**IN THE COURT OF APPEALS**
**STATE OF GEORGIA**

---

**Appeal No. A21A0262**

---

DANIEL E. MCBRAYER, SR., ALPHA OB GYN GROUP, PC, and THE MCBRAYER FAMILY LIMITED PARTNERSHIP

Appellants,

v.

THE GOVERNORS RIDGE OFFICE PARK ASSOCIATION, INC., EXECUTIVE DATA SYSTEMS, INC., GOVERNORS RIDGE, LLC, KOA PROPERTIES, LLC, and PORTFOLIO PROPERTIES,

Appellees.

# BRIEF OF APPELLANTS


Robert B. Remar
Georgia Bar No. 600575
Michael L. Eber
Georgia Bar No. 859338
Cameron B. Roberts
Georgia Bar No. 599839

ROGERS & HARDIN LLP
229 Peachtree Street, N.E.
Suite 2700
Atlanta, GA 30303
(404) 522-4700
rremar@rh-law.com
meber@rh-law.com
croberts@rh-law.com

# TABLE OF CONTENTS

INTRODUCTION ..... 1

PART ONE – STATEMENT OF THE CASE ..... 2

A. Dr. McBrayer and Governors Ridge Office Park ..... 2

B. Proceedings Below ..... 4

PART TWO – ENUMERATION OF ERRORS ..... 9

PART THREE – ARGUMENT AND CITATION OF AUTHORITY ..... 10

I. Standard of Review ..... 10

II. Insufficient evidence supports the verdict on nuisance liability. ..... 10

A. The clinic itself was not a nuisance. ..... 11

1. There is no evidence that Defendants operated the clinic in an unreasonable or unlawful manner. ..... 11

2. The clinic cannot be "out of place" in a commercial office complex zoned for medical facilities. ..... 13

B. Actions of third parties, over whom Defendants had no control, cannot turn the clinic into a nuisance. ..... 15

1. Defendants cannot be liable for nuisance because they did not control or maintain the protests. ..... 15

2. A single instance of arson does not make the clinic a nuisance. ..... 18

C. The Association's nuisance claim fails as a matter of law. ..... 20

III. Insufficient evidence supported the jury's award of damages. ..........20

A. Insufficient evidence supported the jury's award of damages to Portfolio, KOA, and EDS. ....................................20

1. There was no evidence that a nuisance caused the lost rental income calculated by Plaintiffs' expert. ...............21

2. Even on its own terms, Taylor's damages model was fundamentally flawed ...................................................23

3. Because the jury based its awards on unproven lost rental income, a new trial is required. ............................24

B. The jury's award of $555,000 in fines to the Association as "special damages" was not supported by the evidence. ...........25

IV. The trial court erred by incorrectly instructing the jury. .....................27

A. The trial court erred by failing to properly instruct the jury on proximate causation. ..........................................................27

B. The trial court erred by refusing to allow apportionment of fault to the non-party protestors. ..............................................28

C. The trial court's recharge on deference to the Association was erroneous. ...................................................................32

V. The trial court abused its discretion and violated due process by prohibiting Defendants from accessing Plaintiffs' expert's report. ....33

A. The trial court violated due process by prohibiting access to Plaintiffs' expert report. ..........................................................34

B. The erroneous sanctions prejudiced Defendants' ability to cross-examine Plaintiffs' expert. ............................................35

VI. The trial court erred by sequestering Defendants' damages expert. ...37

CONCLUSION ........................................................................................41

## TABLE OF AUTHORITIES

### Cases

*Aldworth Co., Inc. v. England*,
281 Ga. 197 (2006) ........................................................................11

*Anderson v. Atlanta Committee for Olympic Games, Inc.*,
261 Ga. App. 895 (2003) ........................................................................13

*Asphalt Products Co. v. Beard*,
189 Ga. 610 (1940) ........................................................................15

*Bagwell v. Sportsman Camping Centers of Am., Inc.*,
130 Ga. App. 888 (1974) ........................................................................28

*Barnes v. St. Stephen's Missionary Baptist Church*,
260 Ga. App. 765 (2003) ........................................................................20

*Bartell v. State*,
181 Ga. App. 148 (1986) ........................................................................44

*Bean v. Landers*,
215 Ga. App. 366 (1994) ........................................................................ 43, 44

*Bearoff v. Craton*,
350 Ga. App. 826 (2019) ........................................................................24

*Bethany Grp., LLC v. Grobman*,
315 Ga. App. 298 (2012) ........................................................................20

*Boccardo v. United States*,
341 F. Supp. 858 (N.D. Cal. 1972) ........................................................................18

*Bodin v. Gill*,
216 Ga. 467 (1960) ........................................................................ 17, 20

*Bradford Square Condo. Ass'n, Inc. v. Miller*,
258 Ga. App. 240 (2002) ........................................................................17

*Brimberry v. Savannah, Fla., R. Co.*,
78 Ga. 641 (1887) ........................................................................18

*Bryant v. Nationwide Ins. Co.*,
183 Ga. App. 577 (1987) ........................................................................10

*Carey Canada, Inc. v. Hinely*,
181 Ga. App. 364 (1986) ........................................................................39

*Cent. Georgia Power Co. v. Fincher*,
141 Ga. 191 (1913) ...............................................................................29

*Cham v. ECI Mgmt. Corp.*,
353 Ga. App. 162 (2019) ........................................................................10

*Citizens & S. Tr. Co. v. Phillips Petroleum Co.*,
192 Ga. App. 499 (1989) ........................................................................18

*City of Atlanta v. Landmark Envtl. Indus., Inc.*,
272 Ga. App. 732 (2005) ........................................................................29

*City of Douglasville v. Queen*,
270 Ga. 770 (1999) ...............................................................................12

*Claxton v. Lee*,
229 Ga. App. 357 (1997) ........................................................................24

*Connick v. Myers*,
461 U.S. 138 (1983)...............................................................................19

*Cook v. Huff*,
274 Ga. 186 (2001) ...............................................................................10

*Cooper v. Baldwin Cty. Sch. Dist.*,
193 Ga. App. 13 (1989) ..........................................................................21

*Davis v. Deariso*,
210 Ga. 717 (1954) ...............................................................................12

*Davis v. State*,
299 Ga. 180 (2016) ........................................................................... passim

*Dew v. Motel Props., Inc.*,
282 Ga. App. 368 (2006) ........................................................................21

*Double View Ventures, LLC v. Polite*,
326 Ga. App. 555 (2014) ....................................................................35

*Douglas v. Wages*,
271 Ga. 616 (1999) ....................................................................23

*Effingham Cty. Bd. of Comm'rs v. Shuler Bros., Inc.*,
265 Ga. App. 754 (2004) ........................................................ 12, 13, 15

*Galaxy Carpet Mills, Inc. v. Massengill*,
255 Ga. 360 (1986) ....................................................................15

*Getz Servs., Inc. v. Perloe*,
173 Ga. App. 532 (1985) ....................................................................23

*GFI Mgmt. Servs., Inc. v. Medina*,
291 Ga. 741 (2012) ....................................................................36

*Giuffre v. Wis. Women's Health Care Ctr., S.C.*,
514 N.W.2d 55 (Wis. Ct. App. 1993)....................................................16

*Gordon Cty. Broad. Co. v. Chitwood*,
211 Ga. 544 (1955) ....................................................................12

*Gray v. Elias*,
236 Ga. App. 799 (1999) ....................................................................32

*Hammond v. City of Warner Robins*,
224 Ga. App. 684 (1997) ....................................................................22

*Hickory Lake, L.P. v. A.W.*,
320 Ga. App. 389 (2013) ....................................................................36

*Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,
456 U.S. 694 (1982)....................................................................39

*Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.*,
288 Ga. App. 642 (2007) ....................................................................30

*Life Ins. Co. v. Meeks*,
274 Ga. App. 212 (2005) ....................................................................34

*Martin v. Six Flags Over Ga. II, L.P.*,
301 Ga. 323 (2017) .......... 35, 36

*Org. for a Better Austin v. Keefe*,
402 U.S. 415 (1971) .......... 19

*Pearson v. Tippmann Pneumatics, Inc.*,
281 Ga. 740 (2007) .......... 31, 38

*Res. Life Ins. Co. v. Buckner*,
304 Ga. App. 719 (2010) .......... 39

*Six Flags Over Georgia II, L.P. v. Martin*,
335 Ga. App. 350 (2015) .......... 35

*Snyder v. Phelps*,
562 U.S. 443 (2011) .......... 19

*Stanfield v. Glynn Cty.*,
280 Ga. 785 (2006) .......... 16

*State v. Almanza*,
304 Ga. 553 (2018) .......... 42

*Stripling v. Godfrev*,
143 Ga. App. 742 (1977) .......... 45

*Taft v. Taft*,
209 Ga. App. 499 (1993) .......... 32

*Terry v. Catherall*,
337 Ga. App. 902 (2016) .......... 17

*Toyo Tire N. Am. Mfg., Inc. v. Davis*,
299 Ga. 155 (2016) .......... 18, 30

*United States v. Seschillie*,
310 F.3d 1208 (9th Cir. 2002) .......... 46

*Warnock v. Sandford*,
349 Ga. App. 426 (2019) .......... 32

*Wilson v. Evans Hotel Co.*,
188 Ga. 498 (1939) ....................11

**Constitutional Provisions**

Georgia Constitution art. VI, § VI, ¶¶ II-III ....................9

**Statutes**

Former O.C.G.A. § 24-9-61 ....................43

O.C.G.A. § 24-6-615 .................... 42, 44, 45

O.C.G.A. § 41-1-1 ....................11

O.C.G.A. § 51-12-2(b) ....................29

O.C.G.A. § 51-12-33(c) ....................33

O.C.G.A. § 51-12-33(d)(1) ....................34

O.C.G.A. § 51-12-33(d)(2) ....................34

**Other Authorities**

Church Arson Prevention Act of 1996,
PL 104-155, July 3, 1996, 110 Stat. 1392 ....................21

Emma Green, *Black Churches Are Burning Again in America*,
The Atlantic, June 25, 2015 ....................22

## INTRODUCTION

This is a nuisance case in which an office park association and three property owners (Plaintiffs–Appellees) sued the owner and operators of an OB-GYN clinic in the office park (Defendants–Appellants). Plaintiffs claimed that the clinic was a nuisance, mainly because it drew the attention of anti-abortion protestors who regularly gathered on public property outside the office park. After a trial, the jury found Defendants liable for over $1.5 million in damages.

But the evidence established that Defendants had been engaged in a lawful, properly licensed, medical practice in a location zoned for medical clinics. No evidence proved that Defendants conducted their business unlawfully or in an unusual or improper manner. Instead, the evidence showed that any alleged harm was caused by third parties protesting on public sidewalks outside the office park over whom Defendants had no control.

The evidence was also insufficient as to damages. The property owners failed to provide the jury with any rational basis for deciding how much of the damages calculated by their expert were attributable to Defendants. And the office park association, which sought to collect unpaid fines as special damages in tort, failed to show that those fines represented economic losses that flowed from the alleged nuisance.

The trial court also committed several errors that require reversal. It failed

to instruct the jury on the meaning of proximate causation, and it denied Defendants' request to apportion fault to the protestors. The trial court also gave an erroneous response to the jury's question on special damages.

Finally, the trial court imposed overbroad discovery sanctions that prohibited Defendants from seeing Defendants' expert report until the evening before the expert testified. The trial court compounded that error by sequestering Defendants' rebuttal damages expert until his testimony. Those errors deprived Defendants of a meaningful opportunity to cross-examine and rebut false testimony that Plaintiffs' expert gave about the contents of a report underlying one of his key assumptions.

Defendants respectfully request that this Court vacate the judgment and the verdict and remand this case for a new trial.

## PART ONE – STATEMENT OF THE CASE

### A. Dr. McBrayer and Governors Ridge Office Park

Defendant Dr. Daniel McBrayer has been a practicing obstetrician-gynecologist since 1980. V7-150. In 1991, he bought Building 23 in Governors Ridge Office Park, where he operated a medical clinic through the other Defendants, Alpha OB GYN Group, PC, and The McBrayer Family Limited Partnership. V5-14, V5-47, V7-186. About 30 to 40 percent of his medical practice involved performing abortions. V7-155.

Governors Ridge Office Park is a condominium complex in Cobb County on Powers Ferry Road. V5-25-26. The building owners are subject a Declaration of Covenants and are members of Plaintiff Governors Ridge Office Park Association ("the Association"). V5-20, V5-22-23, V9-549. The other Plaintiffs—Portfolio Properties ("Portfolio"), Executive Data Systems ("EDS"), Governors Ridge LLC ("Governors Ridge"), and KOA Properties, LLC ("KOA")—also own buildings in the Office Park. *E.g.*, V9-72.

Soon after Dr. McBrayer opened the clinic, anti-abortion protests began on public sidewalks outside the Office Park. V7-153-54. Eventually, "on a consistent basis, week by week, month by month, year by year, there were a large number [of protestors], a fluctuating number from two or three up to 180 or so." V5-55. Most of the time, at least one protestor would hold a placard such as "Governors Ridge supports abortion clinics" or an image of a fetus. V5-62. During Lent, the protestors would organize a candlelight vigil of around 150 to 200 people (and possibly up to 300) outside the Office Park. V5-56.

At times, Dr. McBrayer hired an off-duty police officer and set up cameras to monitor the protests. V7-164, V7-167. But since the protests did not occur at his building or on his property, V7-155-56, he understood that "[a]s long as they were in their legal rights," and "as long as they maintained the peace and just protest," he "could do nothing" to stop the protests. V7-157.

Even so, the Association complained that the protests had "impeded the day to day conduct of their businesses, diminished their revenues and profits, ... and created a general sense of ill-will and malaise among the owners and tenants and guests." V9-46. In 2009, the Association gave Dr. McBrayer 120 days to "abate the nuisance created by [his] use and occupancy" of Building 23. V9-47. This left him "between a rock and a hard place because the protestors had a legal right to be outside the confines of Governors Ridge." V7-164. Later that year, the Association's board decided to "get [Dr. McBrayer's] attention" by imposing a fine of $10.24 per day for each building in the office park unless he abated the "nuisance." V6-114, V9-53. The fines eventually totaled about $555,000. V5-74.

**B. Proceedings Below**

In 2013, Plaintiffs sued based on allegations that Defendants maintained a continuing, abatable nuisance. V2-11-12. As damages, the Complaint asserted a lost prospective sale, a lost prospective tenant, lost clients and customers, and diminution of property value. V2-9-10. In June 2015, the alleged nuisance ended because Defendants closed the clinic and sold Building 23. V5-79, V7-168, V7-173. At trial, Plaintiffs dropped their claims for damages based on diminished property values and sought damages for past conduct, including lost rental income and annoyance and discomfort. *See* Supp-V1-16.

During discovery, Plaintiffs moved to sanction Defendants for not

responding to certain discovery requests. V2-335, V2-345-46.[1] Those requests sought information regarding defenses to liability and documents about Defendants' assets and finances. *See, e.g.*, V2-193-95, V2-201-02, V2-223-25. None of the discovery requests involved nuisance damages or expert discovery.

The trial court granted the motion, ordered Defendants to respond to the discovery requests, and awarded $2,500 to Plaintiffs for attorneys' fees. V2-370-71. But the sanction order went even further—it barred Defendants "from seeking any further discovery, including pursuing further their outstanding discovery requests." V2-370.

Defendants later requested a narrow exception to the court's sanctions order so that they could read Plaintiffs' expert report on damages and its supporting materials, which Plaintiffs had refused to disclose. V2-619; *see also* V2-593-94. The court denied that request. V2-619.

In anticipation of a trial in 2017, the parties filed a pretrial order, and the trial court signed it. V2-973, V2-988. The issues for determination included "whether or not the protestors or demonstrators caused the private nuisance" and, if Plaintiffs were damaged, "[t]o what percentage were the Plaintiffs damaged by the

[1] Dr. McBrayer did not respond to Plaintiffs' Third Request for Production of Documents. V2-219-27. The other Defendants did not respond to Plaintiffs' Second Continuing Interrogatories and their Second and Third Requests for Production of Documents. V2-189-217, V2-228-45.

protestors and demonstrators, and to what percentage were they damaged by the Defendants?" V2-978.

The court re-scheduled the trial several times. Along the way, the parties submitted several other pretrial orders. Each listed the percentage of fault the jury would apportion to the protestors as an issue for determination. V2-960, V3-44, V3-80, V3-97, V3-113, V3-139, Supp-V1-14.

At a pretrial hearing on September 4, 2019, Defendants asked the trial court to permit their rebuttal damages expert, Daniel Branch, to be in the courtroom during trial because his presence was essential to the defense. Supp-V3-16, Supp-V3-18-19 (citing *Davis v. State*, 299 Ga. 180 (2016)). Relying on cases that pre-date *Davis* and Georgia's new evidence code, the trial court ordered sequestration. Supp-V1-6 (September 6, 2019 Order). At the end of the pretrial hearing, the court instructed the parties to exchange their trial exhibits. Supp-V3-45-46.

Despite the court's instruction, Plaintiffs still withheld the report of their damages expert, Robert Taylor. V4-10. On the first morning of trial, Defendants again requested the report. V4-10, V4-12. Plaintiffs opposed the request, stating that Defendants "had absolutely nothing" about damages and that sharing the exhibit would allow Branch to "try to counter it in his testimony." V4-13-14. The trial court refused Defendants' request, stating, "I don't think [Defendants] should have it a few days before, but maybe the night before or something." V4-16. Not

until the evening before Plaintiffs' expert testified did the trial court finally require Plaintiffs to provide the expert report. V7-138.

During the trial, Plaintiffs called six witnesses, including each Plaintiff's representative and their damages expert, Taylor. In his testimony and report, Taylor explained that he calculated damages based on the difference between a "projected normal rental rate" and the actual rental rates at the Office Park, multiplied by the rentable square footage. V7-37-38; V9-70. He also calculated damages due to lower occupancy based on the difference between "normal" occupancy per square foot and actual occupancy, multiplied by the "projected normal rental rate." V9-70; *see also* V7-22. Underlying all of his testimony was the "Key Assumption[]" that "[a]verage rental rates in 2008 are considered to be indicative of normal rental rates," V9-73, because, he thought, those "were the rental rates charged prior to the onset of the alleged acts." V9-70; *see also* V7-20. In fact, the protests started by 1998 and escalated in 2005. V5-45, V6-127.

Another key assumption for Taylor was that rental rates would have increased 3% annually from 2009 through 2015. V9-70. He "deemed [that assumption] reasonable based on Cushman & Wakefield's *Marketbeat*, published Q3 2015, which reports an ***annual increase of 5%*** for asking rents in the Atlanta Office Market." V9-74 n.2, V9-75 n.2, V9-76 n.2 (emphasis added); *see also* V7-21, V7-28. In fact, Cushman & Wakefield reported essentially ***zero*** net growth in

asking rents during the damages period. V3-318. But Defendants never saw that document until after trial.

During the trial, Defendants requested a jury charge on apportionment of non-party fault. V3-170, V7-108-09, V7-238. The court, however, ruled that Defendants had not provided the notice required by the apportionment statute. V7-108-09, V7-239. The court also rejected Defendants' request to instruct the jury with the pattern proximate cause charge and incorrectly responded to a question from the jury about damages. V8-17-18, V8-49-50, V8-52. (The specific jury charges are described in Section IV of the Argument.)

The jury returned a verdict for over $1.5 million in favor of Plaintiffs and jointly against Defendants. V3-190. The verdict included nuisance damages of $500,000 for EDS, $78,384 for KOA, and $46,264 for Portfolio, while Governors Ridge recovered $0. V3-191. The jury awarded the Association $555,000 in special damages, representing the amount of unpaid fines that the Association had imposed on Dr. McBrayer. *Id.* The jury also awarded $311,685.51 in attorneys' fees. V3-192.

The trial court denied Defendants' amended motion for new trial, V3-394-97, and this appeal followed. V2-1.

## PART TWO – ENUMERATION OF ERRORS

1. A new trial is necessary because there was insufficient evidence to support the jury's liability findings. (V3-190, V3-320-22, V3-279-93, V11-7-18.)

2. A new trial is necessary because there was insufficient evidence to support the jury's damages awards. (V3-191, V3-320-22, V3-293-300, V3-309-13, V11-20-26.)

3. A new trial is necessary because the jury charges about proximate causation, apportionment, and a recharge on special damages were erroneous. (V10-314, V7-238; V7-108, V8-49-50, V8-52, V11-18-20, V11-27-28.)

4. A new trial is necessary because the trial court abused its discretion by imposing overbroad discovery sanctions that prohibited Defendants from accessing Plaintiffs' expert's damages report until the evening before he testified. (V2-370-371, V2-619, V4-10, V4-16. V7-138.)

5. A new trial is necessary because the trial court erroneously sequestered Defendants' rebuttal damages expert. (Supp-V1-5-7, Supp-V3-16, Supp-V3-18.)

This Court has jurisdiction because this matter is not reserved to the Supreme Court. *See* Georgia Const. art. VI, § VI, ¶¶ II-III.

## PART THREE – ARGUMENT AND CITATION OF AUTHORITY

### I. Standard of Review

In reviewing the sufficiency of the evidence, this Court decides whether the verdict is "contrary to law in that it lacks any evidence by which it could be supported." *Cook v. Huff*, 274 Ga. 186, 186 (2001) (citation omitted). Jury charges are reviewed for "plain legal error," with no deference to the trial court's ruling. *Cham v. ECI Mgmt. Corp.*, 353 Ga. App. 162, 164 (2019). The Court reviews rulings on witness sequestration and discovery sanctions for abuse of discretion. *Davis v. State*, 299 Ga. 180, 188 (2016); *Bryant v. Nationwide Ins. Co.*, 183 Ga. App. 577, 578 (1987).

### II. Insufficient evidence supports the verdict on nuisance liability.

The clinic itself was not a nuisance because Plaintiffs failed to prove that Defendants operated it in an unusual, unlawful, or unreasonable manner. Plaintiffs argue that the clinic attracted the protestors and that Defendants are therefore liable for any harm those protestors caused. But under Georgia law, a defendant is only liable for injuries proximately caused by a nuisance that he maintains and can control. Defendants' clinic was not the proximate cause of any harm suffered by Plaintiffs; the cause of harm was third-party protestors exercising their constitutional rights and over whom Defendants had no legal right to control.

Because the evidence failed to establish the elements of nuisance, a new trial

is required. *See Aldworth Co., Inc. v. England*, 281 Ga. 197, 201 (2006).

### A. The clinic itself was not a nuisance.

#### 1. There is no evidence that Defendants operated the clinic in an unreasonable or unlawful manner.

Nuisance is defined as "anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance." O.C.G.A. § 41-1-1. "The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man." *Id.*

Rooted in the common law of nuisance, this definition "has throughout the years been subjected to many qualifications and limitations." *Wilson v. Evans Hotel Co.*, 188 Ga. 498, 504-05 (1939). For instance, "[t]hat which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance. Thus, where the act is lawful in itself, it becomes a nuisance ***only when conducted in an illegal manner*** to the hurt, inconvenience or damage of another." *Effingham Cty. Bd. of Comm'rs v. Shuler Bros., Inc.*, 265 Ga. App. 754, 755 (2004) (emphasis added) (quoting *City of Douglasville v. Queen*, 270 Ga. 770, 773 (1999)).

Evidence that harm resulted is not enough. To prove a nuisance in the context of a lawful business, a plaintiff must show that the defendant's *conduct* was negligent or that the alleged harm resulted from an extraordinary (and abatable) part of the business. For instance, our Supreme Court long ago held that

gas stations "operated in the usual and orderly way" are not a nuisance—despite noise, odors, increased fire hazards, and depreciation of property values. *Davis v. Deariso*, 210 Ga. 717, 717 (1954); *see also Gordon Cty. Broad. Co. v. Chitwood*, 211 Ga. 544, 544 (1955) (nuisance claim based on "danc[ing] and cavort[ing] in a loud, violent, and extremely noisome manner" failed because the plaintiff did not allege that such noises and activities were "unusual, unnecessary, or unreasonable in the proper conduct of the defendant's radio-broadcasting business").

Another example is *Anderson v. Atlanta Committee for Olympic Games, Inc.*, 261 Ga. App. 895 (2003). The plaintiffs there undeniably suffered harm from the bombing at Centennial Olympic Park. But this Court affirmed the grant of summary judgment to the Park's lessees because there was "no evidence [they] *operated* the Park in an illegal manner." *Id.* at 896 (emphasis added); *see also Effingham Cty.*, 265 Ga. App. at 755 (noises from wood chip mill were not a nuisance because the mill's manner of operation was ordinary and lawful).

The way Dr. McBrayer's clinic operated was not unusual, unlawful, or unreasonable. Indeed, the scant evidence presented about the clinic itself proves that it was not a nuisance. Stone Ermentrout, the Association's property manager, admitted that Defendants "ha[d] every right under the law to operate an abortion clinic at Governors Ridge Office Park" and that they were "operating properly … under the law." V5-101-02.

Plaintiffs claim that the clinic's invitees created a nuisance by loitering, littering, and using the Office Park's common areas as a bathroom. But Plaintiffs failed to prove that any such conduct was so frequent and severe as to "produce actual, tangible, and substantial injury to neighboring property" or "interfere sensibly with its use and enjoyment by persons of ordinary sensibilities." V10-306 (jury charge).

For starters, Plaintiffs admitted they were "guessing" and making "assumption[s]" that Dr. McBrayer's invitees were responsible. V5-100, V6-166. And the loitering "nuisance" was just people sitting in cars in the parking lot while waiting for an appointment to start or finish. V5-104; *see al*so V5-102 (admitting that invitees "sit[ting] out in a car … is okay"). As for the other alleged activities, no evidence established their frequency. For instance, the most specific evidence about purported urination and defecation was a 1998 letter—sent 15 years before the damages period—stating that "voiding" in the common area happened "on several occasions." V5-90 (quoting V9-40). And Plaintiffs presented no evidence of *any* damages caused by the invitees, let alone $1.5 million in damages.

### 2. The clinic cannot be "out of place" in a commercial office complex zoned for medical facilities.

Evidence of the clinic's location does not support the verdict because a lawful business is not "out of place" in a ***commercial*** area. The "principle applied in numerous cases is that a lawful business may, by reason of its location in a

***residential*** area, cause hurt, inconvenience, and damage to those residing in the vicinity and become a nuisance per accidens." *Galaxy Carpet Mills, Inc. v. Massengill*, 255 Ga. 360, 360-61 (1986) (emphasis added; quotation omitted). By contrast, when a business is in a commercial area like the Office Park, the plaintiff must show that "the manner of operation was unusual in a business of this character, or unnecessary and avoidable." *Asphalt Products Co. v. Beard*, 189 Ga. 610, 612-13 (1940). Plaintiffs failed to make that showing.

The evidence also contradicted Plaintiffs' "out of place" theory of liability. For instance, Ermentrout admitted that the Office Park had "a number of different doctors." V5-21. He also testified that Cobb County zoned the Office Park as an "Office and Institutional District." V6-43-44; *see also* V10-200. That zoning designation expressly permits "a medical or dental clinic … includ[ing] laboratory facilities in conjunction with normal clinic services." V6-44; *see also* V10-222, V10-237. And Ermentrout agreed that Defendants had a right to operate in that zoning classification. V6-48-49.

Given these admissions, no rational jury could have found Defendants liable on the theory that the clinic was out of place. *See Effingham Cty.*, 265 Ga. App. at

755 (affirming summary judgment on nuisance claim because defendant operated wood chip mill properly at a location zoned for chip mills).[2]

### B. Actions of third parties, over whom Defendants had no control, cannot turn the clinic into a nuisance.

#### 1. Defendants cannot be liable for nuisance because they did not control or maintain the protests.

Despite the lack of evidence that the clinic itself was a nuisance, Plaintiffs have argued that the clinic became a nuisance because it attracted anti-abortion protestors. This theory is unprecedented and wrong. Defendants cannot find *any* appellate court that has ever held a lawful business liable in nuisance because the controversial nature of the business led third parties to exercise their constitutional right to protest on nearby public property. *Cf. Giuffre v. Wis. Women's Health Care Ctr., S.C.*, 514 N.W.2d 55 (Wis. Ct. App. 1993) (non-precedential) (holding, in the only known appellate decision addressing this precise issue, that an abortion provider "cannot be responsible for a resulting nuisance or injury to reputation caused by third parties over whom it has no control").

Plaintiffs insist that foreseeability is all that matters, but that argument has radical and troubling implications. If Defendants can be liable, then a wide range

---

[2] Zoning compliance is not an absolute defense to *all* theories of nuisance liability, but it does foreclose the "out of place" theory. *Cf. Stanfield v. Glynn Cty.*, 280 Ga. 785, 788 (2006) ("[Z]oning compliance is not a defense to liability *which would otherwise exist* for the maintenance of a nuisance.") (emphasis added).

of businesses that some might find controversial—***including gun stores, power plants, banks, newspapers, and even Chick-Fil-A***—could be liable for nuisance solely based on the acts of third-party protestors outside their control.

Plaintiffs' argument ignores the elements of a nuisance claim. They had to prove that Defendants had a "legal right and [was] under a legal duty to terminate the cause of the injury" so that Defendants can be said to have maintained and controlled a nuisance. *Bodin v. Gill*, 216 Ga. 467, 473 (1960); *see also Bradford Square Condo. Ass'n, Inc. v. Miller*, 258 Ga. App. 240, 248 (2002) ("There must be a duty to abate a nuisance before liability may attach."). Indeed, "the essential element of nuisance is control over the cause of the harm." *Terry v. Catherall*, 337 Ga. App. 902, 905 (2016). Nuisance liability also requires proximate causation, *Toyo Tire N. Am. Mfg., Inc. v. Davis*, 299 Ga. 155, 158 (2016), which does not exist when "the injurious consequences complained of … were caused by the acts of others." *Citizens & S. Tr. Co. v. Phillips Petroleum Co.*, 192 Ga. App. 499, 500 (1989) (quoting *Brimberry v. Savannah*, *Fla., R. Co.*, 78 Ga. 641, 645 (1887)).

Defendants had no control over the protestors or the land where they protested. Thus, they cannot be liable for the consequences of the protests. *See Boccardo v. United States*, 341 F. Supp. 858, 865 (N.D. Cal. 1972) (holding that government draft board was not a nuisance even though it attracted anti-war protestors who made bomb threats to neighboring tenants and set fire to premises;

government had no duty to prevent "reactions of unrelated third parties" that "manifested themselves outside the premises under [its] exclusive control").

Plaintiffs also presented no evidence that Defendants had a right to abate protests that happened on *public* sidewalks outside the Office Park. *E.g.*, V6-77, V6-80-81, V7-155-56. A public place next to a public street, "occupies a special position in terms of First Amendment protection." *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (quotation omitted). And speech on matters of public concern—such as abortion—"occupies the highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983). Since peaceful anti-abortion protests are constitutionally protected, Defendants had no legal right to stop them. V7-157; V7-164; *see Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court").

In sum, the evidence presented by Plaintiffs focused on harm caused by third-party protestors on public property outside the Office Park. Defendants had no legal right to control what occurred there. Any harm the protestors may have caused cannot turn the clinic into a nuisance.

### 2. A single instance of arson does not make the clinic a nuisance.

Plaintiffs also argued that the clinic was a nuisance because neighbors feared potential arson or other criminal activity. To establish that claim, Plaintiffs had to prove that Defendants had a duty to abate an unsafe condition at their building, *see Bodin*, 216 Ga. at 473, and that, by failing to do so, they "created or maintained a continuous or regularly repeated act or condition on the property, which caused … injury." *Bethany Grp., LLC v. Grobman*, 315 Ga. App. 298, 302 (2012).

The evidence was that a single incident of arson occurred at Defendants' building in 2012, and the fire was quickly put out without damage to anyone else's property. V5-75-77, V6-117. "A single isolated occurrence or act, which if regularly repeated would constitute a nuisance, is not a nuisance until it is regularly repeated." *Barnes v. St. Stephen's Missionary Baptist Church*, 260 Ga. App. 765, 769 (2003). Thus, in *Barnes*, the nuisance claim failed because the plaintiff presented no "evidence, other than of her own attack, that the building was currently and regularly being used for criminal activity of the kind that caused her injury." *Id*. Similarly, Plaintiffs presented no evidence that the clinic was ever—let alone "regularly"—used for criminal activity.

Some witnesses testified that they were afraid of criminal activity because *other* abortion clinics at *other* locations (such as Birmingham, Alabama) were attacked many years before the arson attempt at Defendants' clinic. *See, e.g.*, V5-

28, V5-92. That evidence is irrelevant. "To establish the existence of a dangerous condition at one place, it is generally not permissible to show conditions at other places." *Cooper v. Baldwin Cty. Sch. Dist.*, 193 Ga. App. 13, 14 (1989).[3]

Otherwise, ***every*** medical facility that provides abortions could be liable in nuisance based on bombings in other parts of Georgia and even in other states. So too, ***every*** house of worship could be deemed a nuisance given the racist and anti-Semitic bombings of the 16th Street Baptist Church in Birmingham and The Temple in Atlanta and the many church arsons in recent decades.[4] That is not the law. *Hammond v. City of Warner Robins*, 224 Ga. App. 684, 696-97 (1997) ("Mere apprehension of future injury from a nuisance which the complainant anticipates may be maintained in the future in the operation of a lawful business is not sufficient to authorize its abatement. If it be a nuisance, the consequences must be to a reasonable degree certain.") (citation omitted).

---

[3] Nor can incidents "at other properties owned by [Defendants]" establish the requisite duty. *Dew v. Motel Props., Inc.*, 282 Ga. App. 368, 371-72 (2006).

[4] *See, e.g.*, Church Arson Prevention Act of 1996, PL 104-155, July 3, 1996, 110 Stat. 1392 ("the incidence of arson of places of religious worship has recently increased, especially in the context of places of religious worship that serve predominantly Africa-American congregations"); Emma Green, *Black Churches Are Burning Again in America*, The Atlantic, June 25, 2015, https://www.theatlantic.com/national/archive/2015/06/arson-churches-north-carolina-georgia/396881/.

### C. The Association's nuisance claim fails as a matter of law.

The Association's nuisance claim stems from the Declaration of Covenants. The Declaration's "nuisance" covenant prohibits property owners from carrying on "[n]oxious or offensive activities" and from using their property in a way that could cause "disorderly, unsightly, or unkempt conditions" or "embarrassment, discomfort, annoyance, or nuisance to the occupants of other Parcels." V10-185.

Our Supreme Court has held that such provisions are "too vague, indefinite[,] and uncertain" to be enforced "except in so far as these words may be included within" the statutory definition of a nuisance. *Douglas v. Wages*, 271 Ga. 616, 617 (1999) (citation omitted). Because the other nuisance claims fail for the reasons above, the Association's nuisance claim and its derivative claim for attorneys' fees, V2-12, V3-140, necessarily fails, too.

## III. Insufficient evidence supported the jury's award of damages.

### A. Insufficient evidence supported the jury's award of damages to Portfolio, KOA, and EDS.

Portfolio, KOA, and EDS's damages theory focused on lost rental income for the parts of their buildings that they did not occupy. *See, e.g.*, V9-69-70. Lost rental income is a form of lost profits that Plaintiffs must prove "with reasonable certainty." *Getz Servs., Inc. v. Perloe*, 173 Ga. App. 532, 536 (1985). Sufficient proof of lost profits requires "great specificity" and "cannot be left to speculation, conjecture and guesswork." *Bearoff v. Craton*, 350 Ga. App. 826, 835 (2019)

(marks and citation omitted). A plaintiff cannot merely show that it suffered *some* damage; it "must provide information or data sufficient to enable the trier of fact to estimate the *amount* of the loss with reasonable certainty." *Id.* (marks and citation omitted; emphasis added).

Plaintiffs' evidence failed to establish how much of their economic underperformance from 2009 to 2015 resulted from the alleged nuisance. The jury thus had no rational basis for awarding damages. *See Claxton v. Lee*, 229 Ga. App. 357, 358 (1997) (reversing an award for lost earnings because evidence did not establish causation for the amount awarded).

**1. There was no evidence that a nuisance caused the lost rental income calculated by Plaintiffs' expert.**

Plaintiffs' expert, Robert Taylor, calculated the difference between "normal" rental and occupancy rates in the Atlanta market and what Plaintiffs experienced from 2009 to 2015. V7-37-38, V9-70. But he offered no opinion on causation. Instead, he "assumed that the defendants' conduct caused the losses to the plaintiffs and to Governors Ridge as a whole." V7-30; *see also* V7-35-36 ("The report is stating what the plaintiffs' allegations are. It is not a conclusion by me on cause."); V7-46 ("I'm assuming causation, trying to measure the damages if the causation is accepted."); *see also* V7-48-49. In other words, Taylor merely calculated the amount of damages *if* the jury had a valid basis to conclude that Defendants caused *all* of Plaintiffs' economic underperformance.

The jury heard no evidence filling the gap between Plaintiffs' general claims of lost rental income and Taylor's assumption that the clinic caused one-hundred percent of the Office Park's economic woes. Instead, the jury was left to speculate on how much of Taylor's damage amounts (if any) the alleged nuisance caused.

Bill Spann testified on behalf of EDS and Governors Ridge.[5] V6-94. Spann claimed EDS "lost a lot of prospective tenants because of the activities in building 23," but he couldn't say for sure "because nobody ever really tells you for sure necessarily why or why they don't lease a space." V6-99-100; *see also* V6-120 ("A lot of times you would have no idea. Maybe it wasn't a good fit, maybe some other reason."). Spann acknowledged that many other factors may have caused prospective tenants to go elsewhere. V6-267. And he admitted that he was "***not qualified to separate … out***" whether vacancies were due to the alleged nuisance or other factors, including the Great Recession. V6-136-37 (emphasis added).

Steve Lyman testified for Portfolio Properties, which leases Building 7 to an alcohol and drug treatment center. V6-177, V6-180, V6-196. After his tenant complained about the protestors, Lyman "worked out a decreased rent." V6-181. But he did not say how much the rent was reduced. And although Taylor had the leases and payment history for Portfolio, he did not use them to calculate lost rent.

[5] Governors Ridge did not seek damages for lost rental income because it occupied the building it owned. V7-20; V7-23.

*See* V9-69-70 (describing assumptions used to calculate lower rents). Thus, no evidence linked Lyman's testimony to Taylor's calculations.

Cynthia Sours testified for KOA Properties, which owns Building 24. V7-67-68. Although she discussed the emotional effect of the alleged nuisance on her, Sours did not identify *any* lost rental income. She said nothing about lower rents. And Taylor calculated no damages due to lower occupancy because KOA had *better* occupancy rates than the market average. V9-75.

Thus, even if Plaintiffs had established liability, the jury could only guess how much of Taylor's damage numbers came from the alleged nuisance.

### 2. Even on its own terms, Taylor's damages model was fundamentally flawed

One of Taylor's "Key Assumptions" was that "[a]verage rental rates in 2008 are considered to be indicative of normal rental rates." V9-73 (emphasis omitted). Taylor chose 2008 rates as the baseline because he thought those "were the rental rates charged prior to the onset of the alleged acts." V9-70; *see also* V7-20 (stating that 2008 "baseline" reflected conditions "before any wrongful acts occurred").

This key assumption is simply wrong. The clinic was operating in 2008, so the rental rates from that year already reflect the alleged nuisance. And if 2008 rental rates were normal *despite* the alleged nuisance, Taylor's damages model is patently unreliable. This basic error in Taylor's damages model confirms that Plaintiffs failed to prove damages to a reasonable certainty.

### 3. Because the jury based its awards on unproven lost rental income, a new trial is required.

Plaintiffs have argued that even if damages for lost rental income are speculative, a new trial is unnecessary because the jury could have based damages on annoyance and discomfort. This theory fails for three reasons.

***First***, the record shows that, with one small exception, the jury awarded damages by discounting Taylor's calculations. Taylor calculated $92,529 in lost rental income for Portfolio, and the jury awarded $46,264—exactly half of Taylor's amount (rounded down by 50 cents). V9-70, V3-191. Similarly, the jury took Taylor's calculation of lost rental income for EDS ($1,209,172), cut it in half, and rounded down to an even $500,000. V9-70, V3-191. Taylor also calculated $136,768 in lost rental income for KOA. V9-70. The jury cut that amount exactly in half and then (this is the small exception) added $10,000 for annoyance and discomfort, leading to a verdict of $78,384. V3-191.

***Second***, the fact that Governors Ridge received zero nuisance damages proves that the jury did not base damages to EDS on annoyance and discomfort. Spann testified on behalf of *both* EDS *and* Governors Ridge, V5-13-14, and he did not distinguish between the two entities as to annoyance or discomfort. *See, e.g.*, V6-102-03. No other witness testified for either of those parties. Yet the jury awarded $500,000 to EDS and nothing to Governors Ridge. V3-191. The only plausible explanation for this difference is that the jury based damages to Spann's

companies on lost rental income only. And Governors Ridge admittedly lost no rental income because its building was owner-occupied. V7-20; V7-23.

***Third***, accepting Plaintiffs' theory would make the verdict contradictory and void. The jury cannot *credit* Spann's testimony when awarding annoyance-and-discomfort damages to EDS but *discredit* the same testimony when considering damages to Governors Ridge. *See Bagwell v. Sportsman Camping Centers of Am., Inc.*, 130 Ga. App. 888, 890-91 (1974). In other words, Plaintiffs cannot rescue a speculative damages award by asking the Court to assume the jury was irrational.

### B. The jury's award of $555,000 in fines to the Association as "special damages" was not supported by the evidence.

From 2010 until the clinic closed in 2015, the Association imposed fines totaling $555,000 against Defendants. V5-72-74. Plaintiffs sought to recover the fines as "***special damages***," and the trial court agreed. V7-100-01, V7-210 (emphasis added). The Court therefore charged the jury that "[s]pecial damages are those which actually flow from a tortious act; they must be proved in order to be recovered." V10-325. The jury ultimately awarded the full amount of the fines to the Association. V3-191. But there was no evidence that the fines reflect economic harm that "actually flow from" the nuisance.

As the trial court correctly charged the jury, "[s]pecial damages are those which actually flow from a tortious act." O.C.G.A. § 51-12-2(b); V10-325. In nuisance cases, a plaintiff can recover special damages if the nuisance caused the

plaintiff to incur certain expenses or caused other economic losses. *See City of Atlanta v. Landmark Envtl. Indus., Inc.*, 272 Ga. App. 732, 742 (2005); *Cent. Georgia Power Co. v. Fincher*, 141 Ga. 191 (1913).

Here, however, the fines were not based on any specific cost or expense that the Association incurred because of the alleged nuisance. As Plaintiffs admitted post-trial, the fines do *not* reflect "money damages for *economic losses*," such as money spent to mitigate the alleged nuisance. V3-370. Instead, the Association imposed fines to "get [Dr. McBrayer's] attention," V6-114, and "to encourage Dr. McBrayer to make a business decision that will satisfy [the Association]." V6-141. In calculating the amount, the Association's manager "wanted to get as close as possible to a round number," V5-74-75, and he calculated the fines to produce a "total penalty" of $100,000 per year. V6-9.

Although this penalty could have been grounds for a suit to collect "sums due" under O.C.G.A. § 44-3-223, the court did not instruct the jury on such a claim.[6] And the fines are not special damages in tort since they have nothing to do

---

[6] Plaintiffs neither filed an action to recover sums due under § 44-3-223 nor mentioned such a claim in the pretrial order. *See* V2-9-13, Supp-V1-11-19. When Defendants objected to Plaintiffs' attempt to recover the fines, V7-99-100, V7-210-11, Plaintiffs pivoted and said they were seeking to recover the fines as "special damages" for nuisance. V7-100-01. And the trial court instructed the jury on special damages in tort. V10-325. To the extent that Plaintiffs sought the fines under § 44-3-223, a new trial would still be required because the trial court failed to instruct the jury on the essential elements of such a claim. *See Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.*, 288 Ga. App. 642, 645 (2007).

with the Association's out-of-pocket economic losses or mitigation costs incurred. Because there is no evidence that the fines reflect economic losses from the alleged nuisance, the jury's award of $555,000 to the Association must be vacated.

## IV. The trial court erred by incorrectly instructing the jury.

### A. The trial court erred by failing to properly instruct the jury on proximate causation.

Proximate causation is an essential element of a nuisance claim. *Toyo Tire*, 299 Ga. at 158. And the causation issue—whether harms resulting from third-party protests are legally attributable to Defendants—went to the crux of the case. *See, e.g.*, V10-295 (trial court's case summary for the jury) ("Defendants contend that any damages to Plaintiffs was caused solely by protestors and demonstrators and not by Dr. McBrayer or his companies."). The trial court thus had a duty "to accurately and completely instruct the jury on the legal principles of proximate cause and the forseeability of intervening acts as applied to the facts of this case." *Pearson v. Tippmann Pneumatics, Inc.*, 281 Ga. 740, 743-44 (2007).

The trial court instructed the jury: "Causation is an essential element of nuisance. To establish proximate cause, a Plaintiff must show *a legally attributable causal connection* between the Defendant's conduct and the alleged injury." V10-314 (emphasis added). But the trial court failed to instruct the jury on what constitutes a "legally attributable causal connection."

This failure "to accurately and completely instruct the jury on the legal

principle[ ] of proximate cause" is reversible error because the evidence showed multiple potential causes of the alleged damages (*e.g.*, protestors, Great Recession). *Pearson*, 281 Ga. at 743-44. When a jury hears evidence of more than one cause-in-fact, the failure to charge the jury adequately on the "legal meaning" of proximate cause "***requires a reversal***"—even if the appellant made no request for "a specific proximate cause charge." *Taft v. Taft*, 209 Ga. App. 499, 500 (1993) (emphasis added); *cf. Gray v. Elias*, 236 Ga. App. 799, 802 (1999) (failure to define proximate cause was not reversible error because the case involved only one cause-in-fact).

What's more, Defendants requested a specific proximate cause charge—pattern jury instruction 60.200. V8-17.[7] This charge is "correct and not misleading." *Warnock v. Sandford*, 349 Ga. App. 426, 431 (2019).

**B. The trial court erred by refusing to allow apportionment of fault to the non-party protestors.**

Since this lawsuit began in 2013, it has been clear to everyone that third-party protestors and demonstrators were at least partially at fault for the alleged damages. Even the Complaint acknowledged this fact. It specifically alleged that Defendants' medical practice "attracted a constant stream of 'right to life' picketers

[7] Defendants at first submitted the charge that the trial court gave, but withdrew it during the charge conference and asked for the "pattern charge" because it gives a "better explanation." V8-17; *see also* V7-232 (discussing pattern charge 60.200).

and demonstrators" who "created adverse publicity which cast an unfavorable light on the entire park." V2-7-8.

Shortly before trial, Defendants proposed a verdict form that would have allowed the jury to apportion a percentage of fault to "Protestors and Demonstrators," among others. V3-179. Defendants also requested a jury instruction on apportionment of fault. V3-171; *see* O.C.G.A. § 51-12-33(c) ("In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.").

But the trial court refused to let the jury apportion fault to the protestors, despite Defendants' objection. V7-238-39; *see also* V7-108.

That refusal is erroneous because the August 2017 pretrial order—which the trial court signed—gave notice of Defendants' request for apportionment. V2-973-89. In their case outline, Defendants explained that "[a]ny damage to the Plaintiffs was caused solely by the protestors and demonstrators and not by Dr. McBrayer or his companies." V2-977. And the "issues for determination by the jury" included this question: "***To what percentage were the Plaintiffs damaged by the protestors and demonstrators, and to what percentage were they damaged by the Defendants?***" V2-977-78 (emphasis added). Two years passed before trial, and this part of the pretrial order never changed. *See* V3-54, V3-139, Supp-V1-14.

The 2017 pretrial order satisfies every requirement for notice of non-party fault. *See* O.C.G.A. §§ 51-12-33(d)(1), (d)(2). ***First***, the notice was timely because it was filed two years before trial. *See id.* § 51-12-33(d)(1) (notice must be given "not later than 120 days prior to the date of trial").

***Second***, the notice was in a "pleading." *Id.* § 51-12-33(d)(2) ("The notice shall be given by filing a pleading in the action …."). Indeed, the pretrial order provided that it "supersedes the pleadings." V2-988; *see, e.g.*, *Life Ins. Co. v. Meeks*, 274 Ga. App. 212, 216 (2005) ("When entered, the pretrial order supersedes the pleadings and controls the subsequent scope and course of the action.").

***Third***, the notice came with "a brief statement of the basis for believing the nonparty to be at fault," § 51-12-33(d)(2). *See* V2-977 ("The Plaintiffs allege that the protestors and demonstrators created adverse publicity resulting in substantial damages to the Plaintiffs.… Any damage to the Plaintiffs was caused solely by the protestors and demonstrators and not by Dr. McBrayer or his companies."). That brief statement was more than enough to put Plaintiffs on notice, particularly given the history of this case and Plaintiffs' own allegations about the protestors.

***Fourth***, the notice's description of "'right to life' picketers and demonstrators" mentioned in the Complaint (*see* V2-977) was the "best identification … possible under the circumstances." O.C.G.A. § 51-12-33(d)(2).

Plaintiffs testified that the protests took place every week throughout the four-year damages period, and sometimes more than a hundred protestors showed up in a single day. *See* V5-58, V5-209, V5-399. Given the sheer number of protestors, it would have been impossible to locate all their names and addresses.

And this Court has held that "***[t]he [apportionment] statute does not require precise party identification***." *Double View Ventures, LLC v. Polite*, 326 Ga. App. 555, 562 (2014) (Miller, J.) (emphasis added), *overruled on other grounds*, *Martin v. Six Flags Over Ga. II, L.P.*, 301 Ga. 323 (2017). Thus, a jury can apportion fault to ***unknown*** actors like the protestors. *See, e.g.*, *Six Flags Over Georgia II, L.P. v. Martin*, 335 Ga. App. 350, 369 (2015) (whole court) (Miller, J., concurring specially) (stating that "it was clear that the trial court was required to place the nonparties on the verdict form"—even though one nonparty was an unidentified "John Doe"), *aff'd in part, rev'd in part*, 301 Ga. 323 (2017); *see also GFI Mgmt. Servs., Inc. v. Medina*, 291 Ga. 741, 742 (2012); *Hickory Lake, L.P. v. A.W.*, 320 Ga. App. 389, 389 (2013).

Because the 2017 pretrial order met all the statutory requirements for a notice of apportionment, the trial court's refusal to let the jury apportion fault to protestors was legal error. That error requires a new trial as to apportionment as well as liability and damages. To be sure, "in the ordinary case, the issue of apportionment among tortfeasors will be sufficiently distinct from the issue of

liability and calculation of damages that the correction of an error in apportionment will not require a full retrial." *Martin*, 301 Ga. at 340-41. But the activities and effects of the protests are intertwined with every part of the case—liability, damages, and apportionment—so a full retrial is necessary.

### C. The trial court's recharge on deference to the Association was erroneous.

During deliberations, the jury sent the court a note asking "if the [Association] assessments fine are a set amount or if we can change it?" V8-48. The jury was contemplating whether to discount the $555,000 in fines as unreasonable, as the jury did with the lost rental income calculated by Plaintiffs' expert. Defendants proposed that the jury *can* change the amount because the Association had sought to recover the fines as "special damages" in tort. V8-49-50; *see also* V10-325 (instructing jury on special damages).

The trial court disagreed and charged the jury that "no principle of law is more firmly fixed in our jurisprudence than the one which declares that the Courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs. … Accordingly, a Court will not substitute its judgment for that of the Board of Directors of the property owners' association." V8-49-50, V8-52.

The recharge was erroneous. It may be correct as an abstract principle, but it was deeply misleading in the context of the jury's specific question. Because the

Association sought to collect the fines as a form of special damages for nuisance, it was for the *jury* to determine the amount. The Association's Board deserves no deference for calculating *tort damages*. Yet the charge effectively directed a $555,000 verdict for the Association by suggesting that tort damages are a "matter[ ] involving merely the judgment of the [Board] majority." V8-52.

Because the charge is misleading and "it is clear from … the question from the jury" that the jury was considering awarding less than the full amount of the fines, the Association's award must be vacated. *Pearson*, 281 Ga. at 744.

## V. The trial court abused its discretion and violated due process by prohibiting Defendants from accessing Plaintiffs' expert's report.

During discovery, Plaintiffs sought documents and interrogatory responses related to Defendants' ***liability defenses and their assets***. V2-215-17, V2-219-44. After Defendants failed to respond, the trial court imposed sanctions. V2-370-71. As part of the sanctions, the court prohibited Defendants from taking any more discovery,[8] *id.*, and the court later extended that sanction to prohibit Defendants from accessing Taylor's expert report on ***damages*** until the evening before his testimony. V2-619, V4-10, V4-16, V7-138. Even then, Plaintiffs never produced the source materials underlying Taylor's report.

Because there was no nexus between that sanction (prohibiting access to the

[8] For purposes of this appeal, Defendants challenge only the lack of access to Taylor's expert report and not the other parts of the trial court's sanctions.

expert report on damages) and the discovery Plaintiffs had originally sought (on liability defenses and Defendants' assets), the sanction violated due process. And the sanction prejudiced Defendants because it allowed Plaintiffs' expert to testify falsely about the contents of a Cushman & Wakefield report—on which he based one of his key assumptions—without a meaningful opportunity for Defendants to cross-examine him about it.

### A. The trial court violated due process by prohibiting access to Plaintiffs' expert report.

"To comply with the Due Process Clause, a court must impose sanctions that are both just and ***specifically related*** to the particular claim which was at issue in the order to provide discovery." *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 738 (2010) (emphasis added and marks omitted). For example, a trial court may strike an answer or defenses when a defendant fails to produce evidence to support those defenses, but violates due process to do so as a penalty for unrelated conduct. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982). Applying these standards in *Carey Canada, Inc. v. Hinely*, 181 Ga. App. 364 (1986), *rev'd on other issue*, 257 Ga. 150 (1987), this Court reversed a discovery sanction that stipulated a finding that "Plaintiffs have suffered personal injury and/or death as a result of being exposed to the asbestos containing products sold by Defendant" because that "finding does not correlate with any of [the] documents requested." *Id.* at 367, 369.

Here, the trial court's sanction, which prohibited Defendants from accessing Taylor's damages report until the evening before his testimony, was unrelated to the liability-focused discovery requests to which Defendants did not initially respond. Because there is no nexus between that sanction and any of the documents or interrogatory responses requested by Plaintiffs, the sanction violated Defendants' due process rights. *See id.*

### B. The erroneous sanctions prejudiced Defendants' ability to cross-examine Plaintiffs' expert.

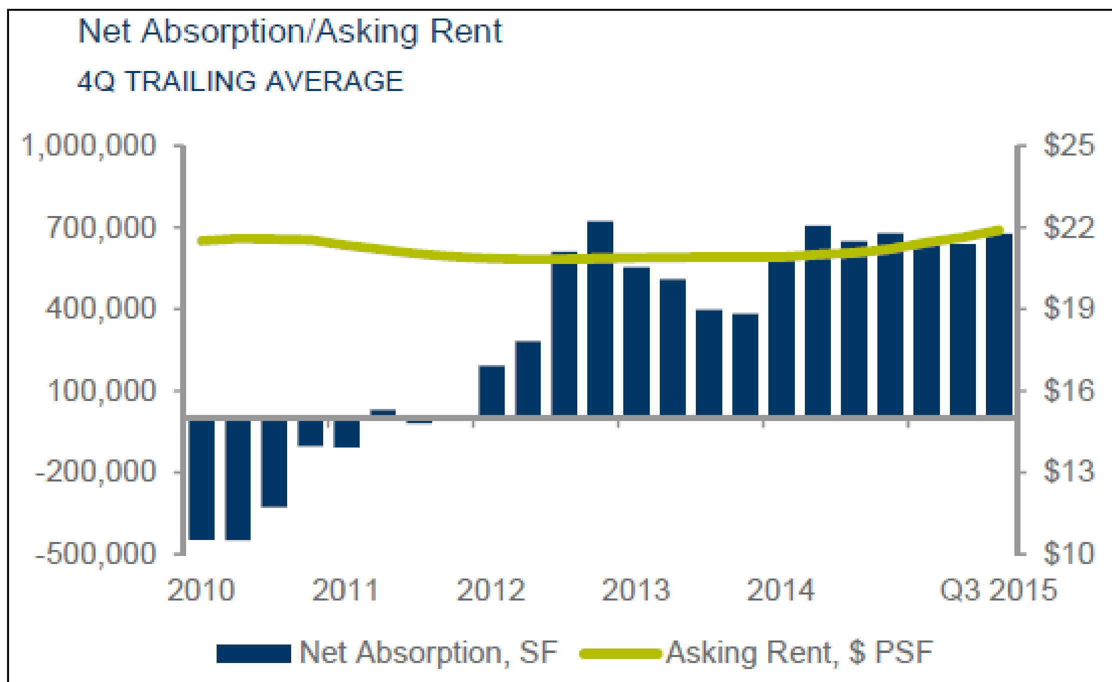
A new trial is required because that violation denied Defendants the meaningful opportunity to cross-examine Taylor about his expert report and his false testimony.

Rather than fully account for the Great Recession's effect on rents from 2009 through 2015, Taylor assumed that, but for the alleged nuisance, rental rates in the Office Park would have increased 3% annually during this period. V9-70.[9] According to his report, that assumption was "deemed reasonable based on Cushman & Wakefield's *Marketbeat*, published Q3 2015, which reports an ***annual*** increase of 5% for asking rents in the Atlanta Office Market." V9-74-76 n.2 (emphasis added). In his direct testimony, Taylor emphasized that the Cushman &

[9] Based on the 3% assumption, Taylor calculated $849,180 in total damages "due to lower lease rents." V9-74-76. That assumption also factors into his calculation of damages for lower occupancy. V9-70.

Wakefield report supports his calculations. V7-21, V7-28.

Then, to rehabilitate Taylor after defense counsel questioned him about the Great Recession, V7-41-45, Plaintiffs' counsel elicited testimony that the Cushman & Wakefield report showed an average five-year rental rate increase of 5% per year. V7-52-53. That testimony is false. The report states that the "[o]verall average asking rents continued their surge in the Atlanta area increasing 5% ***from one year ago*** marking the ***largest*** year-over-year growth since 2008." V3-318 (emphasis added). In fact, Cushman & Wakefield reported essentially ***zero*** net growth in rental rates from 2010 to 2015:




*Id.* (screenshot).

Taylor's false testimony about the Cushman & Wakefield report gave the

jury reason to credit his testimony over Defendants' rebuttal expert on this issue.[10] Because of the erroneous sanctions, Defendants did not receive Taylor's expert report until the evening before trial and ***never*** received a copy of the Cushman & Wakefield report from Plaintiffs. The sanctions therefore prevented Defendants from having a meaningful opportunity to cross-examine Taylor.

## VI. The trial court erred by sequestering Defendants' damages expert.

Our Supreme Court has emphasized that "we are all living in a new evidence world." *Davis v. State*, 299 Ga. 180, 192 (2016). The "fundamental rule" of this new world is that the 2013 Evidence Code displaces "old Georgia precedent" when a Georgia rule is materially identical to a federal rule. *State v. Almanza*, 304 Ga. 553, 553 (2018).

The trial court violated this fundamental rule by relying on witness-sequestration cases from 1977, 1986, and 1994—even though our Supreme Court disavowed that old Georgia precedent in *Davis*. *See* 299 Ga. at 185 (explaining that the new Georgia sequestration rule, O.C.G.A. § 24-6-615, tracks Federal Rule of Evidence 615 and "differs significantly" from Former O.C.G.A. § 24-9-61). The trial court's ruling—that Defendants' expert witness could not sit in the

[10] Plaintiffs' counsel compounded this error when he cross-examined Defendants' rebuttal expert. *See* V7-141. Defendants' expert replied that he was not familiar with the "5 percent a year" finding and that he "might be interested in seeing that because that seems contrary to the research that I found." *Id.*

courtroom during trial—was an abuse of discretion.

At the pretrial conference, Defendants explained that "[i]t is necessary for the trial for [Branch] to hear the facts and the opinion of their expert," Taylor, "[b]ecause we have no other way to do that." Supp-V3-16. Branch's presence was essential to avoid "trial by ambush," because Defendants "were not allowed to get [Taylor's] report, any of his supporting documentation, or anything else." Supp-V3-18. Defendants emphasized that "[w]e're under new [evidence] rules" and that, under *Davis*, "the concerns underlying sequestration are generally overcome where an expert witness will give only or primarily opinion rather than factual testimony." Supp-V3-16, Supp-V3-18. Two days later, the trial court issued a written order denying Defendants' request. Supp-V1-5-7.

The trial court's ruling is erroneous. First, relying on a 1994 Georgia precedent, the trial court said that sequestration is necessary to avoid "'giving an unfair advantage to the party whose witness hears the other witnesses before the witness testifies and thus [can] tailor his or her testimony accordingly.'" Supp-V1-6 (quoting *Bean v. Landers*, 215 Ga. App. 366, 368 (1994)). The new Evidence Code, however, *requires* an exception to the sequestration rule for "[a] person whose presence is shown by a party to be essential to the presentation of the party's cause." O.C.G.A. § 24-6-615(3).

*Davis* ruled that although expert witnesses are not automatically exempt

from sequestration, "the concerns underlying sequestration are generally overcome where an expert witness will give only or primarily opinion rather than factual testimony and may appropriately base that opinion on the testimony of other witnesses." 299 Ga. at 186. On top of that, "[t]he reasons for sequestration may be even less applicable to rebuttal testimony by experts" like Branch. *Id.* at 187. "[T]he very function of a rebuttal witness is directed toward challenging the prior testimony of opposing witnesses, thereby enhancing the fact finder's ultimate determination of an objective 'truth.'" *Id.* (citation omitted). A rebuttal witness who refutes the findings of an opposing expert "can contribute most completely to a jury's truth finding capacity ***only*** by fully understanding and addressing all of the relevant prior evidence." *Id.* (emphasis added; citation omitted).

Second, the trial court said that ordinarily an expert need not hear the testimony of the opposing witness because "'the proper mode of examination is by hypothetical questions.'" Supp-V1-6 (quoting *Bean*, 215 Ga. App. at 368, and *Bartell v. State*, 181 Ga. App. 148, 149 (1986)). But *Davis* rejected that outdated view. Examining an expert with hypothetical questions is "lengthy, convoluted, and typically argumentative." 299 Ga. at 187. "Moreover, trial by ambush and confoundment of rebuttal witnesses hardly advances the purported goals of reliability and trustworthiness." *Id.* at 188 (citation omitted). The Supreme Court also agreed that "it is ***unreasonable to place experts under short time constraints***

***for familiarizing themselves with each other's findings*** and therefore, reasonable to permit all of them to appear in court." *Id.* (emphasis added; citation omitted). Indeed, Branch's presence in the courtroom was particularly essential because he did not receive Taylor's report until 5:30 p.m. the night before each expert testified. V7-138.

Third, the trial court seemed to believe that it had unfettered discretion to require sequestration even though Branch's presence was essential to the defense. *See* Supp-V1-6 ("[A] trial judge has broad discretion in matters of testimony of sequestered witnesses.") (quoting *Stripling v. Godfrev*, 143 Ga. App. 742, 743 (1977)). That view is also outdated. The new Georgia rule cabins the trial court's discretion, providing that the rule "*shall not* authorize exclusion of … (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause." O.C.G.A. § 24-6-615 (emphasis added). While the trial court has discretion "in deciding whether a witness comes within [the essential witness] exception," if the witness is essential the trial court is "preclude[d] … from excluding" him. *Davis*, 299 Ga. at 186; *see also United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002) (holding that exclusion of witness who meets Rule 615(3) criterion is abuse of discretion).

The trial court's erroneous exclusion of Branch from the courtroom was no doubt harmful. The exclusion undercut his ability to fully rebut Taylor's

testimony. In fact, Plaintiffs impeached Branch precisely because he was *not* present in the courtroom to hear Taylor's assumptions and explanations. V7-129.

Excluding Branch also undercut his ability to assist defense counsel. For example, had Branch been present to hear Taylor's heavy emphasis on the Cushman & Wakefield report, *see* V7-21-23, V7-28, V7-43, V7-50, V7-52-53, he could have found the report online and explained to defense counsel (and the jury) why Taylor's reliance on it was incorrect. Instead, Plaintiffs impeached Branch because he was not specifically familiar with the Cushman & Wakefield report on which so much of Taylor's testimony was based. V7-141.

## CONCLUSION

The Court should vacate the judgment and the verdict and grant Defendants a new trial.

Respectfully submitted, this 16th day of October, 2020.

This submission does not exceed the word count limit imposed by Rule 24, as modified by this Court's Order dated October 8, 2020.

*/s/ Michael L. Eber*
Robert B. Remar
Georgia Bar No. 600575
Michael L. Eber
Georgia Bar No. 859338
Cameron B. Roberts
Georgia Bar No. 599839
ROGERS & HARDIN LLP
229 Peachtree Street, N.E.
Suite 2700

Atlanta, GA 30303
(404) 522-4700
rremar@rh-law.com
meber@rh-law.com
croberts@rh-law.com

Counsel for Appellants

## CERTIFICATE OF SERVICE

I certify that there is a prior agreement with Appellees to allow documents in a .pdf format sent by email to suffice for service. I certify that contemporaneously with the filing of the foregoing, a copy was served via email on the following counsel of record:


Alexander P. LeVorse, Esq.
aplevorselaw@msn.com
(770) 408-1234
Northridge 400, Building 2
8325 Dunwoody Place
Atlanta, GA 30350-3307

Noah S. Rosner, Esq.
noahrosner@yahoo.com
(770) 408-1223
Northridge 400, Building 2
8325 Dunwoody Place
Atlanta, Georgia 30350


This 16th day of October, 2020.


*/s/ Michael L. Eber*
Michael L. Eber
Ga. Bar No. 859338
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street NE
Atlanta, Georgia 30303
(404) 522-4700

*Attorney for Appellants*