IN THE COURT OF APPEALS

STATE OF GEORGIA

DANIEL E. MCBRAYER, SR., ALPHA OB GYN GROUP, PC and THE MCBRAYER FAMILY LIMITED PARTNERSHIP	*	
Appellants,	*	
v.		**Appeal No.: A21A0262**
THE GOVERNORS RIDGE PROPERTY OWNERS ASSOCIATION, INC., EXECUTIVE DATA SYSTEMS, INC., GOVERNORS RIDGE, LLC, KOA PROPERTIES, LLC, and PORTFOLIO PROPERTIES,	*	
Appellees.	*	

BRIEF OFAPPELLEES

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INTRODUCTION

Appellees, The Governors Ridge Property Owners Association, Inc.("GROPA"), Executive Data Systems, Inc. ("EDS"), Governors Ridge, LLC, ("GRLLC") KOA Properties, LLC ("KOA"), and Portfolio Properties ("Portfolio"), filed suit in September 2013 alleging Appellants created and maintained a nuisance by opening and operating a women's health clinic that specialized in terminating human pregnancies, both totally out of character for the Park and highly embarrassing, discomforting and offensive to Park owners and occupants, and endangering everyone in the Park, resulting in damages consisting of both substantial economic harm and greatly diminished enjoyment of their respective properties. Appellees sought redress for significant, sustained economic harm, not vindication of any ideological leaning.

The activities of Appellants, their tenants, guests and invitees, violated both the Declaration binding all owners and tenants, and the statutes and common law of Georgia.

PART ONE

Inaccuracies or Incompleteness of Appellants' Statement of Facts

(i) Statement of Proceedings

This suit was filed in September 2013.[1] Appellants filed their Answer and Counterclaim in November 2013, and shortly thereafter a third-party complaint against six Doe third-party defendants (V2-26).[2]

The parties soon served one another with discovery. Appellants repeatedly flouted their discovery obligations, first producing late, incomplete responses to written discovery and later ignoring for months their duties to respond to written discovery requests and to schedule depositions (V2-345-351). In a hearing on a Motion for Sanctions in April 2015 Appellants' new counsel admitted their failure to make discovery was intentionally dilatory, blaming it on prior counsel (V Supp. 3-2). The Court sanctioned Appellants, barring them from conducting any further

[1] The Complaint was amended twice.
[2] Appellants served discovery requests on St. Thomas the Apostle Church they identified as a protest group (V2-133).

discovery,[3] including following up on their outstanding requests, and reopened discovery for Appellees.

The case was tried before a jury for a week in September 2019, which rendered verdicts in favor of Appellees, and against Appellants, totaling just under $1.5 million. Appellants' Motion for New Trial was denied. This appeal followed. Every aspect of the trial about which Appellants now complain was one created by, consented to, or acquiesced in, by Appellants, and their request to vacate the judgment should be denied and the jury verdict given its due dignity.

(ii) Statement of Facts

Some of the proven constituent parts of the nuisance: the patients of Appellants, their drivers and accompanying companions, engaged in grossly inappropriate behaviors including eliminating bodily wastes--urine and feces, littering, and loitering in and around the common areas of the Park over many

[3] Discovery was extended several times by consent, but Appellees never consented to extend discovery deadlines for the two sets of requests the Appellants disregarded, and Appellants never asked. (V-182-187; 183 ¶ 5; 184 ¶ 7). The last extension expired January 16, 2015 (V2-171-172)

years (V5-38; 51-52 (20 years); 52, L 2-7; 79; 90; 102; 104; 114-115; V6-304); Appellants knowingly brought with them a substantial risk of physical harm and property damage to Appellees and others in the Park, instilled a fear that a clinic of Dr. McBrayer might be bombed again (V5- 92-93; V6-102; 150; 155),[4] and their physical safety, lives (V6-102; V6-183) and buildings might be threatened by activities such as the arson fire-bombing in May 2012 of the clinic in the Park operated by Appellants (V5-60; 76; V6-119; V7-76)[5]; the activities of Appellants in the clinic were discomforting, annoying and offensive to many in the Park (V7-82), and so violated the Declaration binding all owners and occupiers; the existence of a medical clinic focusing on terminating pregnancies was out of

[4] Dr. McBrayer performed abortions at a clinic doing business as "Northside Family Planning Services" in Sandy Springs Georgia that was bombed by Eric Rudolph in 1997. https://www.washingtonpost.com/archive/politics/2003/06/01/a-look-at-the-four-bombing-attacks/bcdde946-8813-4b5e-bb31-a5f9eb4c892d/. Previously, McBrayer rented his Park building to Northside Family Planning Services, he acknowledged. (V7-174) (Mistakenly, "North Georgia Family Planning").

[5] The Park clinic was fire-bombed while Dr. McBrayer was seeing patients. Steve Lyman, of Portfolio, had a partner, David McBrayer. (V6-185) and feared an attacker would confuse the two and misdirect an attack. (*Id*).

character of the Park (V6-160, L.:3-7), comprised of staid professional and commercial offices (V6-160), unfavorably changed the perceived character of the Park (V6-131) and brought unwanted attention to the other owners (V7-74-75), greatly embarrassing and distressing them (V6-103)[6]; the protests of anti-abortion picketers, who, among other things, displayed large placards of terminated fetuses, calling attention to the activity created and carried on exclusively in the Park by Appellants, repeatedly amplifying the discomfort of the owners (V6-55, 83, 161) who were reminded of and feared death in the Park (V7-75), greatly diminished the owners' enjoyment and values of their properties[7] in which they conducted their businesses and rented and tried to rent space to other businesses. GROPA sued to collect a fine imposed when Appellants flouted the Declaration. For years.

[6] KOA president Sours testified about the serious emotional impact this had on her. (V7-81-82), and Dr. McBrayer admitted Sours was injured by his clinic. (V7-195). Defense counsel said he was sorry for the effects the clinic had on her. (V7-89)
[7] Bill Spann testified no owner was able to sell a typical building in the Park for a decade (V6-121-122)

Appellee GROPA is an association of small business building owners in a commercial development of low-rise office buildings located in Marietta, Georgia ("Park"). The other Appellees own buildings in the Park which they occupy in which to conduct their businesses and in some cases rent, or attempt to rent, to other small businesses. Appellants are a medical doctor, ("McBrayer"), his wholly owned professional practice which operated the clinic, ("Alpha") and Dr. McBrayer's wholly owned limited partnership which rented the building to Alpha, ("MFLP").

Appellees' damages expert determined that, in the 4 years preceding the suit, through the date Appellants left, the owner Appellees suffered lost rents estimated to exceed $1,450,000.

PART TWO

Standard of Review: When reviewing the verdict, the "Court must view all of the evidence and every presumption arising therefrom most favorably toward upholding the jury's verdict." *Davis v. Johnson*, 280 Ga. App. 318 (2006).

Enumeration 1: There was abundant evidence for the Jury to find Appellants created and maintained a nuisance under both the Declaration and Georgia Law.

Appellants created and maintained a continuing nuisance.

Appellants persistently mischaracterize the claims of Appellees, attempting to shift the blame entirely onto protestors, and misread the law of nuisance. Still, the jury got it.

A. The Jury Found as Fact the Clinic as Operated was a Nuisance

The nuisance was *the clinic itself,* and its activities, not the protestors, the fear, the discomfort, or embarrassment of Appellees, or any other result of the harm occasioned by the clinic. And the evidence developed and stipulated at trial by Appellants makes it undeniably clear they established, owned and maintained—controlled-- the clinic for many years.

As adopted by Georgia nuisance law traces its ancestry to Blackstone and his *Commentaries on the Laws of England*. [8] It is founded on the precept that while everyone is entitled to use and enjoy his property as he sees fit, that right is limited by the rights of his neighbors to enjoy theirs, free from infringement from the first user. *Poultryland, Inc. v. Anderson*, 200 Ga. 549 (1946). Members of a voluntary property owners association share common interests and consent to a series of constraints on their activities. Here, the owners, including Dr. McBrayer and MFLP, submitted to a recorded Declaration governing all parcels in the Park and the Declaration outlawed activities amounting to nuisances. [9] On the stand Dr.

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[8] *See Georgia Law of Torts*, § 27:1, fn. 2 (Adams, 2014-2015 ed.)

[9] "Section 9.09. Nuisances. No rubbish or debris of any kind shall be dumped, placed, or permitted to accumulate upon any portion of the Development, nor shall any nuisance or odors be permitted to exist or operate upon or arise from the Development, so as to render any portion thereof unsanitary, unsightly, offensive, or detrimental to persons using or occupying any other portions of the Development. Noxious or offensive activities shall not be carried on in any Parcel or in any part of the Common Areas and each Owner, his invitees, tenants, visitors, guests, servants, and agents, shall refrain from any act or use of a Parcel or of the Common Areas which could cause disorderly, unsightly, or unkempt conditions, or which could cause embarrassment, discomfort, annoyance, or nuisance to the occupants of other Parcels…." (V9-23)

McBrayer freely acknowledged he received and read the Declaration, including the section proscribing nuisances[10] and admitted the activities of Appellants he conducted and directed could have caused "embarrassment, discomfort, annoyance," nuisance, to the occupants of other Parcels[11], consequently conceding they violated the Declaration by creating a nuisance under it. He directly acknowledged the clinic activities injured Ms. Sours (an owner of KOA).[12] The Board also found the Appellants violated the Declaration following a hearing in November 2009. (V5-70-73)

> The statutory formulation of the common law: O.C.G.A. § 41-1-1: "**Nuisance defined generally** A nuisance is *anything* that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance." (Emphasis supplied).

[10] (V7-544)
[11] (V7-545)
[12] (V7.-545-546)

"Anything" runs the gamut and its formulation is amorphous. In *City of Bowman v. Gunnells*, 243 Ga. 809 (1979) the Supreme Court declared: "Neither this court, nor any other court to our knowledge, has been able to give a precise legal definition of nuisance that would apply to all situations. It has been said that pornography cannot be defined but you know it when you see it. A nuisance is in a similar category…There is general agreement that [nuisance] is incapable of any exact or comprehensive definition." 243 Ga. at 810-811. A working definition is a damaging result[13] of the actions of the defendant that no one should be forced to tolerate. The actions need not be negligent or wrongful. *Id.*

Whether a particular activity or state of affairs is a nuisance depends on the facts and circumstances of the case. "While it may not be easy to discover any very clear line of demarcation between what particular things may, and what may not, be condemned as a nuisance, it should be remembered that *cases of this general class usually stand or fall upon their own particular facts*; and we are not aware of

[13] *Accord*: Charles R. Adams, III, Georgia Law of Torts §27:5 at 602 (2014-2015 ed.)

any case exactly like the present…" *Benton v. Pittard*, 197 Ga. 843, 846 (1944) (Emphasis supplied); *Accord*: *Bowen v. Little*, 139 Ga. App. 176 (1976); *City of Gainesville v. Pritchett*, 129 Ga. App. 475 (1973). Here, the evidence strongly supported the claims of GROPA and the other Appellees, and it is within the exclusive province of the jury drawn from their neighbors, to make that determination.

For example, a legal use by a landowner, simply out of place for the neighborhood, often constitutes a nuisance. In *McGowan v. May*, 186 Ga. 79 (1938) the court upheld an interlocutory injunction barring a mortuary in a residential neighborhood. An undertaking business in a neighborhood essentially and distinctively devoted to residential purposes, which exposes the residents to moving and embalming dead bodies, funerals, and "harrowing incidents of death," "with resulting inevitable injury to the health and happiness of such residents, as

well as depreciation in the value of their property, may be an enjoinable nuisance." *Id.*[14]

In *City of Atlanta* v. *Murphy,* 194 Ga. App. 652 (1990) plaintiff homeowners sued the city for damages arising from the latter's maintenance of a landfill garbage dump, winning damages for extreme annoyance and discomfort caused by "odors emanating from the landfill and by pests and wildlife attracted to it." *(Id).* And, in *Roberts v. Rich,* 200 Ga. 497 (1946) the court declared a warehouse in a residential area, bringing with it the threat of vermin, insects, pests and obnoxious odors could constitute a nuisance.: it was well known that such a business creates "a home and hatching place for vermin, rats, mice, roaches, flies, and other rodents and insects of like nature, *which always follow a business of this nature,* and the entire neighborhood… will become permeated and overrun with such rodents and insects,

[14] Feelings of depression associated with death are recurring themes in nuisances cases. **Prosser** & **Keeton on Torts,** §87 at 620, and n. 18 (5th ed. 1984)

spreading diseases and annoying the plaintiffs and their families."(Emphasis supplied).

In *Benton v. Pittard*, *197* Ga. 843 (1944), the court recognized that a clinic for venereal diseases drawing undesirable characters to the neighborhood could constitute a nuisance, since the plaintiffs alleged it diminished their enjoyment of their own home and greatly decreased its market value.

> "The diseases to be treated at said clinic are declared by statute to be contagious, infectious, communicable, and dangerous to the public health...The said diseases are not only communicable but are *offensive, obnoxious,* and disgusting. The operation of said clinic as planned and threatened will not only be offensive to the petitioners, but will render their dwelling less desirable as a residence, and greatly depreciate its market-value…A thing that is lawful and proper in one locality may be a nuisance in another. *In other words, a nuisance may consist merely of the right thing in the wrong place, regardless of other circumstances. If…it is a nuisance, it is incumbent upon him to*

> *find some other place to do the act where it will not be injurious or offensive…It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable."* 197 Ga. at 845. (Emphasis supplied).

The McBrayer medical clinic in a staid office park was grossly out of place.

The fact the acts of Appellants in operating the clinic *may* have been "lawful" does not insulate them from liability for the nuisance they created and maintained. First, OCGA § 41-1-1 explicitly declares a lawful use can constitute a nuisance.

Second, Appellants misapprehend, and significantly misstate, the law concerning "unlawful acts" and lawful acts in an "illegal manner." In the context of nuisance law these terms mean nothing more than acts the results of which the Appellees should not be forced to bear, nuisances. In *Sumitomo Corp. v. Deal*, 256 Ga. App. 703 (2002) defendant Sumitomo argued that its retention pond flooding the plaintiffs was a lawful and permissible use of its property, and that no part of the project was done unlawfully or contrary to what governing authorities

permitted. In other words, "the project was authorized and executed in accordance with law and cannot, therefore, be a nuisance." 256 Ga. App. at 707.

The Court of Appeals disagreed: “in a case of nuisance ‘the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it’. ‘A condition may be illegal when it is objectionable only on grounds of causing 'hurt or inconvenience,' *i.e.*, when it is a nuisance**.’** *Id* at 708.

Similarly, in *May v. Brueshaber*, 265 Ga. 889 (1995), the Court held:

> “If one do an act, of itself lawful, which, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance. . . To constitute a nuisance…*It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable.*" 265 Ga. at 890. (Emphasis supplied).

Appellants cite three special cases involving specific grants of permission and exercise by government entities for the wrong general conclusion that in every

instance “that which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance.” Citing *Effingham County Board of Commissioners v. Schuler Brothers, Inc*., 265 Ga App. 745 (2004) and *City of Douglasville v. Queen*, 270 Ga 770 (1999). Both cases, and similar government cases are special exceptions to general nuisance law, and rest on permission or legal authority for the defendants to engage in specific acts. In *Effingham* the succinct reason the court held the plant was not a nuisance: “In the present case, however, Shuler Brothers is operating its chip mill in a location specifically negotiated and rezoned for the operation of a chip mill.” 265 Ga. App. at 755. And, in *Douglasville,* the court held the city did not create a nuisance when it used its authority to design a parade route running near railroad track, where a young girl was killed walking on those tracks to get to the parade. The third, *Anderson v. Atlanta Committee for the Olympic Games*, 261 Ga. App. 895 (2003) unremarkably held that ACOG, a nonprofit specifically authorized by Georgia to operate the Centennial Olympic Park, was not liable in nuisance for death and injuries from the bombing where it operated properly.

Where the activity about which the plaintiffs complain is *specifically authorized* by law, the defendant is not liable unless it is negligent in performing the act authorized or does the act in an illegal manner. *See* **Georgia Law of Torts, §** 21:9 at 502 for the author's "propositions" that are special to government liability in tort, especially (d), (e) and (t). [15]

Here, Appellants are not municipal corporations and their clinic was not specifically authorized by the county, or under a specific state granted lease for that purpose.

[15] Appellants cite two other cases for more than they say, *Gordon County Broadcasting Co. v. Chitwood*, 211 Ga 544 (1955), and *Davis v. Deariso,* 210 Ga 717 (1954). Both involve denying preliminary injunctions as nuisances, one where the activities of a radio station were not unusual under its lease, and the other where the court held a gas station would not be enjoined before it opened based on fears of how it might operate.
Appellants also insist *Stanfield v. Glynn County*, 280 Ga 785 (2006) means a use blessed by a zoning ordinance is never out of place. But, the Declaration constitutes an enforceable further restriction on rights of property owners that might otherwise exist under zoning—for the common benefit. *CPI Phipps, LLC v. 100 Park Ave. Partners*, 288 Ga. App. 614 (2007).

Last, Appellants take out of context the quote of the Park Manager to suggest "the Appellants were operating properly…under the law."(Brief p. 12). The law he described was that governing performing abortions (V5-102, L. 1-3). Ermentrout goes on to testify Appellants violated both the Declaration and state laws when their invitees loitered, littered, urinated and defecated in the common areas (V5-102), which contrary to Appellants' claims, were hardly sporadic, lasting 20 years (V5-51-52), and testified to by multiple witnesses(V6-171, 304).

Where, as here, the result is serious offense to the senses, and drastic reduction in enjoyment of life and damage to property, the activity is a nuisance, and GROPA and the other Appellees proved those claims at trial.

Appellees' Park Manager, Stone Ermentrout, testified that the drivers and companions of patients littered, loitered and used the common areas as their bathrooms where they urinated and defecated, on many occasions over many years, and he personally witnessed it (V5-52, 101,104).

Appellee KOA's representative and Board member, Cynthia Sours, testified similarly, both experiencing it first hand, and receiving reports from her employees

and tenants about loitering (which was also a safety concern), urination and defecation (V7-73-74).

And Kirk Rich, the broker with extensive experience leasing and selling buildings in the Park—including Dr. McBrayer's when he left-- testified:

> "But out here [loitering] was unusual. And remember, I sit in my car a lot waiting on people. I did notice that… But it was rare thing for me not to see it in that area, and I didn't see it in other areas.

(V6-171-172).

The detritus and conduct of the patients and their drivers were offensive, noxious and was completely out of place in that office park, and the jury agreed.

A clinic doing pregnancy terminations was by itself grossly out of character for the Park. While there were a couple therapist offices and a dentist (V5-21-22), there were no medical offices performing surgical procedures. According to broker Kirk Rich:

> And there was no other medical-type buildings in the

park. Most of these buildings are sold to more administrative professional firms that are not medical related….

And it would always --

any time someone came through that, the discomfort of kind of the experience but also the discomfort of what is a sensitive subject kind of rattled people.

(V6-292-293).

And, the feeling was shared by the owners, including Appellees. Bill Spann testified he had unpleasant feelings about the clinic and the images of death it evoked (V6-235}. Cynthia Sours testified at times tearfully about the emotional impact and the out of character use of the clinic. The presence of the clinic was itself a problem, giving the Park a "very negative image." "We were all associated with the abortion clinic. There was no way around it." (V7-73). Her feelings were exacerbated by the presence of the boxes containing medical "waste," conspicuously outside the clinic door, on the front porch. "And, obviously, if you

know it's an abortion clinic, you could pretty much know what it is."(V7-75).With all the negative publicity generated, so did everyone else.

The palpable feelings of annoyance and discomfort were exacerbated by the grave and foreboding perceived threats to the safety of Appellees, their tenants and employees. Sours' building was 100 feet from the clinic (V7-75), and she was well aware of the bombing at the Carpenter Drive clinic where Dr. McBrayer did abortions, by Eric Rudolph, the Olympic bomber who also bombed a Birmingham clinic. Her personal fears were greatly heightened when McBrayer's Park clinic was fire-bombed[16] during a working day in May 2012. The black smoke rising from Building 23 alarmed her. *(Id.)*. The testimony was so riveting that Dr. McBrayer himself testified: "Obviously she was injured." (V7-207).

Appellants discuss some cases, nearly all involving premises liability questions, typically attacks, in which the plaintiffs were rebuffed in their nuisance claims. Appellants read too much, or too little, in those cases, which are markedly

[16] Park manager Ermentrout's testimony (V5-76).

different from ours. In *Bethany Group, LLC v. Grobman*, 315 Ga App. 298 (2012), a wrongful death case involving a taxi driver, the court stated that "Nuisance requires proof that a defendant "created or maintained a continuous or regularly repeated act or condition on the property," which led to the plaintiff's injury. *Bethany*, 315 Ga. App. at 302 Appellants assert that, by extension, the fear associated with one bombing against a clinic at which Dr. McBrayer performed abortions, along with one fire-bombing of his own clinic, was too insignificant to constitute a nuisance.[17] However, the claims of Appellees don't rest solely on the fear of any one threat, or even on fear alone, but, again, on fear of physical danger, with discomfort, with offense, and with embarrassment.[18] And the clinic operated for many years in the Park, generating its deleterious effects daily. By no means was it an isolated incident, like those premises cases.

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[17] Prosser disagrees: A threat of future injury may be a present menace and interference of enjoyment, in the case of stored explosives, inflammable buildings... [constituting a nuisance]." **Prosser and Keeton on Torts,** 87 at 620 (5th ed. 1984)

[18] Bill Spann testified he was constantly reminded he might not get out of the Park alive when he went to work. (V6-103)

Camelot Club Condo Association v. Afari-Opoku, 340 Ga. App. 618 (2017) was a premises liability case in which a resident was fatally attacked in his gated community. There, the evidence showed a years-long series of crimes on the condo property. The jury was authorized to find nuisance based on the continuity of attacks. In *Bethany Group, LLC v. Grobman*, 315 Ga. App. 298 (2012) an apartment complex was liable in nuisance for a taxi driver's murder on its chronically unsafe premises. In our case, the fear which gripped the Appellees was that of an *on-going* safety issue hanging over the Park.

More importantly, the GROPA and Park Appellees demonstrated, and the jury agreed, that the *entire complex* of deleterious effects Appellants created was the nuisance, not a single effect. The complex: a gripping fear Appellees' or any of the Park's occupants or visitors could be attacked, could lose life or limb in a bombing, Appellees were constantly subjected to images of "terminations"—death--; suffered negative images and brand effects attaching to their businesses and livelihoods, and had to put up daily with quality of life issues like loitering, littering, and "evacuating" bowels in common areas.

And our law recognizes that a complex of factors often combines to constitute a nuisance. In *Asphalt Products Co. v. Marable* 65 Ga. App. 877 (1941): "[W]e are satisfied that the petition …states a cause of action... [It]… substantially alleges that petitioners owned and occupied a dwelling-house and …defendant erected and began to operate its plant within seventy-five feet …and that practically every day since …the plant emitted a dense, ill-smelling smoke containing tar and asphalt fumes, cinders and fine dust that streamed into petitioners' homes… causing great annoyance to petitioners and impairing their health." 65 Ga. App. at 882.

The Court recognized "[L]ocality is to be considered in determining whether there is a nuisance, although it is not conclusive, but is to be considered in connection with *all circumstances of the case*." *Id*. at 879. At the Park a sizeable array of noxious and offensive effects was visited on Appellees.

Now, Appellants posit an ersatz rule that a commercial use [an abortion clinic] in a commercial location [office park consisting of staid professional offices] cannot be "out of place. (Brief at 14-16). That simply is not the law.

In *Poultryland, Inc. v. Anderson*, 200 Ga. 549 (1946) [another complex of deleterious effects nuisance case] the Court held that a noxious use in an area of Gainesville, Georgia occupied by both business and residences could be enjoined as a nuisance. Appellants also argue that a business operating in proper zoning cannot be a nuisance, citing *Stanfield v. Glynn County,* 280 Ga 785 (2006), but ignore the fact that the Declaration contained superseding, enforceable restraints on permissible activities. *CPI Phipps, supra.*

Simply, there are no such rules Appellants offered.

B. The Appellants Controlled the Clinic whose operation produced the results constituting Nuisance.

Appellants misapprehend the control that is a requisite of liability for their nuisance. Appellants tried to convince the jury the "nuisance" was the protestors, hoping to escape liability by asserting they had no control over them. Even if the protestors were tantamount to the nuisance, and they were not, the protestors were foreseeable and thus not intervening causes which would break the causal connection between the wrongful conduct of Appellants and the injuries suffered

by Appellees. *Williams v. Grier*, 196 Ga. 327 (1943). By Dr. McBrayer's admission, the protests were carried out over a span of years, foreseeable.

More broadly, Appellants assert that they had no "control" over the cause of harm, and thus cannot be liable for nuisance. (**Brief p. 15)**. Ironically, the case they cited throughout this litigation, *Sumitomo Corp*. v. *Deal*, 256 Ga. App. 703 (2002), reveals why Appellants are wrong. They established and maintained—controlled--for years the source of the nuisance, the clinic.

In *Sumitomo* the plaintiffs brought suit for damages and an injunction in response to construction of a retention pond at a shopping center. Defendant Sumitomo argued it could not be held liable because it did not own the developer. The court rejected that defense since "SMG" was an 80% owner of one of two partners that developed the project. That ownership level supported finding Sumitomo had the power and authority, control, to abate the nuisance, and hold it liable for failing to do so, even though the "development was a lawful use of the property, developed according to plans permitted by the county." 256 Ga. App. at 707.

Here, Appellants established and operated the clinic which attracted protestors, trespassers, arsonists, patients and their escorts, whose conduct resulted in consequences so noxious and undesirable that they constituted a continuing nuisance. The infringement was the "result of an act, not [necessarily] wrongful in itself, but only in the consequences that may flow from it." 256 Ga. App. at 708.

Dr. McBrayer was sole shareholder of Alpha, clinic operator, and sole owner of MFLP which leased the building to his clinic. (V3-1021). As such, he had the power and authority to cease its operation which is the wrong thing in the wrong place, and stop inflicting tremendous costs and damages on his association neighbors. He chose for years to disregard that harm.

Appellants insist that because they do not "control" the protesters, they are not responsible for the actions of those protestors. However, as shown in *Benton* (venereal disease patients and loiterers), and *Murphy* (landfill attracting vermin and undesirable animals) both *supra,* the defendants did not "control" the vermin, pests, visitors, passers-by, loiterers, customers and patients whose presence and actions were aspects of the offending nuisances, And in the premises nuisance

liability cases cited by Appellants the attackers were not controlled by the landowners and landlords [19]*Camelot Club Condo Ass'n v. Afari-Opoku,* 340 Ga. App. 618 (2017); *Bethany Group, LLC v. Grobman*, 315 Ga. App. 298 (2012).

Last, Appellants cite some cases, most notably *Snyder v. Phelps*, 562 US 443 (2011) for the proposition that the protestors have protected First Amendment rights and cannot be liable in tort. From that they argue Appellants could not stop the protestors, so are not liable for the effects of the protests.[20] First, Appellees did not sue the abortion protestors. Next, Appellants themselves sued Doe protestors as third-party defendants and argued at trial Appellees should have gotten them enjoined. (V6- 68). Then too Appellants argue the jury should have apportioned damages among Appellants and protestors, all incongruous positions.

[19] Appellants cite *Giuffre v. Wis. Women's' Health Center*, 514 NW 2d. 55 (Wis. Ct App. 1993) as non-precedent precedent an abortion clinic isn't liable in nuisance for protestors. By rule that case cannot even be cited in Wisconsin, and the proposition is *dicta.* The holding was a landlord who leased specifically to an abortion clinic couldn't evict them for conducting abortions.

[20] The case involved 7 protestors picketing for 30 minutes 1/5 mile from a funeral.

Most saliently, Appellees used the presence of the protestors to show the emotional damages they suffered as they were reminded of the prospects of death, injury, and property damage, and substantially reduced enjoyment of their property that attended the operation of the clinic, never claiming at trial the protestors "caused" the nuisance.[21]

Here, Appellants operated a clinic which directly attracted harassing and haranguing protestors, and arsonists, in part because of the abortions Dr. McBrayer performed, along with patients and their escorts who trespassed, littered, loitered and relieved themselves openly in the shrubbery and common areas of the Park, and those activities continued for years. Appellants admitted they were the cause of

[21] This was emphasized at the pretrial hearing days before trial: "I just recited all of the elements that together comprise what we claim is the nuisance. And for that reason, it's simply wrongful to try to recharacterize it as the protestors. The protestors… are most important not because of anything they did, but the fact that their presence created some emotional harm…The owners of the park were constantly reminded by the protestors of these things that were going on in the park that offended them greatly… We could even present the case without mentioning protestors, and we would still have a very strong case with respect to nuisance." (V Supp. 10-11)

the offending activities, and the deleterious effects of those activities—the nuisance-- would cease if and when the building was sold.

Appellants insist a single incident of arson fire-bombing cannot make the clinic a nuisance, again overlooking the other aspects that make the clinic as operated a nuisance. They go on to argue that the fear of a clinic bombing in Birmingham cannot justify declaring Appellants' clinic a nuisance. Perhaps, but the circumstances that actually existed paint a different picture.

Dr. McBrayer performed abortions at a clinic on Carpenter Drive in Sandy Springs, a few miles from the Park, Eric Rudolph bombed in 1997, under an entity, "Northside Family Planning Services," which also leased his building at the Park before he moved in. (V7-174-175). Appellees and others were well aware of that connection, and lived in constant fear for years Dr. McBrayer might be targeted again. The clinic was fire-bombed during regular office hours in 2012, reigniting those fears. (V7-76). And Appellees and Park owners lived with that fear until Appellants departed in June 2015.

The cases cited by Appellants ignore the crucial nexus between the bombing in Sandy Springs and Marietta—Dr. McBrayer. The dangerous condition followed him. And none of Appellants' cases concerned the emotional injury to a landowner who is subjected to a constant threat of physical harm by his neighbor. The longtime foreboding established the nuisance. "It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable.*" Benton v. Pittard,* 197 Ga. 843 (1944). Appellants' Cooper *v. Baldwin County School District*, 193 Ga. App. 13 (1989) is a negligence case (foreseeability of school stabbing) where nuisance was not even claimed. Appellants quote from the dissent in *Hammond v. City of Warner Robbins*, 224 Ga. App. 684 (1997) for their proposition that fear of future harm cannot be deemed a nuisance, again missing the point. The dissent also pointed out that a condition that continues over time can amount to a nuisance, and the constant fear experienced by Appellees meets that squarely. The associated emotional damage, annoyance and

discomfort, is compensable. *Id* at 688-89. The Court also reaffirmed the principle that whether a nuisance exists is almost always a jury question.[22]

C. **The Activities of the Appellants Constituted a Nuisance under the Declaration**.

The Declaration prohibited owners, their tenants, and invitees from engaging in activities that were noxious or *offensive*, or detrimental to persons using or occupying any other portions of the Park or creating disorderly, unsightly, or unkempt conditions, or *which could cause embarrassment, discomfort, annoyance, or nuisance to the occupants of other Parcels…."*[23] And, the Declaration is a contract among the parties entitled to enforcement as written. *CPI Phipps, LLC supra.*

Appellants insist the provision is too uncertain to be enforced, citing and misreading *Douglas v. Wages*, 271 Ga 616 (1999). The *Douglas* covenants banned

[22] Appellants also cite *Dew v. Motel Props., Inc.* 282 Ga. App. 368 (2006) to argue a jury can't normally consider incidents at other properties in the calculus. The case involved premises liability and notice for a spider bite, not nuisance.
[23] Section 9.09

"noxious or offensive activity" and anything that may be "an annoyance or nuisance." *Douglas* did not declare those covenants unenforceable. Instead, it held that the court did not abuse its equity discretion in denying a temporary injunction with words that were vague, when the object was to enjoin loud music and ATV riding in a subdivision, declaring an injunction would be proper where the words met the statutory definition of "nuisance. Neither enforcement of the covenants after trial nor damages was in question. And OCGA §9-11-65 (d) seeks to preserve the status quo and balance equities, not adjudicate merits.

In fact, our courts have expressly approved using the word "nuisance," in a zoning ordinance, as it had a "definite and determined meaning in law," not vague or uncertain. *Stanfield v. Glynn County*, 280 Ga 785 (2006).Also, *Life for God's Stray Animals v. New North Rockdale Homeowners Ass'n,* 253 Ga. 551 (1984).

Enumeration 2: The Jury Properly Awarded Appellees Undivided Sums for Lost Rents and Emotional Harm and GROPA Fines Under the Declaration.

A. Lost Rents and Emotional Harm.

In cases of abatable nuisances plaintiffs may be awarded lost rents for property they let, together with compensation for emotional harm for property they occupy, according to the enlightened conscience of the jury. *City of Atlanta* v. *Murphy,* 194 Ga. App. 652 (1990). Here, the jury verdict form, which Appellants specifically approved (V8-37, 47, 56), did not separate those two items, so Appellants have no complaint about not identifying the component parts. *Camelot Condo. Assoc. v. Afari-Opoku*, 340 Ga. App. 618, 626 (2017).

EDS, KOA and Portfolio all sought money damages for lost rent, the proper measure of economic damages for a landlord. *Hammond v. City of Warner Robbins,* 224 Ga. App. 684 (1997). Appellants misstate the measure as lost *profits,* which are rents minus expenses, and compound the error by citing lost profit cases, which are inapposite. In particular, they cite *Getz Services, Inc. v. Perloe,* 173 Ga. App. 532 (1985) that also uses loose terminology confusing "profits" and "rents," but the body makes it clear rent is the measure:

> "plaintiff's calculations as to lost rental value were based on previous rental fees, on advertisements in local papers for the rent of apartments…, on phone calls made, on "driving by units" that he thought were comparable "to find out what they were renting for," and on rental fees subsequently collected…." 173 Ga. App at 537.

Not a single cost mentioned in the approved calculus. And Appellees knew the rents they were receiving, their occupancy rates, and their lease negotiations, and shared this information with their expert. While lost "profits" must be proved with measured certainty, plaintiffs are presumed capable of giving their opinions of their lost rents. *Getz, supra* at 536-537.

It is absolutely proper for Appellees to furnish information to their expert about their losses, and for the expert to combine it with all those other sources and his professional judgment and expertise in arriving at his calculations of lost rents. *Toyo Tire N. America Manufacturing, Inc. v. Davis*, 299 Ga 155 (2016). Taylor testified he interviewed Appellees and felt they lost rentals for the reasons they

stated and those set out in the pleadings. (V7-51). It is equally clear from the report of Taylor's analysis of damages he was informed by Appellees their losses were caused by the actions of Appellants operating the clinic. "Collectively, these activities, created exclusively by the Defendants, not only amplified the discomfort, perturbation, and fear of the Plaintiffs, diminishing the Plaintiffs' enjoyment of conducting business, but made tenant retention a difficult task and made procuring new tenants nearly impossible." (V9-66). Further exhibits 3.0, 4.0 and 5.0 to the Report all recite "in footnote 1" "This calculation measures the difference between the normal rental rate [each Plaintiff] should have been able to charge for the properties absent the alleged act and the discounted rental rate [Plaintiff] had to offer its tenants to prevent its tenants from vacating the properties due to the alleged acts." And footnotes 3 to each exhibit show the data on which Taylor relied in calculating the deviations from normal occupancy attributed to the acts of the Appellants (V9-74-76). All three Appellees lost rents as a result of the clinic, and all shared that with Taylor, as reflected in his quoted footnotes and Exhibit C (V9-95).

Appellants quibble Taylor did not account for the real estate recession in 2009, though he did (V7-21), and with the rates at which Taylor opined rents would have grown but for the nuisance. Those quibbles are jury decisions.

Appellants also quibble with the "key assumption" in Taylor's model that 2008[24] was a "normal" base year for his analysis, when rents in some places were down. Again, that is a decision for the jury, which heard Appellants' expert argue against that point. And, the quibble is conceptually wrong. Even if rents were depressed in 2008 it is still easy to measure a compensable loss. For example: Rent in 2009 fell to $1,000 from $1,200 in 2008. Taylor testified it would have grown 3%, to $1030 in 2010. If that rent instead stayed flat, that $30 is a compensable rent loss. And so on for each succeeding year.

And again, some or all of the money damages awarded may have been for emotional harm, determined only by the jury's enlightened conscience. *Brown v. Service Coach Lines, Inc*., 71 Ga. App. 437 (1944). But Appellants assert they are

[24] McBrayer moved to the Park full-time then. (V7-173)

certain none of the damages were for emotional harm, and speculate the awards were virtually all lost rents, which they purportedly show by halving the Portfolio award, "rounding" by $104, 586 half of EDS' award, and adding $10,000 to half KOA's to make their point. Itself all speculation. In *Swift v. Broyles,* 115 Ga. 885 (1902) the Court held that juries could use lost rents as a proxy when making an award for emotional harm, and may have done so here, and the fact it chose not to award any damages to GRLLC says nothing . Further, the settled law in Georgia is that a verdict is proper even though it does not exactly match the amount for which the Plaintiffs prayed. *Langston v. Langston*, 42 Ga. App. 143 (1930). The jury has a duty to find facts, and it is discharging that duty when it determines whether, in its view, a particular sum is justified, though the amount veers from anyone's specific testimony.

B. Fines

Following a hearing under the Declaration at which Dr. McBrayer appeared with 2 attorneys he was given notice to abate the nuisance Appellants were found

to have created and maintained under the Declaration.[25] When they failed to act the Board assessed them a fine of $10.24 per day per building in the Park until abated. (V6-114), which totaled $555,000 nine years later at trial.

Appellants insist Appellees never requested the fines, sometimes called "special damages,[26]" so the award was improper. However, Appellees described the Board hearing in the Complaint (V2-8, 9), and would have been bound to do so in discovery if Appellants weren't barred from following through on their requests. And, Appellants were certainly apprised Appellees sought those fines when the Consolidated Pretrial Order was entered two years before trial and in subsequent PTOs. Appellees set out one issue: "Whether the Plaintiffs are entitled to Damages: compensatory, special, attorney's fees; punitive and uncapped," (V2-978), the case was part based on the Declaration as a contract (V2-979) and attached as a PTO Exhibit a copy of the Declaration provisions banning nuisances and the

[25] See 9.09 supra, footnote 9
[26] "Special damages" is a term of art in nuisance law. OCGA 41-1-3

enforcement Section 10.02, empowering the Board to impose and sue for fines, the only issue under that Section involved in the case. (V2-989). Further, the case was tried with considerable testimony of the Board action and fines (V7-101)[27], without any objection by Appellants, so Appellees proved the amount due and were entitled to it. *Baumann v. Snider*, 243 Ga. App. 526 (2000). The only objection raised was the unsupported assertion Appellees had to "confirm" those fines in some other proceeding. (V7-100). And Appellants agreed those damages could be submitted to the jury to consider. (V7-101).

Appellants quibble that the jury charge they submitted, (V10-325) was based on tort law and required proof of "economic loss," though Appellees sued for fines imposed under the Declaration, a contract. Appellants' charge required the jury to find proof of the fines, and the jury did. And, the jury was charged they could award damages under the Declaration: (V10-317, 324) and knew they were asked

[27] It is Board's prerogative to determine "reasonableness" of fines. *King* v. *Baker*, 214 Ga. App. 229 (1994)

to award them as the only question they posed during deliberations was whether they could change the fines. (V8-48).

Enumeration 3: The Jury Charges on Proximate Causation and Special Damages were both Expressly Approved by Appellants and the Court correctly rejected the Apportionment Charge

Appellants created, consented to, or acquiesced in the first two listed jury charges about which they now complain, barring their challenges.

The instructions were clear and the jury understood them. And charges that are objectionable must be both erroneous and harmful. *Lawyers Title Insurance Corp. v. New Freedom Mortgage Corp*., 288 Ga. App, 642 (2007). Here Appellants don't claim the charges on causation and intervening cause were erroneous. And the complaints they raise, omissions, were not harmful, and induced by Appellants themselves.

A court will not relieve a complaining party who induces an error at trial, by acquiescing in a charge or failing to request a charge on a point, and later asserting

a charge was improper or the court failed to give a proper charge. O.C.G.A. §5-5-24(a). The only exception is when the erroneous charge or omission is so grave it renders the trial fundamentally unfair. O.C.G.A. §5-5-24 (c); *Pearson v. Tippmann Pneumatics, Inc*. 280 Ga. 740 (2007). The quibbles Appellants raise fall far short, and given the enormous evidence of their wrongs, could most accurately be characterized as harmless or incidental, even if merited. The long term loitering, littering, and public voiding of bowels was itself sufficient to justify finding Appellants created a nuisance under an "any evidence" standard.

The cases Appellants cite where relief was granted involved *serious* miscarriages in jury instructions. *Pearson v. Tippmann Pneumatics, Inc*. 280 Ga. 740 (2007) concerned a negligence action for injuries to a minor from a paint ball gun discharged by the minor's friend and a seriously flawed charge on proximate cause and intervening acts (similar to Appellants' 7b proposed charge) in its recharge in response to a specific question from the jury on the topic, and the defense counsel objected to the re-charge: "on the grounds that the recharge was confusing, misleading, and contrary to the law inasmuch as it instructed the jury

that even if [the manufacturer] was negligent, its negligence was not the proximate cause of the injury if [the friend's] negligence was sufficient in and of itself to have caused the injury. Plaintiffs' objection clearly identified the paragraph of the recharge to which they were excepting and it was contrary to Georgia law. That is all the law requires to preserve an objection. 280 Ga at 743. And, in *Lawyers Title Insurance Corp. v. New Freedom Mortgage Corp*, 288 Ga. App. 642 (2007) the court held a seriously erroneous charge that a party claiming fraud of a closing attorney did not need to prove fraudulent intent of the attorney constituted reversible error under OCGA §5-5-24(c), since the "central defense" of his insurer was there was no fraud, going to the "crux" of the case. Here, there are no near like errors.

Proximate Cause. Here, the Court offered to give a lengthy pattern charge on proximate cause and Appellants rebuffed the request, stating they wanted to keep the charge "short," (V7-232) and the parties agreed to revisit it. While Appellants asked for a charge (7b) on independent intervening acts (V7-233), lifting a partial quote from a case, the Court properly rejected it because Appellants

omitted a salient sentence, and the case involved a malfunctioning railroad crossing signal, alleged negligence, not nuisance, so it did not fit our facts. "Reversible error will not be found in the refusal of a trial court to give a charge which, while a correct statement of an abstract principle of law, was not adjusted to the evidence…." *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 88-89 (2009).

Taft v. Taft, 209 Ga. App. 499 (1993), doesn't alter this. There the defendants failed to request a charge defining legally attributable cause in a negligence specific case. Here, the Appellants specifically approved all charges, including proximate and intervening cause. As *Gray v. Ellias*, 236 Ga. App. 799 (1999) explained, §5-5-24(c) should be employed rarely and strictly construed to prevent "gross injustice." Again, the evidence of Appellants' sole responsibility for littering, loitering and voiding bowels alone was nuisance.

Now, Appellants assert they later asked for "the" pattern charge (V8-18), the Court chose the charge Appellants submitted 5(b), and Appellants never repeated a

request for "the Pattern,"[28] signaling acquiescence. Toward the end of the charge conference the Court reviewed all charges the parties selected and asked Appellants to "yell out" any objections. (V8-24). The Court reviewed each charge and Appellants announced they were "fine" with them, except for two exceptions to be placed on the record. (V8-36)[29].Immediately before charging the jury the Court asked for final comments and Appellants confirmed they had no objection. (V8-48).

Recharge on Special Damages. The jury questioned whether the GROPA fines were a set amount or could be changed. [30](V8-48). The Court reconvened all attorneys who together fashioned the recharge about which Appellants now complain, (V8-52), piecing together an earlier charge and language Appellants specifically asked for and then announced it met their concerns. (V8-51). The

[28] There are 4 pattern charges on proximate cause.
[29] The exceptions were Appellants' 9(b) which *was* given and two nuisance charges (V8-36).
[30] *King v. Baker*, 214 Ga. App. 229 (1994) leaves that to the Board.

Court gave the joint answer and asked again if Appellants had any exceptions to that charge. "No your honor." (V8-53). Now Appellants do. The law is clear they cannot acquiesce in a charge, or induce error in a putative error and later seek relief. O.C.G.A. §5-5-24(a). And, since they agreed to submit the fines as special damages to the jury they cannot now claim submitting them was fundamentally unfair.

Apportionment. Appellants insist the jury should have been charged they could apportion damages under O.C.G.A. §51-12-33(d) between Appellants and "the protestors." Yet, for six years they *never* made the requisite request to apportion or even uttered the word "apportion." Instead, they argue they "substantially complied" with the statute, though never filed the mandatory pleading notifying Appellees they intended to ask for apportionment. In *Monitronics International, Inc. v. Veasley,* 323 Ga. App. 126 (2013) the Court expressly rejected a claim of substantial compliance, where the only defect was failure to give 120 days' notice, short about one week, since the tort reform statute derogated common law, so had to be strictly construed.

Further, though Appellants claimed they identified the other party at fault in the Pretrial Order—the "protestors"—that identification itself was too imprecise to satisfy the apportionment statute. Appellants filed third-party complaints against Doe defendants, though none were at trial. The logical reference in the PTO was those Doe defendants, no small distinction. If the jury returned an award against Appellants on Appellees' claims, and against third-party defendants on Appellants', there would be no reduction in the gross award to Appellees. If there were an apportionment the award to Appellees would be reduced, a grossly unfair result where no notice of that possibility was presented.

Last, Appellants now maintain that "the protestors" were blamelessly exercising their First Amendment rights; so the protestors couldn't have breached any legal duty to Appellees, and the jury could not apportion fault to them. *Martin v. Six Flags Over Georgia*, 301 Ga. 323 (2017).

Enumeration 4: The Trial Court Imposed a Measured and Just Sanction for the Intentional Protracted Efforts of Appellants to Resist Discovery.

The arguments Appellants make are based on cases and a statute subsection that are inapposite. There is no Due Process concern.

Each case they cite involved O.C.G.A. § 9-11-37 (b)(2), invoking sanctions for disobeying a discovery order. Here, the discovery sanction was imposed under OCGA. §9-11-37 (d)(1), involving no prior order, and can be reversed only for clear abuse of discretion. *Fidelity Enterprises v. Heyman & Sizemore,* 206 Ga. App. 602 (1992).

Trial courts have very broad discretion in controlling discovery. Georgia Courts have consistently upheld sterner discovery sanctions for similar scofflaw abuses. In *Heyman & Sizemore* the complaint was dismissed for plaintiff's failure to respond to interrogatories for 7 ½ months after answers were due. The dismissal was granted based on the conscious and intentional failure, along with plaintiff's failure to respond timely to the motion.

Here, Appellants totally ignored discovery requests served on June 10, 2014 and August 28, despite almost 30 efforts of Appellees to get responses and schedule depositions (V2-185 *et seq*.). Appellees filed their motion for sanctions

December 19. Though discovery was extended a few times, those due dates were not. Appellants *never filed a response* to the Motion, though hired a new lawyer who appeared at the hearing in April 2015. In a post-hearing brief he admitted Appellants sought to drag out the case until the building could be sold, thinking that would end the matter. A conscious or intentional failure to respond is tantamount to willfulness, justifying dismissal of a complaint. *Stolle v. State Farm Mutual Automobile Ins*., 206 Ga. App. 235 (1992). Here, Appellants escaped lucky when the Court declined to strike their Answer, instead barring them from conducting any further discovery, including following up on outstanding discovery, whose period already expired (V2-172, 369). That sanction was just, as the evidence showed the six month delay inflicted money damages on Appellees of as much as $448,800.

Appellants argue the sanction was too harsh since its effect barred Appellants from receiving the full damages report until the eve before their expert testified and they'd requested information on damages in the discovery they were barred from pursuing. Fittingly, the Court noted Appellants were offered access to

the discovery, subject to a consent protective order covering confidential and proprietary information in it, such as rents and lease terms[31], and they never responded.(V2-618). Appellants' only interest was delay.

Last, Appellants argue the sanction inhibited their ability to cross-examine Taylor, asserting he testified "falsely" about a Cushman-Wakefield ("CW") report that recited a 5% asking rent growth for a period. That characterization is off-base, as Taylor *specifically rejected* using 5% as an acceptable rate (V7-391-392), based on his own experience and review of Appellees' leases, testified about rents prevailing—not asking--and his analysis was virtually completed in November 2014, before the CW in late 2015. Appellants' expert also testified he was familiar with the CW, had seen the report before he testified, and the jury heard him dispute it (V7-141).

[31] The information was secret even among the plaintiffs, competing for the same tenants. (V2-619)

Enumeration 5:_ The Trial Court exercised proper discretion when it sequestered Appellants' Damages Expert and Sequestration caused the Appellants No Harm.

The order sequestering Appellants' damages expert was not issued in a vacuum. It was an adjunct to enforcing discovery sanctions against them for intentionally failing to make discovery, which barred them from conducting further discovery of that information (V2-370; V Supp1-3). Some of the information embedded in Appellees' damages report was proprietary, and the court had no sympathy for Appellants who were offered that information before discovery closed and failed to produce a consent protective order (V2-618).

Appellees' damages expert produced a damages opinion (V9-64-95) based factually on rent rolls, occupancy rates, written leases, and interviews with Appellees, which he analyzed using rental sources and personal observations to form a judgment as to how those rents would have grown absent the nuisance. His opinion set out a range of damages for lost rents, a low of 1% annual growth and a

high of 3%. *Id*. That exact theoretical concept of projected growth was in the abbreviated damages report Appellants received 5 years earlier (V10-269).

And while Appellants professed Branch was "essential to present their case," (V Supp.3-16) they never showed the judge, declining when asked to inform the court whether Branch would be called in their case in chief or rebuttal. And, Branch's presence during the testimony of Taylor was not essential.

Taylor explained the facts sources he used, but not the underlying facts, and focused almost exclusively on why those facts supported his opinion rents should have grown at 3% per year. Branch's testimony centered on producing his own "facts" and disagreeing with the assumptions of Taylor concerning growth rates. Branch was barred access to Appellees' underlying facts, and made no effort to investigate anyone else in the Park about their rents and occupancy.

CONCLUSION

The verdict of the Jury should be upheld, as any putative errors at trial were created or acquiesced in by the Appellants and the Court's rulings were proper.

This Brief does not exceed the word limit of Rule 24, as expanded by Order.

Respectfully Submitted November 19, 2020.

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IN THE COURT OF APPEALS

STATE OF GEORGIA

DANIEL E. MCBRAYER, SR., ALPHA OB GYN GROUP, PC and THE MCBRAYER FAMILY LIMITED PARTNERSHIP	*	
Appellants,	*	
v.		Appeal No.: A21A0262
THE GOVERNORS RIDGE PROPERTY OWNERS ASSOCIATION, INC., EXECUTIVE DATA SYSTEMS, INC., GOVERNORS RIDGE, LLC, KOA PROPERTIES, LLC, and PORTFOLIO PROPERTIES,	*	,
Appellees.	*	

CERTIFICATE OF SERVICE

This certifies that today I served a copy of the Appellees' Brief by email with attached pdf, per prior agreement among counsel such service would suffice and addressed to all parties in interest as follows:

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