No. A19A2267

In The
Court of Appeals of Georgia

STAR RESIDENTIAL, LLC and
TERRACES AT BROOKHAVEN, LLC,

Appellants,

v.

MANUEL HERNANDEZ,

Appellee.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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I.

STATEMENT OF INTEREST

The Georgia Defense Lawyers Association ("GDLA") is an association of almost 1,000 lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in the courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice.

The GDLA is particularly concerned about negligent security litigation because, among other reasons, it is the fastest growing segment of tort litigation. ALAN KAMINSKY, A COMPLETE GUIDE TO PREMISES SECURITY LITIGATION 5 (3d ed. 2008); *see also* MICHAEL J. GORBY, PREMISES LIABILITY IN GEORGIA § 4:1 (2018-2019 ed.) ("America's rising crime rate has led to a corresponding increase in actions seeking to hold business owners liable for crimes on their properties."). Indeed, crime is ubiquitous and virtually every person in Georgia goes upon the premises of someone else nearly every day, typically either as a residential tenant of a landlord or as a customer of a restaurant, grocery store, or other business. These premises are owned and managed by clients of the GDLA's members, and so the GDLA has an interest in promoting their fair treatment in litigation.

Additionally, because every negligent security lawsuit involves a client (or potential client) of a member (or potential member) of the GDLA, the GDLA is particularly concerned with how the courts are seemingly expanding the scope of liability in negligent security cases, such as by broadly interpreting the civil cause of action created by the Georgia Street Gang Terrorism and Prevention Act ("GSGTPA") like the trial court did in this case. If the Court decides that a civil cause of action can be brought against property owners who do not participate in criminal gang activity, the ramifications for these individuals and businesses will be enormous. Virtually every subsequent negligent security lawsuit will include a claim under the GSGTPA because it incentivizes litigation by providing for the recovery of treble actual damages.

Such an interpretation of the GSGTPA would be contrary to its plain language and overall context, as well as the General Assembly's intent, and would create serious constitutional concerns. The GDLA is not asking the Court to adopt a skewed interpretation of the GSGTPA to favor property owners, but neither should the Court adopt a skewed interpretation of the GSGTPA to unjustifiably expand the liability of property owners. Instead, the GDLA asks the Court to adopt an interpretation of the GSGTPA that is consistent with the its plain language and overall context, that upholds and advances the General Assembly's intent in enacting it, and that avoids unnecessary constitutional problems.

II.

ARGUMENT AND CITATION OF AUTHORITIES

Plaintiff alleges that on May 29, 2017, he was shot twice from behind by two unknown males as he was attempting to enter his apartment at Terraces at Brookhaven. (R–62, 524.) Defendants, who own and manage this apartment complex, allegedly failed to provide adequate security measures for their tenants. (R–63, 525.) Plaintiff asserts four claims: (1) negligent security under O.C.G.A. § 51-3-1; (2) nuisance under the GSGTPA; (3) negligence per se based on a violation of the City of Brookhaven's nuisance ordinance; and (4) negligence per se based on a violation of DeKalb County's nuisance ordinance. (R–62-72, 525-38.) Defendants filed a motion to dismiss the nuisance and negligence per se claims, (R–179-220), which the trial court denied. (R–589-97.)

The nuisance claim based on the GSGTPA is invalid because the relevant statute, O.C.G.A. § 16-15-7(c), does not create a civil cause of action against property owners who do not participate in criminal gang activity. Instead, it creates a civil cause of action against only those persons and entities who participated in the criminal gang activity that caused a plaintiff's injuries. This is the only interpretation of this statute that is consistent with the plain language, codified legislative intent, and context of the GSGTPA and that avoids the serious constitutional concerns that are associated with plaintiff's and the trial court's

interpretation of this statute. Further, the GDLA explains below that this statute violates the Due Process Clause of the Georgia Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is too vague, indefinite, and uncertain. Although the GDLA acknowledges that defendants did not assert this argument in the trial court and that the Georgia Supreme Court has exclusive appellate jurisdiction over cases challenging the constitutionality of a law, this argument is nevertheless appropriate for the Court to consider because the unconstitutionality of O.C.G.A. § 16-15-7(c) shows that plaintiff's and the trial court's interpretation of this statute is unreasonable and absurd. Accordingly, the Court should reverse the trial court's denial of defendants' motion to dismiss as to plaintiff's nuisance claim under the GSGTPA.[1]

A. HISTORY OF THE GEORGIA STREET GANG TERRORISM AND PREVENTION ACT

The General Assembly enacted the GSGTPA in 1992 amid concerns about increasing criminal gang activity. Carla M. Dudeck, *CRIMES AND OFFENSES Georgia Street Gang Terrorism and Prevention Act: Punish and Deter Street Gangs*, 9 GA. ST. UNIV. L. REV. 219, 219-20 (1992). Within six years, law enforcement officials and prosecutors had determined that the GSGTPA was

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[1] This brief addresses only plaintiff's nuisance claim under the GSGTPA. The GDLA takes no position in this brief regarding the trial court's denial of defendants' motion to dismiss as to plaintiff's negligence per se claims.

ineffective. Adam P. Princenthal, *CRIMES AND OFFENSES Street Gang Terrorism and Prevention: Enact the Georgia Street Gangs Act of 1998 [. . .]*, 15 GA. ST. UNIV. L. REV. 80, 82 (1998). Ironically, it actually reduced the criminal penalties for participating in criminal gang activity, although this really did not matter because it was never used successfully in any prosecution. *Id.* Perhaps because of this, criminal gang activity increased during the early to middle 1990s. *Id.* at 81-82. Finally, the potential effectiveness of the GSGTPA was undermined by serious questions about its constitutionality. *Id.* at 82.

In an effort to overcome these deficiencies, the General Assembly enacted the Georgia Street Gangs Act of 1998, which comprehensively revised the GSGTPA. *Id.* at 82-84, 87. A significant addition to the GSGTPA was the creation of a civil cause of action in favor of persons who are injured by reason of criminal gang activity. *Id.* at 92-93. Specifically, the GSGTPA now provides, "Any person who is injured by reason of criminal gang activity shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages . . . ." O.C.G.A. § 16-15-7(c). Importantly, this cause of action is limited by the requirement that a judgment can be awarded only if "the finder of fact determines that the action is consistent with the intent of the General Assembly as set forth in Code Section 16-15-2." *Id.* The codified intent of the General Assembly in enacting the GSGTPA is as follows:

> (a) The General Assembly finds and declares that it is the right of every person to be secure and protected from fear, intimidation, and physical harm *caused by the activities of violent groups and individuals*. . . .
>
> (b) The General Assembly, however, further finds that the State of Georgia is in a state of crisis which has been caused by violent criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.
>
> (c) The General Assembly finds that there are criminal street gangs operating in Georgia and that the number of gang related murders is increasing. *It is the intent of the General Assembly in enacting this chapter to seek the eradication of criminal activity by criminal street gangs by focusing upon criminal gang activity and upon the organized nature of criminal street gangs which together are the chief source of terror created by criminal street gangs.*
>
> (d) The General Assembly further finds that *an effective means of punishing and deterring the criminal activities of criminal street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by criminal street gangs*.

O.C.G.A. § 16-15-2 (emphasis added).

This civil cause of action went unused for almost twenty years before creative attorneys representing plaintiffs in negligent security cases decided to try

it.[2] The theory is that by "allowing" criminal gang activity to occur on their property, owners should be liable for injuries sustained by victims of this particular type of crime. Of course, Georgia's premises liability statute already provides for the potential liability of property owners when their invitees are injured to due criminal activity – whether gang-related or not – on their property. O.C.G.A. § 51-3-1. But the premises liability statute does not allow a plaintiff to recover treble damages, whereas the GSGTPA does. So, naturally, plaintiffs in negligent security cases started alleging claims under the GSGTPA as a way to enhance their damages, even though it was never intended to be a substitute for, or even a supplement to, the premises liability statute.

B. THE GEORGIA STREET GANG TERRORISM AND PREVENTION ACT DOES NOT CREATE A CIVIL CAUSE OF ACTION AGAINST PROPERTY OWNERS WHO DO NOT PARTICIPATE IN CRIMINAL GANG ACTIVITY

O.C.G.A. § 16-15-7(c) does not apply in this case because it does not provide a civil cause of action against property owners who do not participate in criminal gang activity. Instead, the only proper defendants for a claim under O.C.G.A. § 16-15-7(c) are the members of the criminal street gang who participated in the criminal gang activity that caused the plaintiff's injuries and damages. Because no employees or agents of defendants are alleged to have been

[2] According to undersigned counsel's research, there are no reported appellate decisions in Georgia involving a civil claim brought under the GSGTPA.

members of a criminal street gang who participated in the shooting of plaintiff, defendants cannot be civilly liable for plaintiff's injuries and damages under O.C.G.A. § 16-15-7(c).

1. The plain language, codified legislative intent, and context of the Georgia Street Gang Terrorism and Prevention Act, as well as persuasive precedent from several trial courts, show that the civil cause of action applies only to criminal street gangs and their members who participate in criminal gang activity.

"The first rule of statutory construction is to construe the statute to effectuate the intent of the legislature. To that end, where the language of a statute is plain and unambiguous, judicial construction is not only unnecessary, but forbidden." *Dozier v. Hanes*, 304 Ga. App. 572, 572 (2010) (punctuation and internal quotation marks omitted).

> When [courts] consider the meaning of a statute, [they] must presume that the General Assembly meant what it said and said what it meant. To that end, [courts] must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would. . . . Applying these principles, if the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end.

Deal v. Coleman, 294 Ga. 170, 172-73 (2013) (footnote, citations, and internal quotation marks omitted). "If, on the other hand, the words of the statute are ambiguous, then [the court] must construe the statute, keeping in mind the purpose

of the statute and the old law, the evil, and the remedy." *Busch v. State*, 271 Ga. 591, 592 (1999) (footnote and internal quotation marks omitted).

The Court is not required to speculate about the General Assembly's intent in enacting the GSGTPA. Other laws may require the courts to employ extrinsic aides to divine the General Assembly's intent, but when the General Assembly enacted the GSGTPA, it conveniently committed its intent to writing and codified it as part of the law. O.C.G.A. § 16-15-2. "When the General Assembly codifies its intent for a comprehensive statutory scheme, that codified preamble becomes part of the statutory context in which [the Court] read[s] individual passages." *Harrison v. McAfee*, 338 Ga. App. 393, 400 n.5 (2016) (en banc); *see also Cavalier Convenience, Inc. v. Sarvis*, 305 Ga. App. 141, 146-47 (2010) ("But we have no authority to adopt a construction that is contrary to the General Assembly's intent as plainly codified."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 217-20 (2012) (arguing that a legislative statement of purpose or intent should be considered, regardless of whether it appears in an uncodified preamble of the act or is codified as part of the act).

The plain language of O.C.G.A. § 16-15-7(c), as well as the codified intent of the General Assembly in enacting the GSGTPA and the overall context of the act, reveal a statutory scheme designed to eradicate "criminal gang activity" by

punishing "criminal street gangs." O.C.G.A. § 16-15-2(c). One express way of achieving this goal is through "forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by criminal street gangs." O.C.G.A. § 16-15-2(d). Nowhere in its codified statement of intent or in O.C.G.A. § 16-15-7(c) did the General Assembly indicate that its purpose was to eradicate criminal gang activity by punishing property owners who are unable to prevent gang members from coming on to their property and committing crimes and who are likely unable to determine whether a person is a gang member in the first place. On the contrary, the General Assembly declared its intent to protect the public from "fear, intimidation, and physical harm caused by the activities of violent groups and individuals." O.C.G.A. § 16-15-2(a). Property owners are not "violent groups and individuals" from which the public needs protection. But gang members are. Had the General Assembly intended to punish property owners or to protect the public from fear, intimidation, and physical harm caused by them, as plaintiff apparently contends, it could have easily said so. The fact that it did not indicates that this was not its intent. *Nisbet v. Davis*, 327 Ga. App. 559, 568 (2014).

Plaintiff argues that the General Assembly's purpose was to incentivize property owners to eradicate criminal gang activity by allowing them to be sued for money damages when such crimes occur on their premises, the theory being that

they will prevent these crimes (and avoid civil liability) by implementing certain security measures. This is circular logic because plaintiff finds this legislative purpose in the very statute that is being interpreted. In other words, plaintiff claims that his interpretation of O.C.G.A. § 16-15-7(c) – i.e., that the General Assembly intended for the civil cause of action to apply to property owners who do not participate in criminal gang activity – illustrates the General Assembly's purpose. The flaw in plaintiff's reasoning is that he is attempting to prove the purpose of the GSGTPA by pointing to his preferred interpretation of the statute, whereas the reverse is how the Court should interpret the statute. That is, the Court should look at the express purpose of the GSGTPA, as codified in O.C.G.A. § 16-15-2, as well as the overall context of the act, to determine the scope of the civil cause of action.

The General Assembly's codified statement of intent, which is discussed above, and the overall context of the GSGTPA show that criminal street gangs and their members are the target of its criminal and civil penalties. Even O.C.G.A. § 16-15-7(c) itself shows that criminal street gangs and their members are the target of the civil cause of action. This is because only criminal street gangs and their members can commit criminal gang activity. In addition, O.C.G.A. § 16-15-8 shows that only criminal street gangs and their members are intended to be defendants in a civil action under O.C.G.A. § 16-15-7(c). Under O.C.G.A. § 16-

15-8, "the defendant in any subsequent civil action" is estopped from disputing matters proved in a criminal proceeding if he or she is convicted of criminal gang activity. This statute shows that the criminal defendant and the civil defendant are the same person because a property owner cannot be estopped with respect to a matter to which it was not a party. *Minnifield v. Wells Fargo Bank, N.A.*, 331 Ga. App. 512, 516 (2015) ("In Georgia, mutual identity of parties is required for collateral estoppel, which means that there must be an identity of parties or their privies in both actions.").

Although the GDLA is not aware of any reported appellate decisions involving the scope of the civil cause of action created by the GSGTPA, the Court is not considering this issue on a clean slate. Before the trial court issued its order in this case, six other trial courts had ruled on this issue, and five of those six ruled that O.C.G.A. § 16-15-7(c) creates a civil cause of action only against the criminal street gangs and their members but not against property owners who are not involved in the criminal gang activity:

- *Arroyo v. CF MH II Pine Haven, LLC*, No. 1:16-CV-00795-CC (N.D. Ga. Jan. 13, 2017) (Judge Clarence Cooper). (R–201-05.)
- *Shivers v. Allen Temple Village, LP*, No. 14-EV-002728 (State Court of Fulton County Mar. 9, 2017) (Judge Jay Roth). (R–207-16.)

- *Graham v. Marquise Pointe Holdings, LLC*, No. 2017-CV-00209-KP (State Court of Clayton County May 22, 2017) (Judge Kathryn Powers). (R–195-99.)
- *Elorza v. Impact Bradford, L.P.*, No. 16-C-07172-S5 (State Court of Gwinnett County Aug. 15, 2018) (Judge Pamela South). (R–218-19.)
- *Morales v. Ashford Jackson Creek, LLC*, No. 18-C-08201-6 (State Court of Gwinnett County Jan. 31, 2019) (Judge John Doran).[3]

The only contrary decision was in *Wilcoxson v. Highlands at East Atlanta, LP*, No. 16A-62169-4 (State Court of DeKalb County July 20, 2017) (Judge Johnny Panos). (R–488-95.)

As shown by the plain language of O.C.G.A. § 16-15-7(c), the General Assembly's codified intent in enacting the GSGTPA, the context of the entire act, and persuasive precedent from several trial courts, the GSGTPA does not create a civil cause of action against property owners who do not participate in criminal gang activity. Thus, although plaintiff may sue the person who shot him, if that person can be identified, he cannot sue defendants under the GSGTPA since there is no allegation that their employees or agents were members of a criminal street

[3] The order in *Morales* is not included in the appellate record for this case, but it is available from the State Court of Gwinnett County. Alternatively, the GDLA will provide a copy to the Court upon request.

gang and participated in the shooting of plaintiff or other criminal gang activity at the Terraces at Brookhaven apartment complex.

2. The canon of constitutional doubt or avoidance requires the Court to construe the Georgia Street Gang Terrorism and Prevention Act as creating a civil cause of action only against criminal street gangs and their members who participate in criminal gang activity.

If the Court still believes that plaintiff's and the trial court's interpretation of O.C.G.A. § 16-15-7(c) is plausible, it should resolve the issue by applying the canon of constitutional doubt or avoidance. This canon provides that "[s]tatutes should be interpreted to avoid serious constitutional concerns where such an interpretation is reasonable." *Stone v. Stone*, 297 Ga. 451, 455 (2015); *see also Scott v. State*, 299 Ga. 568, 574 (2016) (recognizing the "obligation, in the interpretation of statutes, to adopt a readily available limiting construction where necessary to avoid constitutional infirmity"); SCALIA & GARNER, *supra*, at 247-51 ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt."). "In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail–whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). This canon "'is a tool for choosing between competing plausible

interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts.'" *Nordahl v. State*, 306 Ga. 15, 20 (2019) (quoting *Clark*, 543 U.S. at 381).[4]

Plaintiff's and the trial court's interpretation of O.C.G.A. § 16-15-7(c) raises serious concerns about the constitutionality of the civil forfeiture provisions in the GSGTPA and, by incorporation, the Georgia Uniform Civil Forfeiture Procedure Act ("GUCFPA"). The GSGTPA's civil forfeiture provision broadly authorizes forfeiture of "[a]ny property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of" the GSGTPA, O.C.G.A. § 16-15-5(b), and it provides that such forfeiture shall proceed pursuant to the GUCFPA. O.C.G.A. § 16-15-5(c). Under plaintiff's and the trial court's interpretation of O.C.G.A. § 16-15-7(c), a person or entity who did not participate in criminal gang activity could be sued civilly for damages caused by criminal gang activity. Then, if a violation of the GSGTPA is established, the real property owned by that person or entity where the criminal gang activity occurred would be subject to civil

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[4] Because the canon of constitutional doubt or avoidance "is not a method of adjudicating constitutional questions by other means," *Clark*, 543 U.S. at 381, utilizing it does not violate the provision in the Georgia Constitution that vests exclusive appellate jurisdiction over questions of constitutional interpretation in the Supreme Court. GA. CONST. art. VI, sec. VI, para. II(1). "Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions." *Clark*, 543 U.S. at 381.

forfeiture in a manner that would present serious questions about its constitutionality. Such questions would not arise with respect to forfeiture of property (real or otherwise) owned by a person who participated in the criminal gang activity – i.e., a member of a criminal street gang. Thus, the canon of constitutional doubt or avoidance requires the Court to reject plaintiff's interpretation of O.C.G.A. § 16-15-7(c) and to find that only members of a criminal street gang can be sued civilly under the GSGTPA.

a. Plaintiff's interpretation of the Georgia Street Gang Terrorism and Prevention Act creates serious concerns about defendants' and others' due process rights.

Forfeiture of the real property where the criminal gang activity happened to occur would present serious questions about the owner's due process rights under the United States and Georgia Constitutions. U.S. CONST. amend. XIV, § 1; GA. CONST. art. I, sec. I, para. I. One issue is that the GUCFPA appears to allow real property to be seized without first affording the owner notice and an opportunity to be heard. O.C.G.A. § 9-16-6. If so, this may violate the owner's due process rights. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62 (1993) ("Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."). Even if the owner later proves

its innocence, "this determination, coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented." *Id.* at 56.

Another issue is that the GUCFPA allows an owner's property to be forfeited based on a preponderance of the evidence. O.C.G.A. § 9-16-17(a)(1). Due process may require the state to satisfy a higher standard of proof, such as clear and convincing evidence. *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., concurring in the denial of certiorari); *see also* Stephen J. Moss, Comment, *Clear and Convincing Civility: Applying the Civil Commitment Standard of Proof to Civil Asset Forfeiture*, 68 AM. U.L. REV. 2257 (2019) (arguing that civil forfeiture based on a preponderance of the evidence violates due process and that only the higher standard of clear and convincing evidence satisfies due process); Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 799-801 (2009) (arguing that the government's burden should be clear and convincing evidence to ensure that due process rights are protected); Barclay Thomas Johnson, Note, *Restoring Civility–The Civil Assert Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1075-79 (2001/2002) (arguing that allowing forfeiture based on a preponderance of the evidence violates due process because it creates "an unacceptable risk that innocent parties will be erroneously deprived of their property").

Although the GUCFPA includes an innocent-owner defense, it puts the burden on the owner to prove its innocence rather than on the state to prove the owner's knowledge of and complicity in the criminal gang activity. O.C.G.A. § 9-16-17(a)(2). This, too, may violate the owner's due process rights. Dan Alban, *The Impact Litigation Campaign to End Civil Forfeiture*, 45 LITIG. 41, 45 (2019); Graeme S. R. Brown, Comment, Bennis v. Michigan*: Forfeiting the Due Process Rights of the Innocent Owner*, 32 NEW ENGLAND L. REV. 479, 500-10 (1998); Peter Petrou, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822. For a variety of reasons, "civil asset forfeiture places an unjust burden on innocent property owners." Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems it Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 345 (2017).

Indeed, the United States Supreme Court has recognized that there are "serious constitutional questions" associated with forfeiture of the property of "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974). In such a scenario, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Id.* at 689-

90 (1974); *see also Austin v. United States*, 509 U.S. 602, 629 (1993) (Kennedy, J., concurring in part and in the judgment) (noting that "whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent[,] . . . would raise a serious [constitutional] question").

Finally, the unique circumstances of this case present a serious question of due process. Under the GUCFPA, forfeited property retroactively vests in the state as of the date of the conduct giving rise to the forfeiture. O.C.G.A. § 9-16-18(a). The incident at issue in this case occurred on May 29, 2017, and so the state would be deemed to have owned the property since then. However, according to the DeKalb County Tax Assessor's website, Terraces at Brookhaven, LLC sold the property to WAH12 Buford Hwy Commons, LLC on August 19, 2018. If the property is forfeited to the state at some time in the future, would that retroactively invalidate the sale? After all, if the state is deemed to have owned the property as of May 29, 2017, how could Terraces at Brookhaven, LLC have sold the property to WAH12 Buford Hwy Commons, LLC more than a year later? This means Terraces at Brookhaven, LLC would have sold a property it did not own.

What about the constitutional rights of WAH12 Buford Hwy Commons, LLC? Could the state take the property from it even though there is no evidence showing that it participated in or sponsored any criminal gang activity there? Would doing so constitute an unconstitutional taking under the Fifth Amendment

to the United States Constitution or the Takings Clause in the Georgia Constitution? U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); GA. CONST. art. I, sec. III, para. I(a) ("[P]rivate property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."). On this issue, the Court must remember that "[p]rotection to person and property is the paramount duty of government and shall be impartial and complete." GA. CONST. art. I, sec. I, para. II. The Court must also remember that the canon of constitutional doubt or avoidance does not care whether the potential constitutional problems relate to parties or non-parties, *Clark*, 543 U.S. at 380-81, and so the Court cannot ignore the potential violations of WAH12 Buford Hwy Commons, LLC's constitutional rights even though it is not a defendant in the case.

b. Plaintiff's interpretation of the Georgia Street Gang Terrorism and Prevention Act creates serious concerns about defendants' and others' right to be free from excessive fines.

Both the United States and Georgia Constitutions prohibit the imposition of "excessive fines." U.S. CONST. amend. VIII; GA. CONST. art. I, sec. I, para. XVII. This is a limitation on "the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin*, 509 U.S. at 609-10 (internal quotation marks omitted). A civil in rem forfeiture is a fine to which this limitation applies because the purpose of forfeiture, at least in part, is to punish the

owner of the property. *Timbs v. Indiana*, 139 S. Ct. 682, 689-91 (2019); *Austin*, 509 U.S. at 611-18; *Howell v. State*, 283 Ga. 24, 25-27 (2008).

Aside from the constitutional concerns regarding forfeiture itself that are discussed in the previous section, civil in rem forfeiture raises serious constitutional concerns about the relationship between the value of the property forfeited and the nature of the conduct that is punished by the forfeiture. "'The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.'" *Patel v. State*, 289 Ga. 479, 483 (2011) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).

In this case, the entire apartment complex is potentially subject to forfeiture. While this case was pending in the trial court, Terraces at Brookhaven, LLC sold the property to WAH12 Buford Hwy Commons, LLC for $26,284,000 (according to the DeKalb County Tax Assessor's website), and so Terraces at Brookhaven, LLC could lose that amount simply because a crime happened to occur on its property. Typically, forfeited property goes to the state, but the GUCFPA grants to the injured person a right or claim to forfeited property that is superior to any right or claim the state has in the property. O.C.G.A. § 9-16-16(c). Thus, the plaintiff in any negligent security case could take the owner's property in addition to whatever

money damages are awarded by the jury. As the value of the apartment complex in this case shows, this has the potential to allow forfeitures that are wildly disproportionate to the injuries and damages at issue.

Indeed, as Justice Stevens has observed, "[s]ome airline passengers have marijuana cigarettes in their luggage; some hotel guests are thieves; some spectators at professional sports events carry concealed weapons; and some hitchhikers are prostitutes." *Bennis v. Michigan*, 516 U.S. 442, 458 (1996) (Stevens, J., dissenting). If Georgia law governed these scenarios envisioned by Justice Stevens, some rather valuable property could be forfeited: a Delta jet, the Ritz-Carlton hotel, Mercedes-Benz Stadium, and countless vehicles of all values. Imagine if a fan of the Atlanta Falcons were assaulted by a member of a gang in a bathroom at Mercedes-Benz Stadium during a game. Under plaintiff's interpretation of O.C.G.A. § 16-15-7(c), that fan could become the owner of a stadium that cost about $1.6 billion. The sheer lunacy of such a disproportionate forfeiture cannot be permitted by the United States and Georgia Constitutions. *Id.* at 462 (noting that the precedents in this area of the law "would [not] justify the confiscation of an ocean liner just because one of its passengers sinned while on board"); *Austin*, 509 U.S. at 627-28 (Scalia, J., concurring in part and in the judgment) ("But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be

regarded as an instrumentality of the offense – the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine."). Nevertheless, this is exactly what plaintiff is advocating because allowing a property owner to be sued civilly under the GSGTPA necessarily subjects its property to forfeiture under the GUCFPA. The examples discussed above demonstrate the disproportionality – and, therefore, the unconstitutionality – of such forfeitures, which is why the Court should interpret the GSGTPA as allowing a civil cause of action to be asserted against only the criminal street gang or member thereof who participated in the injury-causing criminal gang activity.

c. Plaintiff's interpretation of the Georgia Street Gang Terrorism and Prevention Act creates serious concerns about the imposition of vicarious criminal liability.

Because a civil in rem forfeiture is a punishment for a crime – albeit a crime committed by someone else – there is a serious constitutional concern about whether forfeiture by a property owner who did not participate in the criminal gang activity at issue essentially constitutes vicarious criminal liability. After all, the essence of a forfeiture claim is the use of the property for illegal purposes, and so forfeiture proceedings have many of the definitive characteristics of criminal prosecutions. B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 769-72 (1992). But vicarious criminal liability is an

unconstitutional deprivation of due process under both the United States and Georgia Constitutions, at least if the vicariously liable person has a "responsible relation" to the crime (i.e., the power to prevent the crime from occurring) or if the punishment involves imprisonment. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999); *Davis v. City of Peachtree City*, 251 Ga. 219, 221-22 (1983). In addition to there being a serious constitutional concern regarding the forfeiture procedure, there is a similar concern regarding the nuisance abatement procedure because it also seems to impose vicarious criminal liability on a property owner for the crimes of others on its property. O.C.G.A. § 41-3-1.1.

* * *

In sum, serious constitutional questions abound, and so the canon of constitutional doubt or avoidance requires the Court to construe O.C.G.A. § 16-15-7(c) as creating a civil cause of action only against criminal street gangs and their members who participated in the criminal gang activity that caused the plaintiff's injuries and damages. In employing this canon, it is important for the Court to remember that it does not have to be convinced that defendants' and the GDLA's interpretation of O.C.G.A. § 16-15-7(c) is more reasonable than plaintiff's and the trial court's interpretation. All that is necessary is that defendants' and the GDLA's interpretation not be unreasonable. *La Fontaine v. Signature Research*,

Inc., 305 Ga. 107, 111 (2019) (Peterson, J., concurring specially). This standard, combined with the serious constitutional questions discussed above, requires the Court to reject plaintiff's and the trial court's interpretation.

C. PLAINTIFF'S AND THE TRIAL COURT'S INTERPRETATION OF O.C.G.A. § 16-15-7(C) DEFIES COMMON SENSE AND IS ABSURD AND UNREASONABLE BECAUSE IT IS UNCONSTITUTIONAL AS APPLIED TO PROPERTY OWNERS WHO DO NOT PARTICIPATE IN CRIMINAL GANG ACTIVITY

O.C.G.A. § 16-15-7(c) violates the Due Process Clause of the Georgia Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is too vague, indefinite, and uncertain. Although the Court lacks jurisdiction to rule on the constitutionality of this statute, it is nevertheless appropriate for the Court to consider this argument because the fact that this statute is unconstitutional as applied to property owners who do not participate in criminal gang activity shows that plaintiff's and the trial court's interpretation of this statute is unreasonable and absurd.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Similarly, the Due Process Clause of the Georgia Constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law." GA. CONST. art. I, sec. I, para. I. Although the process that is due under the United

States and Georgia Constitutions is not automatically the same in all contexts, it often is the same or the Georgia appellate courts do not consider whether there are differences because the parties did not argue that any differences existed. *State v. Turnquest*, 305 Ga. 758, 769-70 (2019); *see also Cherokee Cty. v. Greater Atlanta Homebuilders Ass'n, Inc.*, 255 Ga. App. 764, 767 n.1 (2002) ("The due process guarantees [of the Georgia and United States Constitutions] are substantively identical."). In the context of the void for vagueness doctrine, there seems to be no difference in the protections afforded by the United States and Georgia Constitutions, and so the GDLA assumes for purposes of this analysis that they are coextensive. Because the language of O.C.G.A. § 16-15-7(c) is too vague, indefinite, and uncertain, it violates defendants' due process rights under both constitutions and cannot be enforced against them.

"Although originally developed as one component of the due process safeguards afforded to defendants in criminal cases, the void for vagueness doctrine has been extended to civil cases." *Prof'l Standards Comm'n v. Alberson*, 273 Ga. App. 1, 8 (2005); *see also Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123 (1967) (noting that "the 'void for vagueness' doctrine [is] applicable to civil as well as criminal actions"). According to this doctrine, the "first essential of due process of law" is that a statute is void if it is too vague, indefinite, and uncertain. *Atlanta v. S. Ry. Co.*, 213 Ga. 736, 738 (1957). Thus,

> [a] statute must be definite and certain to be valid, and when it is so vague and indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law. To withstand an attack of vagueness or indefiniteness, a civil statute must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent.

Anderson v. Atlanta Comm. for the Olympic Games, Inc., 273 Ga. 113, 114 (2000); *see also Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1310 (11th Cir. 2009) (noting that "a civil statute is unconstitutionally vague only if it is so indefinite as really to be no rule or standard at all"); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1429 (11th Cir. 1998) ("Vagueness arises when a statute is so unclear as to what conduct is applicable that persons of common intelligence must necessarily guess at its meaning and differ as to its application."). As these cases show, the standard for determining whether a civil statute is void for vagueness is essentially the same under the Georgia and United States Constitutions.

Before addressing this standard, it is necessary to more precisely identify which part of O.C.G.A. § 16-15-7 is at issue. Plaintiff alleges that the premises was "'real property which is . . . used by [one or more] criminal street gang[s] for the purpose of conducting criminal gang activity'" and that "[b]ecause of this criminal gang activity on the property, the Terraces constituted a public nuisance under O.C.G.A. § 16-15-7." (R–64, 527 (quoting O.C.G.A. § 16-15-7(a)).) It is

true that this statute provides that "[a]ny real property which is . . . used by any criminal street gang for the purpose of conducting criminal gang activity shall constitute a public nuisance and may be abated as provided by Title 41, relating to nuisances." O.C.G.A. § 16-15-7(a). But as this language shows, this subsection of the statute allows for an abatement claim only. The following subsection of the statute limits who can bring an abatement action to "the district attorney, solicitor-general, prosecuting attorney of a municipal court or city, or county attorney." O.C.G.A. § 16-15-7(b). Because plaintiff does not occupy one of these positions, he may not bring an abatement claim under O.C.G.A. § 16-15-7(a).

The only option left for plaintiff is O.C.G.A. § 16-15-7(c), which provides that "[a]ny person who is injured by reason of criminal gang activity shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages." The authorized damages are not relevant to whether plaintiff has a claim, and so the only relevant portion of this statute provides that "[a]ny person who is injured by reason of criminal gang activity shall have a cause of action." This language is so vague, broad, and indefinite that reasonable people of common intelligence cannot agree on what it allows. For example, what type of cause of action is allowed? Negligence? Nuisance? Something else? The statute does not say. Also, against whom may the cause of action – whatever it is – be asserted? The owner of the real property? A

management company hired by the owner? The gang member(s) who perpetrated the crime at issue? Again, the statute does not say. Finally, does the injured person's status relative to the defendant matter? As in traditional premises liability cases, is the standard of liability different depending on whether the injured person is an invitee, a licensee, or a trespasser? This is yet another important but unanswered question. Because the statute does not answer these questions, reasonable people of common intelligence are left to guess at who can be sued, for what, and under what standard. *Fla. Ass'n of Prof'l Lobbyists Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1078 (11th Cir. 2008) ("To overcome a vagueness challenge, a statute must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; and it must provide explicit standards for those who apply them to avoid arbitrary and discriminatory enforcement.").

In addition, the language "[a]ny person who is injured by reason of criminal gang activity shall have a cause of action" is too broad and indefinite. The term "criminal gang activity" means "the commission, attempted commission, conspiracy to commit, or solicitation, coercion, or intimidation of another person to commit" certain offenses, including racketeering, stalking, rape, aggravated sodomy, statutory rape, aggravated sexual battery, escape, aiding or encouraging a child to escape from custody, criminal trespass or criminal damage to property

resulting from graffiti, and any crime involving violence, possession of a weapon, or use of a weapon. O.C.G.A. § 16-15-3(1). This broad definition means that virtually all negligent security cases will involve criminal gang activity since most of them arise out of a shooting, an assault, or some other crime of violence. Under this definition, such a crime constitutes criminal gang activity, even if it was not committed by a member of a criminal street gang, as is required for criminal liability under O.C.G.A. § 16-15-4. Indeed, because plaintiff was shot with a gun, this definition means that he was the victim of criminal gang activity even though he does not allege that the shooter was a member of a criminal street gang.

This makes no sense and is not what the General Assembly intended, as expressed in its codified statement of intent. *Thornton v. Clarke Cty. Sch. Dist.*, 270 Ga. 633, 634 (1999) ("The construction of statutes must square with common sense and sound reasoning."). The purpose of the GSGTPA is "the eradication of criminal activity by criminal street gangs by focusing upon criminal gang activity and upon the organized nature of criminal street gangs which together are the chief source of terror created by criminal street gangs." O.C.G.A. § 16-15-2(c). As explained in greater detail above in Part II(B), this purpose is not promoted by allowing property owners to be sued civilly by the victim of a crime that had no relationship whatsoever to a criminal street gang. This is especially so because the General Assembly did not express any concern about the conduct of property

owners. It did, however, find that the public needs to be "secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals." O.C.G.A. § 16-15-2(a). Because the General Assembly did not find that the public needs to be protected from property owners, a civil cause of action against property owners based on the criminal conduct of unrelated persons was not its intent.

Although it is illogical to create civil liability based on criminal gang activity committed by someone who was not affiliated with a criminal street gang, at least when the purpose of the GSGTPA is to target gang members, that is exactly what O.C.G.A. § 16-15-7(c) does. And because civil liability under O.C.G.A. § 16-15-7(c) does not depend on the perpetrator being affiliated with a criminal street gang, the interpretation of this statute espoused by plaintiff and the trial court essentially represents an expansion of the potential liability of property owners in premises liability cases. As such, O.C.G.A. § 16-15-7(c) is far too broad and indefinite to satisfy due process requirements.

While the GDLA acknowledges that the Court lacks jurisdiction to rule on the constitutionality of O.C.G.A. § 16-15-7(c), GA. CONST. art. VI, sec. VI, para. II(1), the constitutional question is relevant to consider because "[i]t is the duty of the court to consider the results and consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences

not contemplated by the legislature." *State v. Mulkey*, 252 Ga. 201, 204 (1984) (internal quotation marks omitted). Because plaintiff's and the trial court's interpretation of O.C.G.A. § 16-15-7(c) would render it unconstitutionally vague, indefinite, and uncertain, and would dramatically expand the potential liability of property owners in ways not contemplated by the General Assembly, their interpretation would fail the test of common sense and would cause absurd consequences to ensue, as explained elsewhere in this brief.

III.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's denial of defendants' motion to dismiss as to plaintiff's nuisance claim under the GSGTPA.

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

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