Mot. 14–15. And Lyerly's contention that Daikin's conduct was wrongful because it violated the GWQCA is incorrect, as the next section explains.

Third, Lyerly's argument (Resp. 36) that it “has plead [sic] numerous intentional acts,” including manufacture, sale, and use of PFAS, talks right past the requirement of Georgia law that a trespass must be an intentional act “in that it intended the immediate consequences of the act, causing the trespass or invasion, *i.e.*, an intended act as opposed to a negligent act.” *Lanier*, 245 Ga. App. at 570. Lyerly has not alleged (and could not allege in good faith) that Daikin intended to

contaminate its water. Nor can Lyerly say that the alleged contamination was the immediate consequence of any action Daikin did intend.

Finally, but most fundamentally, as noted above, Lyerly cites no Georgia precedent for the proposition that a municipality has a cause of action for civil trespass. *See* O.C.G.A. § 51-9-1 (core civil trespass statute, creating a cause of action to protect “[t]he right of enjoyment of *private* property [which is] an absolute right of every *citizen*” (emphasis added)).

For these several reasons, Lyerly’s trespass claim must be dismissed.

#### **IV. Lyerly’s GWQCA Claim Fails (Count Seven).**

Last is Lyerly’s GWQCA claim. Daikin explained why it could not be liable under that statute. Mot. 16–17. Lyerly does not dispute that Daikin did not spill, discharge, or deposit PFAS anywhere near Lyerly (or elsewhere in Georgia).<sup>5</sup> Lyerly instead argues only that Daikin can be liable as a causer or permitter of discharges by others. Resp. 39–40. Lyerly is wrong. It triple-emphasizes that the GWQCA reaches anyone who “causes or permits” the prohibited “*spill[s], discharge[s], or deposit[s]*.” Resp. 39 (emphasis in original). But Lyerly does not discuss the words just before that phrase—“intentionally or negligently.” O.C.G.A. § 12-5-51(a); *see*

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<sup>5</sup> Indeed, Lyerly’s counsel could not dispute that fact in good faith, because they previously represented the City of Rome in its case against Daikin and other Defendants and learned in the extensive discovery there that Daikin only sold products in Georgia and never discharged anything in any water in the state.



Resp. 39–40. Those words set the scope of liability, and Daikin is outside that scope. Lyerly nowhere alleges that Daikin intended PFAS to enter Lyerly’s water. Nor does Lyerly allege a basis for determining that Daikin negligently effectuated that outcome. *See* Section I above.

Nor does Lyerly even try to address the decisions Daikin cited interpreting substantively similar environmental statutes as not reaching remote parties who are uninvolved in the actual spill, deposit, or discharge and who have no control over those who are involved. Mot. 16–17. This Court should interpret the GWQCA consistent with those decisions rather than as encompassing anyone with some alleged connection to an eventual discharge, no matter how remote in time or place. Indeed, throughout the law in Georgia and elsewhere, causation is limited as a policy decision to avoid unreasonable extensions of legal liability. *See Johnson v. Avis Rent a Car Sys., LLC*, 311 Ga. 588, 592 (2021). So too here. This interpretation does not render the statute’s “causes or permits” language superfluous. Resp. 40 n.85. The GWQCA applies, for example, to those who direct their agents to discharge pollutants into state waters, or permit others to come onto their property to illegally discharge pollutants into state waters. But that is far afield from Lyerly’s theory that product suppliers are liable under the GWQCA if residue from their products ends up in state water long after and far away from the sale.

The GWQCA has been Georgia law for more than 50 years, but Lyerly can

cite no Georgia precedent supporting its theory of GWQCA liability. Like its unsupported efforts to expand Georgia nuisance and trespass law, Lyerly's effort to turn the GWQCA into a products liability law should be rejected, and Count Seven dismissed.

**V. Lyerly's Derivative Claims Fail (Counts Five and Six).**

Lyerly does not dispute that its derivative claims for wantonness and punitive damages (Count Five) and attorneys' fees (Count Six) fall with its substantive claims. *See* Resp. 49–50. Accordingly, the Court should dismiss these claims with the rest of Lyerly's claims.

**CONCLUSION**

For these reasons, this Court should dismiss the complaint against Daikin.

[signatures on following page]

Dated: October 21, 2024

Respectfully submitted,

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*Attorneys for Defendant Daikin America, Inc.*

### **CERTIFICATE OF SERVICE**

I hereby certify that on this day I e-filed a true and correct copy of the foregoing Reply in Support of Defendant Daikin America, Inc.'s Motion to Dismiss via the PeachCourt E-Filing system. The parties will be served via eService through PeachCourt.

Dated: October 21, 2024

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