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.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiffs contend that a properly licensed medical clinic operating in an ordinary manner at a properly zoned location was a nuisance because it performed abortions that offended them and others. They argue, for example, that "[a] clinic doing pregnancy terminations was by itself grossly out of character for the Park" and that the "sensitive subject" of abortion "rattled people" and produced "unpleasant feelings," "offense," and "embarrassment." Resp. 20-21, 23. Plaintiffs also complain that the clinic "attracted" protestors and that Defendants should have "cease[d] … operation" to abate the alleged nuisance. Resp. 28.

This argument reflects a fundamental misunderstanding of nuisance law and, if adopted, it would have dangerous consequences. This case involves abortion, but Plaintiffs' theory threatens many controversial businesses or institutions—including gun stores, banks, churches, synagogues, and mosques. Georgia's appellate courts have never recognized such a sweeping theory of liability. For this reason and others discussed below, this Court should reverse.

ARGUMENT

I. Insufficient evidence supports the verdict on nuisance liability.

A. Insufficient evidence showed that Defendants operated the clinic in an unlawful, unusual, or unreasonable manner.

Contrary to Plaintiffs' assertion, nuisance liability does not "run[ ] the gamut." Resp. 11. Instead, a century of common-law "qualifications and

limitations" cabin liability. *Wilson v. Evans Hotel, Co.*, 188 Ga. 498, 504-05 (1939). One such limitation is that lawful businesses are not liable for being controversial. That a "business itself is offensive to others, … or that persons of fastidious taste would prefer its removal, is not sufficient" to create a nuisance. *Id.* at 501 (quoting *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345 (1919)).

Another critical limitation on nuisance liability is that a lawful business operating in a *commercial* area is not "out of place" and thus a nuisance—*unless* "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); *see also Newman v. Sessions*, 215 Ga. 54, 55-56 (1959) (holding that if a properly zoned business on a "commercial lot" is a nuisance, "it must be because of the manner of its operation"); *Effingham Cty. Bd. of Comm'rs v. Shuler Bros., Inc.*, 265 Ga. App. 754, 755 (2004); Br. 13-14.

Plaintiffs' contrary authority is off-point because it involves businesses in mainly *residential* areas. *See, e.g.*, *Poultryland, Inc. v. Anderson*, 200 Ga. 549, 553 (1946) ("The locality and community in which the plant is located is predominantly a residential section."); *McGowan v. May*, 186 Ga. 79, 79 (1938) (undertaking business "in a section essentially and distinctively devoted to residential purposes").

Plaintiffs argue that lawful operations can still be a nuisance except in cases "involving specific grants of permission" to governmental entities. Resp. 16-17. But none of the cases cited above relied on a legislative grant of authority. For example, *Effingham County* only involved government zoning for a private business, just like this case. 265 Ga. App. at 755. If the mill in *Effingham County* was not a nuisance because it was zoned properly and operated in an ordinary manner, then Defendants' clinic was not a nuisance for the same reason. Br. 14.

Plaintiffs rely on imprecise language in *Sumitomo Corp. of America v. Deal*, 256 Ga. App. 703 (2002), to suggest that a lawful business is liable *whenever* it produces hurt or inconvenience. Resp. 15-16. But nuisance plaintiffs must also show that the location of the business (in a mainly residential area) was improper or that the harm stemmed from an "unusual ... or unnecessary and avoidable" part of the business. *Asphalt Products*, 189 Ga. at 612-13; *see also Effingham County* 265 Ga. App. at 755. That rule aligns with *Sumitomo*, where the developer of a 1,300-acre residential neighborhood built a detention pond but then unnecessarily put the outlet pipe too close to the homeowner's land. 256 Ga. App. at 704.

At trial, the testimony overwhelmingly focused on harm caused by protestors—rather than the operations of the clinic itself. *See, e.g.*, V9-50-51; V5-54-62; V6-68; V6-77; V6-83; V6-101-04. To change that focus, Plaintiffs now claim that minor incidents of alleged misconduct by Defendants' invitees alone can

support the verdict. Resp. 19-20. But Plaintiffs significantly overstate this evidence, which could not establish nuisance liability and was not the basis on which the jury awarded $1.5 million in damages. Br. 13. Indeed, Plaintiffs presented no evidence of *any* economic harm allegedly resulting from the conduct of Defendants' invitees.

Some witnesses described people "loitering" near Defendants' building, but they were just the companions of Defendants' patients who would "[h]ang out" in their cars or in the parking lot during appointments. V5-100, V5-103, V6-172. Because the companions were there for a legitimate purpose, they were not even "loitering." *Bell v. State*, 252 Ga. 267, 270, 272 (1984). Contrary to Plaintiffs' assertion (Resp. 20), no evidence showed that loitering posed a safety risk.

Ermentrout testified that he observed patients' companions litter by, for example, discarding fast food containers, at times over a 20-year period. V5-100-01. But there was insufficient evidence that littering was so frequent and severe that it would substantially harm a reasonable person, rather than people "peculiarly sensitive to annoyances or disturbances of the character complained of." *Warren Co. v. Dickson*, 185 Ga. 481, 483 (1938).

Similarly, the most specific descriptions of "voiding" are from letters written in 1998—well outside the limitations period. V5-90; V5-38; V9-40; V9-42. And there was no evidence of frequency. All Ermentrout said was that it happened

again after Defendants hired security and installed a camera. V5-51-52. That testimony is insufficient. *See City of Atlanta v. McCrary*, 328 Ga. App. 746, 753 (2014) ("9 accidents and 2 injuries for 2006, and 13 accidents and 10 injuries for 2007" in connection with traffic stops was insufficient evidence of nuisance); *Morin v. City of Valdosta*, 140 Ga. App. 361, 361 (1976) (two "separate" and "distinct" incidents "three months apart" could not show "continuity or repetition necessary for a finding of nuisance").[1]

B. Insufficient evidence showed that Defendants' maintained control over protestors engaged in protected speech.

Defendants cannot be liable for protestors they cannot control. Br. 15-17. Plaintiffs claim the foreseeability of protestors is all that matters, Resp. 28-29, but accepting that argument would expose a wide range of controversial businesses to potentially crippling liability.

That argument is also unprecedented. It finds no support in *Benton v. Pittard*, 197 Ga. 843 (1944), or *City of Atlanta v. Murphy*, 194 Ga. App. 652 (1990). Protestors on public sidewalks are not like the invitees in *Benton* who "congregate[d] *in and around the* [defendant's] building" while awaiting treatment for dangerous communicable diseases. 197 Ga. at 846 (emphasis added). Nor are

[1] Plaintiffs also mention Cynthia Sours's testimony about medical waste boxes, Resp. 21-22, but Sours admitted she just "imagine[d]" that the boxes contained fetuses and knew nothing about what was inside. V7-87-88. Nor is it unusual for a medical clinic to put medical waste boxes on its front porch.

protestors exercising their constitutional rights remotely like "vermin and undesirable animals" that are naturally attracted to a landfill. *Murphy*, 194 Ga. App. at 652. In those cases, the defendants had the legal right and ability to abate the harm taking place ***on their property***. Not so here.

C. Insufficient evidence showed that Defendants had a duty to protect Plaintiffs from arson by third-party criminals.

Defendants cannot be liable in nuisance based on a single incident of arson that caused no damage to Plaintiffs or their buildings. Br. 18-19 (citing *Barnes v. St. Stephen's Missionary Baptist Church*, 260 Ga. App. 765, 769 (2003)). And Plaintiffs have identified no case finding nuisance liability based on fear that a neighbor's property would be attacked.[2]

Under premises liability law, no legal duty exists to prevent third-party crime unless substantially similar crimes have previously occurred on or near the property. *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 786 (1997). Plaintiffs try to distinguish premises liability cases (Resp. 23-24), but this Court has applied the *Sturbridge* standard in nuisance cases. *See Camelot Club Condo Ass'n v. Afari-Opoku*, 340 Ga. App. 618, 624 (2017) (nuisance established by "ample evidence at trial of prior criminal activities on the premises"); *Bethany Group, LLC*

[2] Fear of future physical harm might be relevant to inherently dangerous facilities like a "stored explosives" warehouse (Resp. 23 n.17), but that line of non-Georgia cases is irrelevant here.

v. Grobman, 315 Ga. App. 298, 302 (2012) ("repeated instance of armed robberies" raised a jury question on nuisance). Here, until 2012, there was no arson (or other crime) at the clinic. That single incident cannot, as a matter of law, give rise to nuisance liability. *Barnes*, 260 Ga. App. at 769.

Premises liability law also makes clear that incidents at *other* clinics do not trigger liability. *See Dew v. Motel Props., Inc.*, 282 Ga. App. 368, 371-72 (2006) (other property owned by defendant). Otherwise, schools, churches, synagogues, and mosques could all be liable for nuisance simply because *other* facilities in *other* counties or even *other* states have been attacked. Br. 19.

D. Defendants are not liable under the Declaration unless they are liable for common law nuisance.

The Association's nuisance claim, based on the Declaration of Covenants, fails for essentially the same reasons as Plaintiffs' tort claims. Br. 20. Such covenants are enforceable only if they are interpreted to track the common law definition of nuisance. *Id.* (citing *Douglas v. Wages*, 271 Ga. 616, 617 (1999)).

Plaintiffs misunderstood this argument (*see* Resp. 33-34), which is not that nuisance covenants are never enforceable. Under *Douglas*, the Declaration authorizes recovery for nuisance only when the common law would, too. Because the tort-based nuisance claim fails, any Declaration-based nuisance claim (including a derivative attorneys' fee claim) must fail too.

II. Insufficient evidence supports the damages awarded by the jury.

A. The damage awards depend on speculation and guesswork.

The jury had no rational basis for calculating the damages it awarded because Plaintiffs failed to prove how much of their economic underperformance from 2009 to 2015 was caused by the alleged nuisance. *See* Br. 20-23; *Owens v. Novae, LLC*, A20A1268, 2020 WL 6146145, at *5 (Ga. Ct. App. Oct. 20, 2020) (holding evidence "simply insufficient" to estimate damages with reasonable certainty where plaintiff admitted "there could be other causes for the decline in revenue"). Even assuming Plaintiffs suffered ***some*** damage, their testimony was disconnected from their expert's assumption that Defendants caused ***all*** of their lost rental income (relative to the Atlanta market). The jury could only guess how much to discount the Plaintiff's expert's calculations—which is impermissible.[3]

Plaintiffs appear to concede that their own testimony provided no reasonable basis for estimating lost rental income damages. *Compare* Br. 21-22 (reviewing testimony of Spann, Lyman, and Sours), *with* Resp. 35-37 (not mentioning any lay witness testimony). While Plaintiffs argue that they "are presumed capable of

[3] It ultimately does not matter whether lost rental income is a form of lost profits. *See* Br. 20-21; Resp. 35-36. Either way, Plaintiffs "ha[d] the burden of proof of showing the amount of loss in a manner in which the jury can calculate the amount of the loss with a reasonable degree of certainty." *Legacy Acad., Inc. v. Doles-Smith Enterprises, Inc.*, 337 Ga. App. 575, 582 (2016).

giving their opinion of their lost rents" (Resp. 36), there was no lay testimony on the amount (or percentage) of lost rents caused by the alleged nuisance.

Plaintiffs rely only on their expert, and they insist that he opined on causation. *See* Resp. 36-38. ***But Taylor denied having any such opinion***. *See* Br. 21. Plaintiffs say Taylor concluded that activities "'created exclusively by the Defendants … made tenant retention a difficult task and made procuring new tenants nearly impossible.'" Resp. 37 (quoting V9-66). But defense counsel read that quotation to Taylor, V7-34-35, and he confirmed "[t]he report is stating what the Plaintiffs' allegations are" and "[i]t is not a conclusion by [him] on cause." V7-35-36. Taylor said—three times—that he simply "assum[ed]" causation for the full value of his damage calculations. V7-30; V7-35; V7-46. And he candidly admitted that "the testimony that is going come in regarding the causation is not from me." V7-48-49.[4]

Even more to the point, it doesn't matter if the evidence showed that "[a]ll three Appellees lost [*some*] rents as a result of the clinic." Resp. 37. The jury still had no information or data it could use to estimate with reasonable certainty *how*

[4] Given Taylor's unambiguous testimony, the footnotes in his report also assume that other evidence will prove causation. *See* V9-74 nn.1 & 3; *see also* V7-35.

much of Taylor's damages number is attributable to Defendants. The jury apparently guessed "about 50 percent," but that was pure speculation.[5]

To save the verdict, Plaintiffs argue that it might reflect damages for emotional harm (Resp. 38-39)—but Defendants opening brief anticipated that argument. Br. 24-25. The record shows that the jury anchored its damages award to Taylor's calculations. Br. 24. It is not "all speculation" (Resp. 39) to recognize, for example, that the jury's $46,264 award to Portfolio is exactly half of Taylor's calculation of lost rental income. *See City of Atlanta v. Landmark Envtl. Indus., Inc.*, 272 Ga. App. 732, 738 (2005) ("A general verdict must be construed in light of the pleadings, the issues made by the evidence and the charge of the court.").[6]

Plaintiffs argue the jury "could use lost rents as a proxy when making an award for emotional harm." Resp. 39. But Taylor's calculations cannot be a valid "proxy" for emotional harm because he (1) failed to determine how much of the decreased rents were caused by Defendants; and (2) calculated lost rent for the parts of Plaintiffs' property that they *rented* to others, not for the parts they *occupied*. V9-74-75 nn.4-5. *See Toyo Tire N. Am. Mfg., Inc. v. Davis*, 299 Ga. 155, 164-65 (2016).

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[5] Although the verdict need not "exactly match the amount for which the Plaintiffs prayed" (Resp. 39), it must be within the authorized range of damages *proven* at trial. *Beasley v. Wachovia Bank*, 277 Ga. App. 698, 699 (2006).

[6] That Defendants agreed to a general verdict form does not waive any of their substantive grounds for appeal. *See Curran v. Scharpf*, 290 Ga. 780, 780 (2012).

Plaintiffs assert—without explanation—that "the fact [the jury] chose not to award any damages to [Governors Ridge] says nothing." Resp. 39. To the contrary, this fact proves that the jury did not award *any* emotional harm damages to Plaintiff EDS, either. Br. 24. Spann was the only witness for EDS or Governors Ridge, and he did not distinguish between the two entities as to annoyance or discomfort. The Court cannot presume that the jury *irrationally* awarded $500,000 to EDS for emotional harm but zero to Governors Ridge for exactly the same harm. Doing so would make the verdict contradictory and void—a point that Plaintiffs flatly ignore. *See* Br. 25; Resp. 39.

B. Plaintiffs cannot recover the fines as "special damages."

Plaintiffs misunderstand Defendants' argument about special damages. The jury charge is not the problem—it correctly stated the law that special damages must "actually flow from a tortious act." V10-325; *see also* Br. 25 ("the trial court correctly charged the jury"). But there is no ***evidence*** that the fines were based on economic harm from the alleged tort. Indeed, Plaintiffs admitted that the fines do *not* reflect "money damages for *economic losses*," such as money spent to mitigate the alleged nuisance. V3-370; *see also* Br. 26 (collecting record citations to which Plaintiffs did not respond).

Plaintiffs claim that fines are "sometimes called 'special damages'" (Resp. 40), but they cite no authority for that proposition. Special damages for the tort of

nuisance are *expenses* incurred by a plaintiff, often for abatement. Br. 25-26 (citing cases). Fines that the Association imposed to "get [Dr. McBrayer's] attention," V6-114, do not "actually flow" from any nuisance. V10-325.

The correct way to recover fines imposed by an association is to sue under O.C.G.A. § 44-3-223 to recover sums for breach of covenants. But Plaintiffs never did so, *see* Br. 26 & n.6, and the jury received no instruction on *any* element of a contract claim. *See* V10-315, 320-23, 325-26 (referring to "tort," "tortfeasor," "tort damages," "tortious act," or "tort actions"); *see also* Resp. 47 (acknowledging "agree[ment] to submit the fines as special damages to the jury").[7]

No reasonable jury could have awarded the amount of the fines as "special damages" in tort. Although Defendants did not move for a directed verdict, they deserve a new trial because the evidence on this issue (and others) was insufficient. *See Wimpy v. Martin*, 356 Ga. App. 55, 57 n.2 (2020).

III. The trial court erred by incorrectly instructing the jury on proximate cause and on apportionment.

A. Defendants did not acquiesce to the trial court's proximate cause instruction.

Despite the trial court's independent duty "to accurately and completely instruct the jury on the legal principles of proximate cause" as applied here,

[7] The jury was charged that fines are a personal obligation of the lot owner, V10-317, but not that fines could be recovered independent of the tort claim.

Pearson v. Tippmann Pneumatics, Inc., 281 Ga. 740, 743-44 (2007), the jury received no instruction on the *legal meaning* of proximate cause. Br. 27-28. This is hardly a "quibble[ ]." Resp. 43. Proximate cause is an essential element of a nuisance claim and was the crux of the case, especially because the jury heard evidence of multiple causes-in-fact. This substantial error thus "requires a reversal." *Taft v. Taft*, 209 Ga. App. 499, 500 (1993); *see also Lawyers Title Ins. Corp. v. New Freedom Mortgage Corp.*, 288 Ga. App. 642, 645 (2007).

Plaintiffs do not try to defend the proximate cause charge itself. Instead, they mostly argue that Defendants "acquiesce[d]" to it. Resp. 45-46. But Plaintiffs are wrong. Defendants *initially* submitted the proximate cause charge that the trial court ultimately gave. V3-1163. But, at Plaintiffs' request, the trial court asked the parties to consider whether it should give pattern charge 60.200 instead. V7-231-32. The next morning, Defendants asked for the "pattern charge" because it gives a "better explanation." V8-17. Plaintiffs opposed giving it, reasoning that a "basic" instruction was better because "juries … don't understand what proximate cause means." V8-18. The trial court agreed with Plaintiffs. *Id.*

Plaintiffs claim that Defendants later acquiesced to the proximate cause instruction. Resp. 46. But the record only shows Defendants' failure to object, which does not waive a challenge under O.C.G.A. § 5-5-24(c). *Pearson*, 281 Ga. at 742-43. To waive that challenge by acquiescence, a party must give "specific[]"

and "express" consent to the giving of the instruction. *Moody v. Dykes*, 269 Ga. 217, 220 (1998) (statement that "I won't object to anything. I'll accept it all" was acquiescence). Defendants did not do so. *See* V8-30 (silence when proximate cause charge mentioned); V8-36 (counsel says "fine" as to other charges just discussed); V8-48 (replying "No, ma'am" after trial court asked whether there was "[a]nything [else] on the final jury charge").

Finally, Plaintiffs argue that any error was harmless "under an 'any evidence' standard." Resp. 43. But that is the wrong standard. Erroneous jury charges are presumed harmful unless the entire record demands a contrary finding. *Foskey v. Foskey*, 257 Ga. 736, 736-37 (1988). Sufficient or not, the evidence certainly did not *require* a $1.5 million verdict against Defendants.

B. Defendants fully complied with the apportionment statute.

The trial court's refusal to let the jury apportion fault to the protestors is reversible error because the 2017 pretrial order met every requirement for notice of non-party fault. Br. 28-32. Entered two years before trial, that order, which superseded the pleadings, said that one of the "issues for determination by the jury" was "***[t]o 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).

Defendants do not claim just "substantial compliance" with O.C.G.A. § 51-12-33—the notice fully complied with every requirement. Br. 30-31. And the statute says nothing about using any magic words (such as "apportion"). *See* O.C.G.A. § 51-12-33(d)(1) (requiring "notice … that a nonparty was wholly or partially at fault").

Plaintiffs argue that the notice's description of the protestors was "too imprecise" (Resp. 48), but the statute requires only "the best identification … possible under the circumstances." O.C.G.A. § 51-12-33(d)(2). Plaintiffs do not dispute that the protestors were so numerous that identifying all their names and addresses was impossible. Br. 31. And Plaintiffs ignore this Court's holdings that a jury can apportion fault to unknown actors, like the protestors. *Id.*

Plaintiffs' argument that the notice supposedly referred to third-party Doe defendants is untenable. Defendants did not pursue any claims against the third-party Doe defendants. *See* V2-973 (caption of pretrial order); V2-975 ("the names of the parties as shown in the caption to this order are correct and complete"). Instead, the pretrial order referred to "a constant stream of 'right to life' picketers and demonstrators" at the Office Park and to apportionment of fault against all "the protestors and demonstrators." V2-977-78.

Finally, contrary to Plaintiffs' assertion (Resp. 48), the jury could have apportioned fault to the protestors despite their potential First Amendment immunity from liability. *Zaldivar v. Prickett*, 297 Ga. 589, 604 (2015).

IV. The trial court abused its discretion by prohibiting access to Plaintiffs' expert report.

The orders prohibiting Defendants from accessing the report of Plaintiffs' expert—even well after the trial started—violated due process because that sanction had no nexus to the requested supplemental discovery. Br. 34-35.

Plaintiffs appear to argue that the due process limits on sanctions under O.C.G.A. § 9-11-37(b)(2) do not apply to sanctions imposed under § 9-11-37(d). Resp. 49. That argument is nonsense. The holding of *Resource Life Insurance Co. v. Buckner*, which follows federal precedent, did not depend on the specific subsection of the statute. 304 Ga. App. 719, 738 (2010); *see also* 8B Wright & Miller, Federal Practice & Procedure § 2283 (3d ed. 2020) (describing due process limits as applying to all sanctions issued under Federal Rule 37). And the only case cited by Plaintiffs is distinguishable: it involved dismissal of a complaint, the offending party did not respond to *any* discovery requests, and no one raised a due process issue. *See Stolle v. State Farm Mut. Auto. Ins. Co.*, 206 Ga. App. 235 (1992). Finally, contrary to Plaintiffs' suggestion (Resp. 50), the validity of the

sanction depends on its nexus to Plaintiffs' discovery requests, not on whether the trial court could have imposed a different kind of sanction.

Because of the sanction, Defendants could not rebut Taylor's false testimony about historical data (in a Cushman & Wakefield report) that supposedly justified his methodology. Br. 35-37. Plaintiffs assert that Taylor "specifically rejected" the 5% growth rate he attributed to the Cushman & Wakefield report (Resp. 51), but Plaintiffs are wrong. Taylor defended the reasonableness of his 3% growth rate based in part on the claimed existence of a report showing 5% average annual growth. V7-22-23; V7-43; V9-74-76 n.2. And Plaintiffs impeached Defendants' expert, Branch, based on Taylor's false testimony. V7-141.

Plaintiffs' assertion that Branch knew about the report (Resp. 51) is also inaccurate. While Branch was familiar with the "general report"—*i.e.*, the existence of quarterly Cushman & Wakefield reports—he had "not seen the study" and was "not familiar" with any finding that rental rates increased by 5% on average during the relevant period. V7-141.

V. The trial court abused its discretion by sequestering Defendants' damages expert.

The trial court abused its discretion by relying on precedent disavowed in *Davis v. State*, 299 Ga. 180 (2016). Br. 37-41. Plaintiffs do not try to justify the trial court's reasoning. Instead, Plaintiffs claim that the sequestration order was

"an adjunct to [the] discovery sanctions." Resp. 52. But the trial court's sequestration order said *nothing* about discovery sanctions. Supp-V1-6-7.

Because the trial court applied the wrong legal standard, this Court cannot affirm unless, "had the trial court used the correct facts and legal analysis, it would have had no discretion to reach a different judgment." *Fulton Cty. v. Ward-Poag*, 2020 WL 5883344, at *3 (Ga. Oct. 5, 2020) (citation omitted). And the trial court not only could have allowed Branch in the courtroom, but doing so was mandatory because his presence was essential to avoid trial by ambush. *See* O.C.G.A. § 24-6-615(3).

The notion that Branch's presence was not essential because he had seen an "abbreviated damages report … 5 years earlier" (Resp. 52) is absurd. That "report" is just a cover letter providing outdated calculations and no supporting analysis at all. V2-332. Plaintiffs admitted that "[e]verything will be new because we have changed our report" and that Branch "had absolutely nothing … to be perfectly blunt with you." V4-14; *see also* Supp-V3-15 ("their expert doesn't know … any facts to speak of"). And an expert rebuttal witness "can contribute most completely to a jury's truth finding capacity only by fully understanding and addressing all of the relevant prior evidence." *Davis*, 299 Ga. at 187 (citation omitted).

CONCLUSION

The Court should reverse the judgment and verdict, and remand for a new trial.

Respectfully submitted, this 9th day of December, 2020.

This submission does not exceed the word count limit imposed by Rule 24.

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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:

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