IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

Michael Gatto and Katherine Gatto, et al.	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION FILE
v.	)	NO. STCV2016000167
	)	
City of Statesboro, Georgia, et al.	)	
	)	
Defendants.	)	

DEFENDANTS CITY OF STATESBORO AND SUE STARLING'S AMENDED FIRST MOTION IN LIMINE

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DEFENDANTS CITY OF STATESBORO AND SUE STARLING'S AMENDED FIRST MOTION IN LIMINE

COME NOW Defendants City of Statesboro, Georgia (the "City") and Sue Starling ("Ms. Starling"), individually (collectively, "Defendants"), and, in accordance with the Court's Case Management Order, file this motion in limine whereby the Defendants seek an Order precluding Plaintiffs or their attorneys from introducing or referencing certain irrelevant, unfairly prejudicial, and/or inadmissible evidence at trial.[1]

PROCEDURAL POSTURE AND REMAINING CLAIMS

Plaintiffs filed a complaint initiating this action on October 26, 2016. The original complaint named the City as a defendant, as well as Ms. Starling as a defendant individually and in her official capacity as the City Clerk.

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[1] The Court's June 21, 2018 Amendment to the Case Management Order requires any dispositive motions and motions in limine to be filed by September 1, 2018. Thus, while Defendants feel very strongly that Plaintiffs' claims are subject to disposition via summary judgment, and have simultaneously filed such a motion, they file the instant motion out of an abundance of caution and in conjunction with their summary judgment motion. Even at the summary judgment phase, only *admissible* evidence may be considered. See Maloof v. Metropolitan Atlanta Rapid Transit Auth., 330 Ga. App. 763 (2015) ("Admissibility of evidence on motion for summary judgment is governed by the rules relating to form and admissibility of evidence generally.") (Citation omitted).

Factually, the original complaint alleged that Michael Joseph Gatto (the "Decedent") was killed due to injuries he sustained on August 27-28, 2014 while he was at Rude Rudy's, a bar located near Georgia Southern University. (Compl. ¶¶ 13-19.) The complaint further alleged the City issued a business license, occupational tax certificate, and an alcohol license to Rude Rudy's. (Id. ¶¶ 20-26). Also alleged was a history of criminal activity which purportedly transpired at or around Rude Rudy's prior to the Decedent's injuries. (Id. ¶¶ 27-29.) Plaintiffs' allegations set forth an historical background concerning the City's enactment and enforcement of ordinances regulating the provision of alcohol by business establishments within the City, including allegations that Ms. Starling failed to carry out her alleged duties as the City Clerk in enforcing certain parts of the ordinances. (Id. ¶¶ 35-64.) Plaintiffs' ultimate allegation was that the Decedent's death at the hands of Grant Spencer, a former bouncer of Rude Rudy's, was the result of the City's and/or Ms. Starling's alleged failure to take action against *Rude Rudy's* alcohol license and/or to eliminate crime-related dangers to patrons such as the Decedent. (Id. ¶¶ 65-71.)

The original Complaint contained two separate nuisance claims. Specifically, Count II alleged a claim of nuisance based on the Defendants' alleged acts and/or omissions in allowing *Rude Rudy's* to remain in operation, which Plaintiffs contend created a hazardous and dangerous condition at *Rude Rudy's*, and which Plaintiffs further posit caused the death of the Decedent. (Id. ¶¶ 83-89.) The original Count III alleged nuisance as well; however, as noted by the Court in its January 26, 2017 Order, Count III substantially differed from the original Count II nuisance claim in that its allegations were not limited to Rude Rudy's, but broadly allege the creation of a "*City-wide environment"* by the enactment of changes to the City's alcohol ordinances which the Plaintiffs contend caused the financial benefit of selling alcohol to underage patrons to outweigh any financial or criminal deterrent of doing so. (Id. ¶¶ 91-102.)

Following receipt of the specious and inflammatory complaint, Defendants filed a motion for partial judgment on the pleadings, which the Court granted on January 26, 2017. By granting the motion, the Court: (1) dismissed the punitive damages claim against the City; and (2) dismissed the Count III nuisance claim, which the Court noted alleged "that the ordinance changes created a dangerous environment at establishments in the municipality by encouraging the sale of alcohol at underage college students by licenses inclined to place financial profit above the safety of its patrons and thus constituted a nuisance that was injurious to the invitees to the premises and the general public." (Jan. 26, 2017 Order at p. 9.)[2] Therefore, while Plaintiffs' underlying claims of negligence and nuisance related to *Rude Rudy's* still remain (at least at this point), the "*City-wide environment*" claim – which was not limited to Rude Rudy's in particular – was dismissed with prejudice.

On July 5, 2017, Defendants filed their *First Motion in Limine* pursuant to which, among other types of evidence, they sought to preclude evidence of criminal activity and/or other alcohol violations at establishments other than Rude Rudy's. In a blatant attempt to circumvent the clear and controlling law set forth in Defendants' original motion, Plaintiffs amended their Complaint, and have done so twice more since that time to shift their theories of liability. The operative complaint is the Third Amended Complaint ("TAC").

Plaintiffs' current negligence claims are based on the flawed premises that (1) the City Clerk breached a duty to set due process hearings concerning alleged alcohol violation against Rude Rudy's (and other University Plaza bars) "upon her receipt of notice of violations" against those establishments (TAC ¶¶ 147-152), and (2) the City allowed the renewal of the "alcohol and business licenses of the University Plaza Establishments" notwithstanding alleged knowledge of "criminal and dangerous activity." (Id. ¶¶ 154-156.) Plaintiffs' operative nuisance claim differs substantially

[2] Prior to the Court's ruling, the Plaintiffs dismissed all claims against Ms. Starling in her official capacity.

from the Count II nuisance claim set forth within the original Complaint (but is quite like the original Count III nuisance claim that was dismissed)[3] insofar as it is not based on the mere licensing of Rude Rudy's, but rather on the licensing of Rude Rudy's and *three other businesses* – Retrievers, Rum Runners, and Rusty's Tavern – which are collectively referred to in the TAC as the "University Plaza Establishments." (TAC ¶¶ 24-54, 157-164). Specifically, the TAC alleges that the City and Ms. Starling had knowledge of criminal activity occurring at University Plaza prior to August 27-28, 2014; that despite this knowledge, they renewed the alcohol and business licenses of the University Plaza Establishments; by doing so, allegedly created a nuisance that "was injurious to the invitees to the premises, the citizens of the City of Statesboro, and the general public"; allegedly failed to "abate the nuisance by revoking the alcohol licenses and business licenses" of the University Plaza Establishments; and allegedly proximately caused the Decedent's death. (Id. at ¶¶ 157-164). It is this procedural posture which frames many of the issues below.

ARGUMENT & CITATION OF AUTHORITY

A. Evidence of Criminal Activity and/or Alcohol Violations at Establishments Other Than Rude Rudy's Should be Precluded.

During discovery, the parties have obtained and produced a number of documents which purportedly reflect either alleged criminal activity (such as fights or disorderly conduct) or alleged alcohol violations occurring not only at Rude Rudy's, but also at a number of other establishments located at University Plaza and various other places within the City. Such documentation includes police incident reports, uniform traffic citations ("UTC's"), dispatch summary reports, summaries of

[3] As noted, Count III of the Complaint was premised upon the assertion that the City's changes to its alcohol ordinances over time created a "dangerous environment at establishments in the City of Statesboro by encouraging the sale of alcohol to underage college students," resulting in danger to the safety of their patrons and ultimately caused the death of the Decedent. Plaintiffs have attempted to disguise virtually the same claim by limiting it to establishments in an area of the City known as University Plaza.

EMS reports, and testimony by witnesses regarding claimed criminal activity within the City. In addition to the evidentiary objections set forth below, Defendants object to the use, at trial or at the summary judgment phase, of *any* such evidence *which is not tied or linked specifically to Rude Rudy's* – such as *admissible* portions of uniform traffic citations which relate to alleged violations of the City's alcohol ordinances or a police incident report which reflects an incident of purported violence at Rude Rudy's that is "substantially similar"[4] to the act giving rise to the Decedent's injuries for several reasons.[5]

First, this Court has already dismissed the original Complaint's "City-wide environmental" nuisance claim. The current version of Plaintiffs' nuisance claim rests on similar theories. This Court has already recognized that Plaintiffs' *original* theory of liability was improperly based not on

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[4] Although this is not a "premises liability" case, given that Defendants did not own Rude Rudy's, a private establishment, in such cases prior criminal acts must ordinarily be "substantially similar" to the act harming the plaintiff to be admissible. See Nalle v. Quality Inn, Inc., 183 Ga. App. 119(1) (1987) (Prior crimes at hotel of which hotel operator had knowledge were not sufficiently similar to subsequent assault and robbery of guest so as to make it liable to guest); Cooper v. Baldwin County School Dist., 193 Ga. App. 13(1)-(3) (1989) ("In the absence of prior similar acts, evidence as to any periodic patrol of the courtyard area or similar precaution otherwise normally undertaken by a school does not indicate that appellee was or should have been aware that the courtyard was a particularly dangerous location so as to require that appellee guard against and prevent a possible attack upon one of its students by a knife-wielding fellow student at that location.").

[5] The term "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." O.C.G.A. § 24-4-401. While relevant evidence is generally admissible and irrelevant evidence is not, even "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." O.C.G.A. § 24-4-403. "The decision to admit or exclude evidence is committed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. When an issue is raised whether the probative value of evidence is outweighed by its tendency to unduly arouse the jury's emotions of prejudice, hostility, or sympathy, a trial court's decision regarding admissibility is a matter of discretion." Sellers v. Burrowes, 302 Ga. App. 667, 671(2) (2010); see also Mitchell v. State, 200 Ga. App. 146, 148(2) (1991) ("[A]nything not legitimately arising out of the trial of the case, which tends to destroy the impartiality of the juror, should be discountenanced.").

a defect or condition at a *particular* place, but instead was based on an "environment" that purportedly was created and otherwise allowed by the City to exist in and around various parts of the City, such as the four college bars located at University Plaza. (See January 26, 2017 Order, noting "It is enlightening that Count III twice uses the phrase… "environment", rather than being couched in the terminology normally associated with nuisance such as 'defect' or 'condition'."). Because it is in essence the same claim, it is subject to dismissal and Plaintiffs' attempt to circumvent the case authority below fails.

Second, in addition to the reasons above and the additional reasons set forth in Defendants' Memorandum of Law in support of Motion for Summary Judgment, the concept that the City's and/or Ms. Starling's purported negligence with respect to Rum Runners, Retrievers, and Rusty's Tavern somehow caused the Decedent's death is absurd. The Decedent died at Rude Rudy's, not at any of the other three establishments. There is no causal nexus whatsoever between violations at the other establishments and violations at Rude Rudy's.

Third, evidence of fights, open container violations, and other types of alleged criminal activity outside of Rude Rudy's and/or in the parking lot of these establishments is irrelevant and unfairly prejudicial because none of the tenants owned or controlled any portion of the ***parking lot*** at University Plaza. (SMF 84-85) In addition, the parking lot at University Plaza was ***privately owned***, rather than a public street or sidewalk controlled by the City. (SMF 81-82) There is also no evidence that the City *ever* issued an alcohol license to University Plaza, Inc. (SMF 87) Finally, while Section 6-88(c) of the City's Pre-December 6, 2011 Ordinances and the December 6, 2011 Ordinances provided that "No licensee shall permit on the licensed premises any disorderly conduct, breach of peace, or noise or activity *which is disturbing to the surrounding neighborhood*," no provision set forth in the City's ordinance prohibited: (1) fights or other criminal activity which were

not disturbing to the surrounding neighborhood; or (2) fights or criminal activity in parking lots or other spaces that are not "on the premises." (SMF 113) See McCoy v. Gay, 165 Ga. App. 590, 592 (1983) ("Generally, it may be said that it is not permissible, for the purpose of establishing whether a condition at one place is dangerous[,] to show conditions at places other than the one in question.")[6]

Evidence of alleged criminal activity, injuries requiring medical treatment, and/or violations of the City's alcohol ordinances at establishments *other than Rude Rudy's*, and especially as in the *parking lot* of the "University Plaza" development, has absolutely no relevance to Plaintiffs' remaining claims and is otherwise outweighed by the dangers of unfair prejudice. Courts routinely hold that "[t]o establish the existence of a dangerous condition at one place, it is generally not permissible to show similar conditions at other places." Charles R. Adams III, *Ga. Law of Torts* § 4.7 (2014-15 Ed.). See also Cooper v. Baldwin County School Dist., 193 Ga. App. 13, 14 (1989) (Upholding trial court's refusal to admit evidence of prior fights at school that did not occur in courtyard where plaintiff was stabbed); Dew v. Motel Properties, Inc., 282 Ga. App. 368 (2006), cert. denied (Feb. 26, 2007) (similar). Likewise, courts have held that crimes inside the premises (such as the attack on the Decedent while he was inside of Rude Rudy's) do *not* make crimes in the parking lot foreseeable, and vice versa. See Drayton v. Kroger Co., 297 Ga. App. 484, 485 (2009) (Attack of a store patron by a third party in the parking lot of a shopping center was not reasonably

[6] Examples of non-premises liability cases in which the prejudicial value of evidence was found to substantially outweigh its limited probative value include the following: Trotman v. Velociteach Project Management, LLC, 311 Ga. App. 208, 215 (2011) (trial court did not err in precluding evidence of former employer being motivated by racial bias in an action involving the former employee's alleged breach of a confidentiality agreement and other related claims); Miller v. Cole, 289 Ga. App. 471, 473-474 (2008) (testimony that an eye surgeon breached the standard of care in performing two prior surgeries on patient, which occurred three years before surgery that was subject of the patient's medical malpractice action against surgeon, and as to which any claims were time-barred, in that admitting such testimony would have arguably forced the surgeon to defend against time-barred malpractice claims); Brock v. Wendicamp, 253 Ga. App. 275, 281-284 (2002) (evidence related to mother's sex life in son's wrongful death action against the drivers of the cars in a crash that killed the mother found irrelevant and unfairly prejudicial).

foreseeable by the operator of the store or the owner of the shopping center and the parking lot); Vega v. La Movida, Inc., 294 Ga. App. 311, 314 (2008) (evidence of crimes occurring in the parking lot did not show that La Movida was on notice that, in spite of its efforts to put security precautions in place at the entrance to its bar, a dangerous condition existed inside the bar).[7] Moreover, whatever limited probative value such evidence or testimony hypothetically may have (if any) is substantially outweighed by the resulting dangers of prejudice, hostility, and jury confusion, given that the ultimate issue in this case is and should be whether the Defendants' acts or omissions related to *Rude Rudy's* were the proximate cause of the Decedent's death.

In Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011) the Court was confronted with an admissibility determination involving call service lists at an apartment complex. This list showed over 5,800 requests for police assistance at the complex and within a one mile radius of the complex. Although some information was noted in the various lists, the lists contained multiple layers of hearsay upon hearsay and numerous unexplained codes and data. (Raines, at 306). Plaintiff attempted to have the lists introduced to establish similar crimes at the complex. The court noted "such facts and data remain inadmissible 'unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.' O.C.G.A. § 24-9-67.1(a) Raines has made no showing that the circumstances of the various incidents reflected on the lists are substantially similar to the murder of her son, such that they would bear directly upon the question of foreseeability. See Grandma's Biscuits, Inc. v. Baisden, 192 Ga. App. 816, 817–818(1), 386 S.E.2d 415 (1989) (prior crimes on premises that were included on police

[7] The excluded evidence in Vega "included two carjacking's; one kidnapping/car theft; one car theft; one stabbing, beating, and aggravated assault with a knife, probably gang-related; one armed robbery at gunpoint; two hit-and-run incidents; one driving under the influence, in which a person was dragged in the parking lot; one person seen brandishing a firearm; and four instances of gunshots fired in or near the parking lot." Vega, 294 Ga. App. at 314, n. 12.

computer printout not shown to be substantially similar to crime at issue). Moreover, the lists are confusing, and substantial explanation would have been required for the jury to understand them. These reasons are enough to warrant the exclusion of the content of the service call lists." (Raines, at 307.) Just as in Raines and the other cases cited herein, this type of inadmissible evidence and/or testimony of should be precluded in its entirety.

B. Most Otherwise Potentially Relevant Police Incident Reports, Uniform Traffic Citations, EMS Reports, and Dispatch Summary Reports Contain Hearsay And Must Be Appropriately Redacted if Admitted, or Excluded Altogether.

O.C.G.A. § 24-8-803(8)(B) provides a hearsay exception for public records and reports reflecting "[m]atters *observed* pursuant to duty imposed by law as to which matters there was a duty to report" as well as "matters *observed* by police officers and other law enforcement personnel in connection with an investigation." (Emphasis added). The statute in question was modeled after Rule 803 of the Federal Rules of Evidence. See Ware v. Multibank 2009—1 RES-ADC Venture, LLC, 327 Ga. App. 245, 249(2), n. 11 (2014) ("Because O.C.G.A § 24–8–803 mirrors Rule 803 of the Federal Rules of Evidence, we will look to case law from federal courts within the Eleventh Circuit for guidance in interpreting that statute."). In light of the statute's use of the word "observed," "[i]t has been held that, in civil cases, when a police officer personally observed the matter described in a police report, that officer's report is admissible." Maloof, 330 Ga. App. at 767 (citing Jones v. Isuzu Motors Ltd., 210 F. Supp. 2d 1373, 1378 (M.D. Ga. 2002) (in a lawsuit arising from an automobile accident, police report containing diagram of incident found admissible because it was prepared from the officer's own personal observation of the scene)). As such, to the extent relevant police incident reports or similar documents reference observations and conclusions based on observations *personally made* by a responding officer who prepared the report, the Defendants concede that those contents of such reports are non-hearsay (though not necessarily relevant in light

of the case law referenced above), but must still be probative, non-prejudicial and relevant.

The same is not true, however, with respect to out-of-court statements from, and nonverbal conduct by,[8] third-parties that are contained within a police incident report or similar document. Federal cases issued both prior to and after the revision of Georgia's evidence code are consistent with this view. See, e.g., See Benson v. Facemyer, 2017 WL 1400558, *5 (N.D. Ga. April 19, 2017) ("It is well established that entries in a police report which result from the officer's own observations and knowledge may be admitted but that statements made by third persons under no business duty to report may not.") (citing United Tech. Corp. v. Mazer, 556 F.3d 1260, 1278 (11th Cir. 2009)). Such cases have held that for "public record" exceptions to apply, the police officer's report must contain "factual findings" that are "based upon the knowledge or observations of the preparer of the report," as opposed to a *mere collection of statements from a witness*. Miller v. Field, 35 F.3d 1088, 1091 (6th Cir. 1994). See also United States v. Pazsint, 703 F.2d 420, 424 (9th Cir. 1983) ("It is well established that entries in a police report which result from the officer's own observations and knowledge may be admitted but that statements made by third persons under no business duty to report may not."); Miller, 35 F.3d at 1091 (finding Rule 803(8) inapplicable); Parsons v. Honeywell, Inc., 929 F.2d 901, 907 (2d Cir. 1991) (same). In other words, "[p]lacing otherwise inadmissible hearsay statements by third-parties into a government report does not make the statements admissible." Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp., 407 F.Supp.2d 1304, 1315 n. 2 (S.D. Fla. 2005), aff'd in part, vacated in part on other grounds, 531 F.3d 1339 (11th Cir. 2008).

Importantly, while the Court in Maloof declined to rule on the issue because it had not been

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[8] O.C.G.A. § 24-8-801(a) and (c) defines the term "statement" to include "nonverbal conduct," and the term "hearsay" to mean "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

properly raised, the Court's dicta strongly suggest that third-party statements in a police report – as well as conclusions based upon a mere collection of statements by third parties – do not fall under the hearsay exception and would be inadmissible if challenged. See Maloof, 330 Ga. App. at 768, n. 5 ("We note that the police report contains out-of-court statements from third parties to the police officer during the investigation. As such out-of-court statements have not been challenged, we express no opinion herein whether they would be admissible through the police report at trial."). Other appellate decisions also support the Defendants' position. See Tuggle v. Rose, 333 Ga. App. 431 (2015) (the statement of a student contained within a school's investigative report was found inadmissible; even though the report itself was sought to be admitted as a business record, the plaintiff presented no foundation for admission of the student's statement).

Plaintiffs assert that they do not intend to offer these kinds of records to prove the truth of the matter asserted within the records, but rather to simply establish that they were created and, thus, the City was on notice that such records were created and, in turn, put the City on notice of the dangerous conditions at University Plaza. Plaintiffs' argument fails for two obvious reasons. First, it fails to account for the hearsay-within-hearsay rule, as many of the incident reports contain statements from victims about what someone else did, which the officer did not personally observe yet recorded in an incident report, in many instances after the fact (which poses yet another problem). See O.C.G.A. § 24-8-805 ("Hearsay included within hearsay shall not be excluded under the hearsay rule if ***each*** part of the combined statements conforms with an exception to the hearsay rule.") (Emphasis added). Second, the concept that Plaintiffs would not be offering an incident report for the purposes of establishing that a violation occurred, yet to show that the City was on notice of a violation, is completely circular and transparent. Clearly, Plaintiffs are offering the incident reports for the truth of the matters asserted therein, and in fact, they are being relied upon by their own

purported expert for purposes of establishing foreseeability! It is disingenuous to claim Plaintiffs are not using the incident reports to establish that an event or a violation as described within the reports actually occurred.

To the extent any police incident reports (or similar documents) reflecting alleged criminal activity or alcohol-related violations contain any reference to statements of third parties, or base their conclusions and factual findings on the conduct or statements of third parties, the reports contain inadmissible hearsay and should either be excluded in their entirety or appropriately redacted. See also Meder v. Everest & Jennings, Inc., 637 F.2d 1182, 1188 (8th Cir. 1981) (testimony of police officer as to how accident occurred could not be admitted as lay witness opinion under Rule 701 where it was based on statements of unknown declarant that were not admissible under exceptions to hearsay rule).

A non-exhaustive list[9] of examples of objectionable documents include the following, which have been collectively attached hereto as Exhibit A:

- CS005101-CS005107 (Ex. A-1), reflecting a UTC issued to Shelbi Sims, a former bartender of Rude Rudy's, on March 28, 2013, and a related "Incident Report" and "Drug Investigator Report." All of these documents are inadmissible, because the factual conclusions and charges reflected in the UTC and Incident Report all stem from the Drug Investigator Report, which describes an incident in which an unidentified third-party "Confidential Source" who was purportedly underage (referenced in the report as "CS") informed the officer who actually prepared the Report (Ofc. Phillip Conner) that he (CS) went into Rude Rudy's on the day in question, paid a cover charge to a bouncer, obtained an under-21 wrist band, and was able to order an alcoholic drink from a "white female bartender." (CS005106.) The report goes on to describe how Ofc. Conner and another officer *later* went into the establishment, "located the white female bartender matching the description *provided by the CS*," and issued her a citation for Sale of Alcohol to a minor. (CS005107.) Ms. Sims was then charged, according to the UTC issued by Ofc. Conner, with the offense of "sale of alcohol to person under 21" in alleged violation of O.C.G.A. § 3-3-33. Therefore, because both the underlying UTC and the Incident Report contain factual conclusions based *entirely* upon the conduct and assertions of a confidential information (the CS) and/or Ms. Sims (whom the CS purportedly described to the

[9] Defendants will bring all of the UTC's, incident reports, and dispatch summary reports to which they object to the Court's oral hearing on this motion so that the Court may conduct an inspection of the documents.

officers who prepared the report), the entire report is inadmissible.

- CS005124-CS005142 (Ex. A-2), reflecting a number of UTC's, Incident Reports, and an Investigative Report related to four UTC's issued to employees of Rude Rudy's for alleged hours of sale violations, one UTC issued to the former general manager of Rude Rudy's (Derek Todd) for an alleged hour of sale violation, and two UTC's issued to the former owner of Rude Rudy's (Jon Starkey) for alleged hour of sale and discriminatory alcohol pricing citations. Parts of the Investigative Report which led to the UTC's and Incident Reports are inadmissible. For example, the Investigative Report describes how Ofc. Dustin Cross went to Rude Rudy's on July 22, 2011 and was told by a "second door man that told me it would cost $5 to get in," but that the doormen subsequently "let multiple females into the establishment without making them pay, and without wristbands." (CS005142). This inadmissible hearsay led to the discriminatory pricing UTC (CS005128, CS005139), therefore these portions of the Investigative Report should be redacted, and any use of the UTC in question precluded in its entirety. In addition, the hours of sale reports appear to be entirely based upon the out-of-court assertions of third parties and, as such, are also not admissible (making the entire collection of documents also inadmissible).

- PLTF_GATTO_006528-6530, reflecting Incident No. 1205265 (Ex. A-3). This Incident Report describes an incident at "University Plaza" on September 1, 2012 in which an "unknown" complainant reported that an individual left the scene of a motor vehicle accident. The alleged offender was later contacted and arrested. Because the Report does not reflect the personal observations of an officer and the offending charges were generated from the assertions of an unidentified declarant, the Report is inadmissible.

- PLTF_GATTO_006531-6533, regarding Incident No. 1205289 (Ex. A-4.) This Report describes an incident located between RumRunners and Rude Rudy's involving an alleged fight. According to the Report, upon the officer's arrival, he/she "observed no active fight," but several unidentified "patrons told me [that a person lying on the ground had] been knocked out." The victim "couldn't advise[] [the officer] much about the fight, just that somebody hit him in the right ear, and that he didn't see who did it, and didn't know why." None of the salient events described in this Report were based on the personal observations of the responding officer, and the entire report is inadmissible.

- PLTF_GATTO_006546-47, regarding Incident No. 1205917 (Ex. A-5). This Incident Report describes a complainant who described, on October 1, 2012, an incident which allegedly occurred the previous night outside of the officer's presence at Rude Rudy's. Specifically, the "victim stated that on the above dates and times, she and the above listed offender were in a verbal argument at the above listed location," after which the offender choked her while in Rude Rudy's, and later struck her outside of Rude Rudy's. None of this information noted was observed by the reporting officer, making the entire report inadmissible.

- PLTF_GATTO_006548-006551, regarding Incident No. 1206021 (Ex. A-6). The report describes an incident on October 7, 2012 at "University Plaza" that was responded to by Statesboro police who, once on scene, "met with the complainant who stated that between the above date and time, and unknown male struck him in the face with a closed fist twice over a verbal altercation over a female." None of this reported information was observed by the

reporting officer, making the entire report inadmissible.

- PLTF_GATTO_006552-6558, regarding Incident No. 1206181 (Ex. A-7). This report describes an alleged assault on the dance floor of Rude Rudy's on October 7, 2012. According to the Incident Report, the reporting officer "met with the complainant at the Statesboro Police Department . . . on 10-14-2012 in reference to battery. [The complainant] advised that sometime between 0130 hours and 0200 hours on 10-07-2012 he was in the area of the dance floor by the bar at Rude Rudy's and was walking toward the exit when he was struck in the face by an unknown black male." None of the contents of the report reflect observations personally made by the reporting officer on the night in question, making any factual conclusions regarding the incident admissible.

It should once again be stressed that the documents referenced above and attached hereto reflect a non-exhaustive but illustrative list of the Incident Reports and related documents that Defendants believe to be objectionable and completely inappropriate as evidence in either opposition to the Defendants' summary judgment motion or at any potential trial in this matter. Therefore, because approximately 500 pages worth of "Incident Reports" purportedly relating to Rude Rudy's alone have been produced, in the event the Court grants this aspect of the motion, Defendants request a pre-trial order *in limine* on any of the "Rude Rudy's" incident reports that Plaintiffs intend to reference or submit at the trial of this matter. Defendants respectfully submit that such an order should require a pre-trial proffer by the Plaintiffs, with respect to which specific Incident Reports they contend are both relevant and admissible (and the portions thereof), in order to avoid a series of mini-trials on what appear to be inadmissible and non-probative items of evidence.

C. Mayor Moore's Self-Prepared Spreadsheet Reflecting EMS Incident Reports and Responses Between 2011 and 2014 is Inadmissible.

At her deposition, the City's then Mayor, Jan Moore, was asked about a document identified and attached as Exhibit 9 to her deposition, which bears the Bates-label CS005143-46. The document in question, which is attached hereto as Exhibit B, purports to reflect certain details

contained within EMS reports related to 911 calls purportedly originating from University Plaza.[10]

Mayor Moore testified that she personally prepared the document in question by requesting EMS records, which are maintained by the Bulloch County Sherriff's Office. (Moore Dep. at 102:5-21). She could not recall when she obtained the reports, other than that it "would have been at some point after Michael Gatto was killed." (Id. at 103:20-24.) The Mayor further testified that the four pages of data reflected in Exhibit 9 to her deposition do not reflect what she *actually received* from the Sherriff's Office; what she received were "the actual tickets, [EMS] reports." (Id. at 105:5-16.) She then created a form document on her computer, and recorded some of the information reflected on the reports into her spreadsheet, such as the date of the incident, a description of the stated need for medical attention, the alleged location of the incident generating the call, and whether the complainant was a male or female. (Id. at 105-110.) It is undisputed that EMS is a county function, and thus records of this nature also cannot be admissible as statements by officers or other City agents under O.C.G.A. § 24-8-801(d)(2). (Cont'd 30(b)(6) Dep., Boyum, at 26:7-23, 39:11-19.)[11]

In light of the foregoing, Plaintiffs' Exhibit 9 to Mayor Moore's deposition is undoubtedly inadmissible under hearsay-within-hearsay principles, and on the grounds of relevance (given that it is not limited to incidents allegedly stemming from Rude Rudy's). Exhibit 9 fails to provide any indication of whether the information reflected therein represents the personal observations of the responding medical personnel, and thus the exceptions established in O.C.G.A. § 24-8-803(8) do not apply because its contents are not based on the personal observations or factual findings of Mayor Moore. See also O.C.G.A. § 24-6-602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter.")

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[10] The transcripts from the depositions of Mayor Jan Moore and Councilmen John Riggs and Gary Lewis were filed with the Court on August 7, 2017.

[11] Relevant excerpts from the May 17, 2018 30(b)(6) Deposition of the City of Statesboro, with Councilman Phil Boyum as Designee, are attached hereto as Exhibit D.

In addition, its accuracy is inherently unreliable, and whatever worth it may possess is substantially outweighed by the potential to mislead, confuse, or unfairly prejudice the jury. The report could not be said to have put the City on notice of the incidents in question since it was prepared after the death of Michael Gatto. Therefore, any use or reference to the exhibit at trial or in opposition to the Defendants' forthcoming Motion for Summary Judgment should be precluded.

D. Any and All Dispatch Summary Reports Are Inadmissible.

As previously stated, documents referred to as "dispatch summary reports" have also been exchanged between the parties. Several samples of these types of records are attached hereto as Exhibit C-1. (See Affidavit of Sharry Ryall at ¶ 4, attached hereto as Exhibit C.) These documents (over 500 pages worth purportedly related to Rude Rudy's have been produced) generally include a number of details about a call or need for assistance reported to the Bulloch County 911 Center (which Statesboro Police Department dispatchers have the ability to hear over radio traffic), including a summary of the generating 911 call, when a dispatch order was issued, when the responding officer arrived, a timeline of events, notes regarding information requested at the scene (such as driver's license queries), the complainant, and other similar information. (Id.) They are not prepared by the actual officer or officers who reported and responded to a given situation. (Id.) In other words, they merely represent an internal record-keeping "summary" of police and dispatch activity which lacks necessary details or other information necessary to make them admissible.

For these reasons, the reports do not meet the hearsay exceptions identified in O.C.G.A. § 24-8-803(8), are inherently unreliable, and whatever limited probative value they could possibly offer is substantially outweighed by the dangers of unfair prejudice and jury confusion. Again, the concept that Plaintiffs would not be offering an incident report for the purposes of establishing that a violation occurred, yet to show that the City was on notice of a violation, is unavailing. Plaintiffs

desire to offer the incident and dispatch summary reports for the truth of the matters asserted therein. Therefore, Defendants object to the use or reference of *any* dispatch summary report.[12]

E. Testimony Regarding Alleged Racial Profiling or Decision-Making at Rude Rudy's or the City in General is Irrelevant and Unfairly Prejudicial.

As noted above, this case involves the death of an underage Decedent, who was drinking at the Rude Rudy's establishment before being beaten to death by an assailant, Grant Spencer. Both Spencer and the Decedent are white. Both the former owner (Jon Starkey) and the former general manager (Derek Todd) of the Rude Rudy's establishment are white. Moreover, all but one of the City's Councilmen at the time of the incident (with Gary Lewis being the lone exception), the former City Manager (Frank Parker), the City Clerk (Ms. Starling), and the City's former Public Safety Director (Wendell Turner), are white. None of these facts are in dispute.

Notwithstanding the foregoing, the Plaintiffs' attorneys have asked a number of deponents questions which imply that they intend to inject the issue of "race" into this case. For example, Grant Spencer testified in response to questions at his deposition that "at some point in time whenever there was too many black people in the bar, [Rude Rudy's management] would actually change the type of music to make more black people go home so that it would be a less violent atmosphere," and that dress codes were established in order to keep black patrons from coming into the establishment. (Spencer Dep. at 33:15-34:22, 183:7-184:2). As another example, former Councilman Lewis was asked, and testified, about his belief that African-American clubs were more closely scrutinized by the City Council and the Statesboro Police Department than "white" clubs, stating it was his "opinion" that former Councilman Will Britt was behind this. (Lewis Dep. at 42:5-43:18.) Mr. Lewis also testified that he and unidentified other people were unhappy when former

[12] The "records of regularly conducted activity" exception is also inapplicable. See O.C.G.A. § 24-8-803(6) ("Public records and reports shall be admissible under paragraph (8) of this Code Section and shall not be admissible under this paragraph.").

Public Safety Director Turner (white) replaced the former white police chief, Stan York, because he was expecting a black person to be the next chief. (Id. at 67). Judy McCorkle, the former City Clerk, was also asked if she had "some sense that the city administration was treating employees who were black differently…" (McCorkle Dep. at 148:4-6.)[13] These are but a few examples of race-related questions that have been asked during depositions.[14]

Simply put, the insinuation of alleged race discrimination, and the topic of race in general, has absolutely no relevance to this case. As such, its only possible intended use by the Plaintiffs is to attempt to inflame and bias potential members of the jury pool. It has long been held that "irrelevant matters which improperly tend to destroy a juror's impartiality, or which only excite the passions of the jurors should not be admitted." Cook v. State, 232 Ga. App. 796, 797(1) (1998). In Cook, the Court concluded that evidence of abortion in a rape case "only injected an improper element of emotionalism" given that the issue is "extremely emotional and divisive, and persons with divergent views often become heated over this subject." Id. The same is true with respect to the topic of race, particularly during the present time, and especially so in this case, which will draw heavily on the alleged actions or inactions of law enforcement personnel (which have widely divided various communities across the country during recent years). Therefore, any evidence or testimony regarding alleged racially discriminatory practices at Rude Rudy's, alleged or suggested (and unsubstantiated) preferences by the City Council towards ignoring issues at "white" bars while on

[13] Relevant excerpts from the Deposition of Judy McCorkle are attached hereto as Exhibit E.

[14] Councilman John Riggs was also questioned by Plaintiffs' counsel regarding whether he was "ever aware of any racial discrimination alleged to be going on at Rude Rudy's" and whether he "heard about steps being taken to keep black people from being in there." (Riggs Dep. at 127:8-19.) He was also asked if establishments such as "Primetime Lounge" and "Platinum Lounge" were "considered to be black clubs" and whether "the other city council members knew that at the time y'all were shutting them down." (Riggs Dep. at 140:2-15.) There is no evidence that the situations at Primetime and Platinum Lounges were substantially similar to that of Rude Rudy's. These involved multiple gunshots incidents in a business zone and fraud in the application. (See fn 19 herein).

two occasions taking measures to shut down "black" clubs (such as Primetime Lounge or Platinum Lounge), and the *topic of race in general*, should be precluded at the trial given that there is no legitimate reason for believing or suggesting that the Decedent's death is somehow tied to either his race or the color of his skin.

F. Spencer's Testimony About Being "On Duty" Is Inadmissible Hearsay.

One of the issues in this lawsuit is whether the assailant, Grant Spencer, was actually on duty and acting within the course of scope of his employment with Rude Rudy's when he attacked and killed the Decedent. At his deposition, Mr. Spencer testified that while he was not officially on-duty the night of the incident, he was allegedly "required to be there" by unidentified members of Rude Rudy management. (Spencer Dep. at 22:14-22.) Spencer went on to claim that unidentified persons said, "hey, we know that you are going to have to be here for a while, so we are going to give you really cheap alcohol while you are here, for the people that were employees there that were required to be there." (Id. at 58:14-21.) Other testimony regarding the out-of-court directions/assertions of Rude Rudy's management concerning Spencer's presence at the establishment, and whether his attack on the Decedent was "on behalf of Rude Rudy's in his capacity as a bouncer," was also provided during the deposition. (Id. at 156:17-24, 163-64, 170:12-23, 175:10-19.)

Mr. Spencer's testimony that he was allegedly directed by Rude Rudy's management to be present at the bar on the evening of the incident constitutes hearsay, and no exception to the hearsay doctrine exists. See O.C.G.A. § 24-8-801 to 24-8-803. In turn, Spencer's corollary testimony that he was acting in his capacity as an employee of Rude Rudy's when he attacked the Decedent is also inadmissible given that it rests on his inadmissible hearsay testimony about being required to be present at the bar by unidentified managers. Accordingly, in the absence of testimony by Rude Rudy's personnel that Mr. Spencer was required to be present at the bar on the night in question, any

testimony (or suggestion to the jury) that Mr. Spencer had to be present at or was acting on behalf of Rude Rudy's when he killed the Decedent should be precluded.

G. Speculation or Conjectural Testimony About What Other Councilmen Desired, Intended, or Were Thinking Should Be Precluded.

During discovery, Plaintiffs' counsel have repeatedly asked witnesses to speculate or opine about what individuals other than themselves were thinking or intended. For example, Mr. Lewis was asked whether there were any particular people on the City Council who were in favor of a 50/50 ordinance, requiring establishments within the City that sold alcohol to have at least 50% of their revenue come from non-alcoholic sales. (Lewis Dep. at 28-31, 103-104). Mr. Lewis also testified that certain other council members did not seem to be concerned about underage drinking, and was asked for his "impression" about why Mr. Britt allegedly wanted certain other individuals to be elected to council positions. (Lewis Dep. at 58-61, 93-94, 139-40.) Similarly, Mayor Moore was asked whether Mr. Britt or anyone else on the City Council "preferred" or "lean[ed] any particular way" in matters related to alcohol, (Moore Dep. at 46:2-48:23), and Councilman Riggs was asked if there was "anybody in particular on council who seemed to know most about the [alcohol ordinance] changes that were being proposed…" (Riggs Dep. at 61:8-18). Ms. McCorkle was repeatedly asked similar questions at her deposition. (McCorkle Dep. at 110:1-3, "Were there any other establishments that you had the impression that Will Britt was a partner in", 149:20-22, "Did you have any impression that any one council member seemed to have any kind of influence over the others?").

A "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter." O.C.G.A. § 24-6-602. Moreover, if the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences must be limited to those which are rationally based on the perception of the witness, helpful to a

clear understanding of the witness's testimony, and not based on scientific, technical, or specialized knowledge. See O.C.G.A. § 24-7-701. In any case, a lay witness may not engage in speculation or conjecture in the manner that Plaintiffs' questioning seeks to accomplish – *i.e.*, "Tell me what you think the other person was thinking or intended." See, e.g., Evans v. State, 275 Ga. 541(3) (2002) (witness could not testify as to what another person meant by a certain statement); Fulton County v. Dangerfield, 260 Ga. 665(1) (1990) ("it is not competent for a witness to testify directly as to another's intention."); Faulkner v. State, 295 Ga. 321(10) (2014) (opinion regarding another person's intent usually inadmissible). The inherent unreliability of such testimony is demonstrated through the following exchange at Ms. McCorkle's deposition:

> Q. So it's your testimony that Mr. Haynes, Shane Haynes, is the one who fired you?
> A. He was.
> Q. And he made the decision?
> A. The decision was made before he came. He implemented it.
> Q. You weren't present when the decision was made to fire you; right?
> A. I was not.
> Q. And it's your testimony that you think the reason you were fired is because of your stance and activities as related to alcohol; right?
> A. It absolutely was.
> Q. But you never heard any city council member actually say that's the real reason you were fired?
> A. They didn't have to say it. I knew it….Will Britt said it. Will Britt told Gary Lewis. He told multiple people.
> Q. Okay. Did they ever tell you that?
> A. **They didn't tell me that, but I *knew* that**.
> Q. Okay. And you knew that because you're a **mind reader**?
> A. ***Yes***.

(McCorkle Dep. at 197:16-198:15.) (Emphasis added.) Therefore, questions and testimony similar to those that have been posed to Mr. Lewis, Mayor Moore, Councilman Riggs, Ms. McCorkle, and many other witnesses by the Plaintiffs' counsel should be precluded at trial.

H. Evidence of Remedial Measures Must Be Precluded.

It is not disputed that the City recently revised its alcohol ordinances following the death of the Decedent. It is also not disputed that there was an administrative investigation of Rude Rudy's, led by the Statesboro Police Department, following the death of the Decedent which ultimately resulted in the surrendering of Rude Rudy's City-issued alcohol license and the eventual closing of the establishment. There has also been testimony that the City now employs a full-time alcohol compliance officer, and that the City Clerk's office has enacted or adopted new procedures with respect to the handling of UTC's alleging violations of the City's alcohol ordinances. These are classic examples of remedial measures.

"In civil proceedings, when, after an injury or harm, remedial measures are taken to make such injury or harm less likely to recur, evidence of the remedial measures shall not be admissible to prove negligence or culpable conduct but may be admissible to prove product liability under subsection (b) or (c) of Code Section 51-1-11." O.C.G.A. § 24-4-407. The exclusion of remedial measures serves a valuable purpose, because the admission of such evidence conflicts with the public policy of encouraging safety through remedial action, for the instituting of remedial safety measures might be discouraged if such conduct was admissible as evidence of negligence. Therefore, evidence or testimony regarding each of the remedial measures identified above, as well as any other remedial measures taken by the City or Ms. Starling following the Decedent's death, should be precluded at the trial.

I. Evidence of the City's Liability Insurance Must Be Precluded.

Georgia courts have long recognized a policy-based exclusion of evidence that a defendant in an action for damages is protected, in whole or in part, by liability insurance. The Evidence Code embodies and extends this exclusion:

> In all civil proceedings involving a claim for damages, evidence that a person was or was not insured against liability shall not be admissible except as provided in this Code section.

O.C.G.A. § 24-4-411. The policy behind this rule is two-fold: (1) evidence of a party's insurance coverage increases the risk that a fact-finder might award damages to a party who will not pay costs out-of-pocket; and (2) it is public policy that parties should be encouraged to insure against the harms they may cause others. See *Green's Georgia Law of Evidence*, § 4.39, John D. Hadden (2014-2015 Ed.). Indeed, even the mere mention of liability insurance at trial has served as grounds for a mistrial. See City Council of Augusta v. Lee, 153 Ga. App. 94, 99 (1980). Moreover, while the issue of sovereign immunity and/or the alleged waiver of the same based on the City's purchase of insurance has yet to be resolved, issues of immunity are matters of law for the Court, rather than the jury. See Savage v. E.R. Snell Contractor, Inc., 295 Ga. App. 319, 323(3) (2008) (noting that "sovereign immunity . . . is a matter of law.")[15] Accordingly, neither Plaintiffs nor their attorneys should be permitted to mention or offer any evidence at trial regarding the City's liability insurance. In addition, because the Plaintiffs' complaint specifically alleges that the City purchased liability insurance and has purportedly waived sovereign immunity by doing so, and attached to the complaint is the declarations page, those paragraphs of the complaint (and the preceding header) as well as the declarations page may not be shown to the jury. (TAC. ¶¶ 5-8.)[16]

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[15] There are two exceptions to the rule against the exclusion of evidence of insurance coverage. The first exception permits evidence of insurance in direct-action lawsuits where the insurer is named as a party, such as in a separate but related declaratory judgment action. See O.C.G.A. § 40-1-112. The other permits proof of liability insurance for "a relevant purpose," including "proof of agency, ownership, or control." O.C.G.A. § 24-4-411. Here, neither exception exists, and even if evidence of the City's insurance was somehow relevant to an issue for the jury, its limited probative value is substantially outweighed by the danger of unfair prejudice. See O.C.G.A. § 24-4-403.

[16] Defendants anticipate that Plaintiffs may attempt to present voir dire questions or otherwise allude to the fact or infer before the jury that the City or Ms. Starling have liability insurance coverage that applies to the subject incident. It is well settled under Georgia law that in ordinary

J. Evidence of the Grief, Pain, and Suffering of the Decedent's Family is Irrelevant and Unfairly Prejudicial.

Many witnesses in this case have testified about the emotional pain, stress, and loss that the death of Michael Joseph Gatto caused them. In addition, as reflected in the transcript of proceedings from the October 11, 2016 hearing in the Superior Court of Bulloch County concerning Grant Spencer's negotiated plea, many of the Decedent's family members testified about their stress-related physical and mental ailments, nightmares, anxiety, depression, school failures, sadness, and fears.[17] That is completely understandable, and Defendants' counsel do not wish for such pain or grief on anyone, most especially the parents.

But this unfortunate case is about the death of Michael Joseph Gatto and whatever pain *he* may have suffered, not anyone else. Plaintiffs seek damages for *his* pain and suffering, not their own of those of his relatives. The "full value of the life of the decedent" is the economic and other losses that the decedent would have sustained had he lived a normal life expectancy. Therefore, pain and losses attributable to others is not included. In wrongful death cases, the plaintiff and other close family members to the decedent may suffer grief, mental pain and suffering, emotional distress, or other losses, but this is not the decedent's loss and is not a part of the full value of the decedent's life. Also, the plaintiff's loss of the society, companionship, advice, counsel, or consortium with the decedent is not part of the "full value of the life of the decedent." Likewise, the measure of damages does not include the wants and needs of the plaintiff, because these are injuries not to the decedent

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negligence cases, not only is the liability insurance policy of the defendant inadmissible in evidence, but disclosure to the jury of its mere existence is ground for mistrial. See City Council of Augusta v. Lee, 153 Ga. App. 94 (1980). Defendants anticipate that Plaintiffs will attempt to question the prospective jurors during voir dire as to their affiliation with insurance companies or the insurance industry in general. Under Georgia law attorneys are prohibited during voir dire from questioning the jury as to insurance when the trial court, in qualifying the jury panel, has previously asked the proper qualifying questions.

[17] The referenced transcript, Bates-labeled CS005523-5607, is attached hereto as Exhibit F.

but to the plaintiff. Accordingly, any testimony regarding the grief and sorrow of decedent's relatives or friends is irrelevant. Their testimony would only serve to cloud the issues and unduly prejudice the jury. Because the witnesses' own personal grief as to the death of Michael Joseph Gatto and its impact on relatives and friends is irrelevant, such testimony should be properly excluded.[18]

K. The Autopsy Photographs of Michael Joseph Gatto.

In connection with discovery in this action, the Defendants produced, at Plaintiffs' request, all documents associated with the criminal prosecution of Grant Spencer. This included photographs from the autopsy of the Decedent, bearing the bates-labels CS00006556-6649. These images are extremely graphic. Many of them depict the Decedent nude, with post-autopsy staples throughout his body. Others show his head and brain open, as well as his chest. Out of respect for the Gatto family, Defendants' counsel does not attach these images to this motion so that they do not become part of the public record. But Defendants move to exclude all of these images on the basis that they are both irrelevant to the actual claims and would be extremely unfairly prejudicial to the jury, and would cause sadness and outrage to the point that the ability to form an unbiased verdict would be

[18] See Eldridge's Wrongful Death Actions § 6:11, Non-recoverable items (2016). See also Southwestern R. Co. v. Paulk, 24 Ga. 356 (1858) (solatium not recoverable); Central R. R. v. Rouse, 77 Ga. 393 (1887) (wants and needs of family not recoverable); Augusta & K.R. Co. v. Killian, 79 Ga. 234 (1887) (plaintiff's loss of society, company, companionship and mental suffering not recoverable); Glawson v. Southern Bell Tel. & Tel. Co., 9 Ga. App. 450 (4) (1911) (plaintiff's mental anguish not recoverable); Southern Ry. Co. v. Turner, 89 Ga. App. 785 (2) (1954) (child's deprivation of further education not recoverable); Hudson v. Cole, 102 Ga. App. 300 (3)(a) (1960) (plaintiff's mental or physical suffering or emotional upset not recoverable); Bulloch County Hospital Authority v. Fowler, 124 Ga. App. 242, (1971) (overruled on other grounds by, Gilson v. Mitchell, 131 Ga. App. 321 (1974)) (wants and needs of family and mental suffering, grief or wounded feelings of family not recoverable); Bell v. Sigal, 129 Ga. App. 249 (1973) (plaintiff's mental anguish not recoverable); Howard v. Bloodworth, 137 Ga. App. 478 (1976) (plaintiff's emotional distress and mental suffering not recoverable); Elsberry v. Lewis, 140 Ga. App. 324 (4) (1976) (solatium not recoverable).

compromised.[19]

L. The Terminations of Judy McCorkle and Stan York.

Judy McCorkle was terminated in 2008, and the position of Stan York (as shown in Defendants' statement of undisputed material facts) occurred in 2010. These individuals apparently believe that their terminations had to do with their actions related to the City's alcohol ordinance, but there is no evidence to this effect. The Plaintiffs would apparently seek to require the City to litigate the reasons for these individuals' firings 10-plus years (in the case of McCorkle) and 8-plus years (in the case of York) after they occurred. These matters are not only completely irrelevant to whether or not a nuisance existed at University Plaza and whether the City negligently failed to take action on the alcohol licenses of Rude Rudy's during the 3-4 plus years before the 18-year-old Michael Joseph Gatto went to Rude Rudy's on August 27-28, 2014, but are also impossible to defend given the passage of time and the absence of witnesses who were actually employed by the City when these events occurred. For example, the City Attorney at the time is now dead, the City Managers involved were terminated years ago, and the present City Council is vastly different. Again, this is another attempt by Plaintiffs to paint an "environment" that the City had towards alcohol, which claim has already been dismissed by this Court. Both topics should be precluded.

M. Legends, Woodin Nickel, Primetime, and Platinum.

There has been an ample amount of testimony in this case about establishments such as Legends, Woodin Nickel, Primetime, and Platinum. None of those establishments have anything to

[19] Defendants' counsel has been advised that Plaintiffs' counsel do not intend to tender or publish any of the autopsy photographs, and in fact consent to Defendants' motion to exclude, however reserve the right to change this decision in the event the City or any witness introduces some issue for which the autopsy photographs would be relevant. Plaintiffs' counsel has informed Defendants that "[in] the unlikely event that occurs, we will let you know about our intentions before introducing the photos, and we will agree to have the Court address the photos in camera, on a confidential, non-public basis before they would be shown to the jury or otherwise made part of any public proceeding."

do with this case and all reference to them should be precluded.

For example, Legends was not even located at University Plaza and was closed in 2006 or 2007. (York Dep. 20:17-21:3; W. Britt Dep. 15:8-14.)[20] In addition, its closing had to do with 50/50 reports, not alcohol-related violence. (York Dep. 79:2-80:1; T. Britt Dep. 12:6-13:3.) While Woodin Nickel was located at University Plaza, it was closed in or around 2006 or 2007 also for 50/50 violations. (York Dep. 79:2-80:1.) Similarly, Platinum Lounge and Primetime were also not located at University Plaza, so they bear zero relation to this case. Any and all testimony about these four places should be excluded.

N. Legal Malpractice or Negligence.

The Plaintiffs should also not be permitted to state, imply, or otherwise suggest to the jury that any of the City's attorneys were negligent. They have not retained a legal expert. In addition, while they have suggested that the dismissal by Leaphart and/or the 8/3/2011 email of Graves may be grounds for establishing negligence, suggesting as much would require expert testimony. Moreover, the actions of Leaphart, in his role as City Solicitor, in dismissing the July 2011 and the 2014 noise citations are subject to prosecutorial discretion and are not proper subjects to suggest negligence.[21]

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[20] Excerpts from the depositions of Will Britt and Stan York are attached hereto as Exhibits G and H, respectively.

[21] The doctrine of absolute prosecutorial immunity protects district attorneys and other prosecutors from civil suit for a range of functions they perform as state or federal advocates in criminal matters. See Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502, 506 (1997). "This immunity is derived from the absolute immunity afforded judges and grand jurors who, like prosecutors, are required to perform an integral function in our system of criminal justice." Nathan v. Lawton, 1989 WL 11706 (S.D. Ga. 1989). Prosecutors, like judges, should be free to make decisions properly within the purview of their official duties without being influenced by the shadow of liability. Therefore, a district attorney is protected by the same immunity in civil cases that is applicable to judges, provided that his acts are within the scope of his jurisdiction." Smith v. Hancock, 150 Ga. App. 80, 81 (1997).

O. <u>The Post-Gatto Terminations of Brunson and Forney</u>.

Like the terminations of McCorkle and York, the terminations of Brunson and Forney have nothing to do with this case. Both happened after the death of Michael Joseph Gatto. As such, they have nothing to do with this case.

P. <u>Alvin Leaphart's Legal Opinions and Conclusions Set forth in his Memoranda</u>.

As this court is aware, the former City Attorney Alvin Leaphart drafted two memoranda concerning some of the issues in this case. On April 10, 2018 Mr. Leaphart testified by way of a deposition. Mr. Leaphart was the former City Attorney for Statesboro, commencing December 11, 2011 until December 31, 2017. He was also the City Solicitor during this time. (Leaphart dep. 17:11-16, 17-20; 19:1-5)[22] As part of his testimony, Plaintiffs' inquired of certain legal conclusions and legal analysis surrounding different legal action concerning various lawsuits as well as those contained in Mr. Leaphart's two memorandums following the death of Michael Gatto.

To begin, Plaintiffs never identified Mr. Leaphart as a legal expert in the area of nuisance law, foreseeability of beating deaths, alcohol-induced activity and the like. This is also not a malpractice case against Mr. Leaphart. Yet, Plaintiffs' counsel spent hours examining Mr. Leaphart's opinions as to whether or not he should or would have sought an injunction or nuisance action in a given set of circumstances. **Mr. Leaphart is not on trial in a malpractice action by the Plaintiffs.** There is no testimony from ***any*** expert who is a lawyer reflecting upon the legal conclusions and legal thought process of Mr. Leaphart while he was the City Attorney/City Solicitor. For this reason alone, the testimony of Mr. Leaphart related to various legal theories, his opening argument notes, his interpretation of whether a given set of circumstances may or may not constitute a nuisance, differences in legal strategy of one lawsuit versus another, and how this compares to the Gatto

[22] Excerpts from the deposition of Alvin Leaphart are attached hereto as Exhibit I.

circumstances is neither relevant nor pertinent and calls for legal conclusions that should properly be subject to a motion in limine instruction and order.

While an expert witness may render an opinion or inference otherwise admissible, no lay or expert witness may offer opinions or conclusion that the jury is competent to draw itself and no witness should testify as to the law or express an opinion in legal terms or legal conclusions. See, e.g., Flexible Products Co. v. Ervast, 284 Ga. App. 178 (2007), (overruled on other grounds by, Federal Deposit Ins. Corp. v. Loudermilk, 295 Ga. 579 (2014)) (expert's testimony as to what facts are "material," triggering a legal duty to disclose, is inadmissible); Shafer v. State, 285 Ga. App. 748 (2007) (deputy's testimony that defendant's actions constituted "aggravated stalking" were inadmissible); Allen v. Columbus Bank & Trust Co., 244 Ga. App. 271 (2000) (accountant not allowed to testify that certain actions were "fraudulent" when that is at issue in the case); Cheesman v. State, 230 Ga. App. 525, (1998) (improper to ask police officer witness what the legal term "possession" means); Michaels v. Gordon, 211 Ga. App. 470 (1993) (witness could not testify that a person "failed to act in good faith"); Department of Transp. v. Franco's Pizza & Delicatessen, Inc., 200 Ga. App. 723 (1991) (expert could not testify that property was "unique" under condemnation law).

This Court has already ruled that it was improper to ask the City's 30(b)(6) designee to offer legal conclusions about the City's ordinances, and the City Attorney's memos are littered with legal conclusions concerning the same. O.C.G.A. § 24-7-701 provides:

> (a) If the witness is not testifying as an expert,[23] the witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are:
> (1) Rationally based on the perception of the witness;
> (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and

[23] No party has offered Mr. Leaphart as an expert witness, thus his testimony is merely offered as a lay opinion witness, even though it relates to complex legal issues.

> (3) Not based on scientific, technical, or other specialized knowledge within the scope of Code Section 24-7-702.
> (b) Direct testimony as to market value is in the nature of opinion evidence. A witness need not be an expert or dealer in an article or property to testify as **to** its value if he or she has had an opportunity to form a reasoned opinion.

Relevant here, in McCorkle v. Department of Transp, 257 Ga. App. 397 (2002), the Court of Appeals held the trial court properly excluded two letters written to the Governor by a judge. In refusing to admit the letters into evidence the Court noted:

> The judge testified that he had driven through the intersection on occasion, but he had no specific knowledge of the facts and circumstances of the accident involved in this case; did not have any specific information or recollection as to the traffic control in place at this intersection; and had not witnessed or come upon any accident at the intersection. Additionally, the judge testified that he had not witnessed any other accidents on the bypass…The judge testified he had no personal knowledge of any accidents, other than his own accident, and relied solely on hearsay of other accidents for his opinion of dangerousness." (Id. at 166)

An examination of the two memoranda written by Mr. Leaphart and the testimony surrounding same reveals a similar lack of personal knowledge and conjecture that caused the judge's letters in McCorkle to be excluded. Plaintiff's Exhibit 24 to Mr. Leaphart's deposition is a memorandum written by Mr. Leaphart on October 24, 2014, months after the death of Michael Gatto. (Leaphart dep. 118:5-19, Exhibit P-24). Even the Memorandum itself has a section titled "LEGAL CONCLUSIONS" and they are exactly that.

Equally important, Mr. Leaphart testified that he made a lot of "assumptions", that he did not have firsthand knowledge of many of the items comprising the investigation and conclusions, and "there are a lot of assumptions in there" (Id. at 120:11-121:24;179:8-20). Mr. Leaphart also admitted he had no personal knowledge or information regarding the accuracy or inaccuracy of the 50/50 reports related to the bars at University Plaza (id. at 126:5-15); as to the opinion-based statement in the memorandum that changes to the ordinances increased the likelihood of violence, Leaphart also testified he did not actually study the actual number of incidences or violence *prior* to the adoption

of the ordinance in 2009 or 2011, and in fact, he admitted that he does even not recall how many establishments in the City held an alcohol license in 2009, 2011 or 2014; he also could not testify as to what increase in violence actually occurred in the City for businesses that held an alcohol license between 2009 and 2014 and he did not know if violence actually increased at any specific business versus another. (Id. at 157:22-159:14); Leaphart also conceded that the adoption of the ordinance in December 2011 that eliminated the legal requirement for a background check on bouncers didn't actually prevent any business from running its own background checks, and the City Council had the discretion to amend the ordinance. Mr. Leaphart also conceded that there was nothing illegal about how or why the City amended its ordinance in eliminating this background check requirement. (Id. at 159:15-160:12) Further, Mr. Leaphart admitted that had the background requirement been in place, he does not know whether or not Grant Spencer would have been permitted in the bar at Rude Rudy's in 2014. The background check requirement, when it applied, only applied to employees working at the location. So, if somebody just walked in the bar, they weren't working, the background check wouldn't be applicable. (Id. at 160:19-161:7) Leaphart did not ask anyone or have any conversations with anyone about why uniform traffic citations for alcohol violations were not being written. (Id. at 103:17-104:8)

Additionally, when Leaphart wrote his memoranda of October 24 and 30, 2014 and his "Legal Conclusions" he admitted he did not determine how many businesses that served alcohol had their licenses suspended under the pre-2011 ordinance. During his investigation, Leaphart also found no evidence that the license holder Rude Rudy's even qualified for an automatic revocation of its license under Section 6-36 of the City of Statesboro Ordinances. (Id. at 176:20-177:6). More telling is that Leaphart testified the "Legal Conclusions" reached in his memorandum required him to ***speculate*****, make certain** ***assumptions*** in regards to whether or not the pre-2011 ordinance would

have been carried forward with no amendment. (Id. at 179:8-20) . Leaphart also admitted he does not know if the Pre-2009 ordinances actually effectively deterred the underage sale of alcohol. He doesn't know if the 2011 ordinance effectively deterred or did not deter the underage sale of alcohol. No licensee was interviewed who told him anything about the deterrent effect. His conclusions were "speculative" and "were not founded in sort of statistical factual analysis," it's just his opinion." (Id. at 181:9-182:23.) Leaphart made no determination as to whether or not undercover sting operations by the Statesboro Police Department per business increased, decreased or stayed the same between 2009 and 2014. Leaphart did not perform any research or analysis into whether or not these operations actually deterred the sale of alcohol to underage people, nor alcohol-related violence. (Id. at 184:2-185:1).

Leaphart further admitted that his conclusion regarding the impact of the ordinance modification of the vesting authority to conducts audits leading to bars being created was "speculative." (Id. at 188:4-19.) Leaphart had no personal knowledge whether the City Council or Mayor, or Ms. Starling had knowledge of the actual 42 citations written in 2013. (Id. at 198:25-199:4; 200:2-6) His reference about the City's "tone of indifference and hostility towards alcohol compliance" was based solely on the statement of Will Britt and Frank Parker as Leaphart did not talk to the remaining Council members to see if they had the same tone, nor the Mayor, nor the Statesboro Police Department. (Id. at 200:8-201:1)

Further, the testimony of a lay witness cannot be based on inadmissible hearsay. See, In Re Copelan, 250 Ga. App. 856, 866 (2001); Fidelity & Casualty Insurance Company v. CIGNA/Pacific Employers Insurance Company, 180 Ga. App. 159, 16 (1986). In Avant Trucking Co., Inc. v. Stallion, 159 Ga. App. 198, 199 (1981) the Court noted "A police officer who investigates an accident, however, cannot base his opinion as to the manner in which the accident occurred upon

hearsay statements which he receives during his investigation unless they are a part of the *res gestae*. Augusta Coach Co. v. Lee, 115 Ga. App. 511 (1967).

Having not been tendered as an expert in the legal field, Mr. Leaphart should not now be able to testify as to legal conclusions. Even experts may not state a legal conclusion as to the ultimate issue in a case, much less a layperson. The opinions and conclusions of Mr. Leaphart contained in his two memoranda and testimony concerning same should be properly excluded as nothing more than his personal opinions of legal conclusions. As Mr. Leaphart testified:

> "**Question: Were your conclusions in the memorandum that you wrote about it [the ordinances post 2009] being a deterrent to—or would not deter underage alcohol, were those speculative?**
>
> **Answer: Yes. Yes. They were not founded in sort of statistical factual analysis.**
>
> **Question: That's just your opinion, right?**
>
> **Answer: That's just my opinion.**

(Id. at 188:14-23). This is true of all of the legal conclusions Mr. Leaphart stated in both memoranda. As such, they should be excluded.[24]

[24] Neither should Mr. Leaphart be allowed to testify as to other legal actions which do not have the same fact pattern as that involving Michael Gatto. This includes the suits brought against HAF Enterprises, LLC d/b/a Platinum Lounge (Leaphart dep. Exhibits P. 1-13) and suit against Bulloch Investors et al d/b/a Primetime Lounge (Id. P-14 and related documents). One of the suits (Primetime) was ultimately dismissed because the City determined there was fraud in the application and revoked a license. (Id. at 76:12-79:16.) The circumstances at Platinum Lounge involved seven incidents of shots being fired or something to do with guns. (Id. at 68:22-72:20.) The circumstances are very dissimilar to the facts of the Gatto matter. Both had handgun-related homicides at the establishments in short order and other issues. (Id. at 53:7-54:5.) Leaphart testified in his deposition about the differences between the Platinum Lounge case with proximity to banks and businesses, numerous occasions of gunfire, and an increase in police presence, while the Gatto matter involved one incident. He expressed his inability to proceed in a nuisance matter against Rude Rudy's. (Id. at 148:13-150:21; 151:2-152:15.)

Q. Questions and Testimony About the Meaning or the City's Interpretation of Ordinances.

This Court has previously ruled that questions of the City's witnesses about the meaning of or the City's interpretation of its ordinances improperly call for legal conclusions or opinions. As such the Court should preclude testimony or evidence of such at the trial.

R. Motion in Limine to Exclude Witnesses and Documents Not Properly Identified in the Discovery and/or Not Listed in Pretrial Order.

Generally, exclusion of documents into evidence that could and should have been produced in discovery is appropriate. In Sweetheart Products, Inc. v. Cohen et al., 198 Ga. App. 684 (1991), the Court of Appeals affirmed the trial court's exclusion of an invoice that was probative of plaintiff's damages in a breach of contract trial. Id. at 685. The trial court had granted the defendant's motion in limine to exclude the invoice on the grounds that it "had not been produced in response to discovery and was not listed in the pretrial order." Id. On appeal, the Court of Appeals held that the trial court had not abused its discretion by excluding this material evidence. Id. Still other Court of Appeals opinions have held that exclusion of a witness is at least within the court's discretion "where a party deliberately withholds the names of his witnesses." Jones v. Atkins, 120 Ga. App. 290, 291 (1969); accord Trustees of Trinity College v. Ferris, 228 Ga. App. 476, 480 (1997). This prevents any trial by ambush.

S. Evidence of Attorney's Fees and Costs Sought Pursuant to O.C.G.A. § 13-6-11.

Defendants propounded interrogatories and Requests for Production to Plaintiffs regarding the nature of their fees, the invoices, hours, and the like. The only thing provided was a redacted engagement fee arrangement providing the nature of the contingency (50%) owing to multiple

firms.[25] Defendants' Request for Production of Documents Request Number 3 requested Plaintiffs to produce "any and all documents or other tangible things (including, but not limited to, audio or visual recordings and computer disks or files) which support or otherwise relate to your request for expenses of litigation and attorneys' fees, whether made under the provisions of O.C.G.A. § 13-6-11 or otherwise." Plaintiffs objected to this request in that it sought "documents protected by the work-product doctrine, information obtained in anticipation of litigation, and attorney-client privilege" and stated that "Plaintiffs will produce all non-objectionable responsive documents by supplementation." See Plaintiffs' Responses to Defendants First Interrogatories and Request for Production, number 3 of the Request for Production. Yet no evidence at all of their fees has ever been provided. As such Plaintiffs should be precluded for not providing any evidence of costs, attorney's fee or incurred expenses.

T. To Exclude any Attempt by Plaintiffs or their Counsel to as the Jurors to Put Themselves into the Shoes of the Plaintiff.

Defendants anticipate that Plaintiffs may ask jurors to imagine that they are in the same position of Plaintiff or to put themselves in the shoes of the Plaintiffs. In Georgia, it is improper to argue the "Golden Rule" or to suggest that jurors should put themselves in the place of one of the parties. See Myrick v. Stephanos, 220 Ga. App. 520 (1996). Such appeal to sympathy improperly usurps the jury's role as fair and impartial arbiters and instead requires the jury to evaluate the case from the perspective of the Plaintiff. See Naimat v. Shelbyville Bottling Co., 240 Ga. App. 693 (1999).

[25] The fee agreement is attached hereto as Exhibit J, Bates-labeled Gatto_PLTF 00013691-13694.

U. "Send a Message" Arguments

Defendants move this Court to exclude any argument, testimony, exhibits, or mention to the jury encouraging it to "send a message," by the size of the verdict or otherwise. Defendants submit that such argument is inherently inflammatory and simply improper in that it encourages the jury to ignore the facts of the case, the purpose of damages, and their role as jurors. The jurors are to decide Plaintiffs' case against Defendants only and base their verdict on properly admitted evidence in this case only.

Plaintiffs' counsel should be precluded from appealing to the jurors to consider extra-judicial factors instead of the trial record in considering liability or for calculating the amount of any compensatory damage award. For example, Plaintiffs should not be able to urge during opening statement, closing argument, or any other point of the trial relating to compensatory damages, that the jury members should "send a message" to Defendants, act as "conscience of the community," seek to vindicate the rights of other persons not before the Court, act as a safety regulator, or consider similar and equally improper factors unrelated to the instant case and the harm to this specific plaintiff. The courts in Georgia have condemned "send a message" arguments as improper and highly prejudicial. See Central of Georgia R.R. Co. v. Swindle, 260 Ga. 685 (1990); Gielow v. Strickland, 185 Ga. App. 85 (1987); Neal v. Toyota Motor Co., 823 F. Supp. 939, 943-44.

V. Expressing Personal Belief in the Veracity of any Witness.

Any expression by counsel or a witness regarding the veracity of any witness in this case will be improper. The Court should exclude in limine any such testimony or argument of counsel. Manning v. State, 123 Ga. App. 844 (1971).

W. Ineffectiveness of Money Damages.

Any argument that money damages are ineffective to fully compensate the Plaintiffs, with the implicit idea that additional damages should be awarded, should be excluded in limine. Gielow v. Strickland, 185 Ga. App. 85 (1987).

X. Reference to Plaintiff's Requirement to Pay Attorney's Fees.

Reference to any of Plaintiffs' attorneys' fees, contingent contract or the like does not bear upon any issue in this case and should be excluded in limine. SCL v. Thomas, 125 Ga. App. 716 (1972).

Y. Reference to Verdicts in Other Cases.

Reference to verdicts in other cases does not bear upon any issue in dispute in this case. The court should exclude in limine any reference to any verdict returned in any other case. Wilson v. Northside Plumbing, 128 Ga. App. 625, 626 (1973).

Z. References to "God", suggestion that the verdict be rendered based upon spiritual authority or position of counsel as a minister or man of the cloth.

Defendants move in limine that counsel be precluded from arguing in the name of "God" or "Jesus", and further be prohibited from suggesting a particular outcome is mandated by spiritual authority. These areas are wholly without relevance and seek to exert improper influence on the jury outside of the law of the State of Georgia.

AA. Rumors and speculation as to the ownership of various establishments or what Will Britt may have been doing in "counting money" is inadmissible hearsay.

Plaintiffs should be precluded from eliciting testimony based on rumors, speculation and conjecture. Such is inadmissible hearsay. For example, Plaintiffs' counsel has repeatedly asked various deponents about Will Britt's alleged ownership in establishments at University Plaza. When witnesses say they have no personal knowledge, the follow-up questions are things such as "what

have you heard?" "Are there any rumors?" "Rumors from unknown sources are inadmissible hearsay. Plemans v. State, 155 Ga. App. 447, 270 S.E. 2d 836 (1980). Other citations suggesting that such hearsay is inadmissible are: Clauss v. Plantation Equity Group, Inc. 236 Ga. App. 522, 512 S.E. 2d 10 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993) (Cited in Opinions of The United States Supreme Court); General Electric Co. v. Joiner, 522 U.S. 136 (1997) (Cited in Opinions of The United States Supreme Court); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999) (Cited in Opinions of The United States Supreme Court). Questions related to "why do you think Will Britt was counting money in a parking lot" when the witness has no personal knowledge of where the money came from, how much, etc. should be inadmissible.

CONCLUSION

WHEREFORE, the Defendants request that the Court grant this motion in limine in its entirety and issue an Order precluding Plaintiffs and/or their attorneys from introducing evidence or providing testimony or other statements regarding any of the matters set forth herein.

Respectfully submitted, this the 30th day of August 2018.

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IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

Michael Gatto and Katherine Gatto, et al.	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION FILE
v.	)	NO. STCV2016000167
	)	
City of Statesboro, Georgia, et al.	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that, on August 30, 2018, I electronically filed the foregoing **DEFENDANTS CITY OF STATESBORO AND SUE STARLING'S AMENDED FIRST MOTION IN LIMINE** with the Clerk of Court using the PeachCourt system, which will automatically send email notification of such filing to all counsel of record.

/s/ John D. Bennett
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