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(“Mr. Ramsey”). But Spencer is a jobless twenty-two-year-old who lives in prison; Rude Rudy’s did not maintain liability insurance; and University Plaza went into bankruptcy. Therefore, Plaintiffs were left to try and manufacture baseless claims against the City and Ms. Starling (a public servant), who they apparently believe are better candidates for potentially satisfying a money judgment and whom they allege were the proximate cause of the death of Michael Gatto.

Plaintiffs have sued the City and Ms. Starling under both a negligence and a nuisance theory of recovery. This motion addresses the *negligence* claims, which 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, 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.” Plaintiffs’ ultimate premise is that Rude Rudy’s would have been closed on August 27-28, 2014 and this was the proximate cause of the Decedent’s death. Plaintiffs’ theory of recovery fails under clear and controlling precedent.

*First*, as reflected in the Memorandum of Law in Support of the City’s Motion for Summary Judgment Pursuant to the Doctrine of Sovereign Immunity, an unambiguous insurance policy endorsement precludes coverage for the claims against the City, and decisions concerning the issuance, renewal, and revocation of alcohol licenses and occupational tax certificates are “governmental.” Thus, the City is entitled to sovereign immunity. *Second*, Plaintiffs’ claims against the City must be dismissed because their pre-suit ante litem notice failed to place the City on notice of the claims. *Third*, any duty owed by the Defendants to enforce the City’s ordinances or to prevent crime ran to the public in general and not to the Decedent, meaning the “public duty doctrine” bars Plaintiffs’ claims as a matter of law. *Fourth*, there is no evidence Ms. Starling had proper notice of

any citations involving the University Plaza Establishments within the three-year period preceding the Decedent's death. *Finally*, the criminal acts committed by both the Decedent and Spencer shattered any nexus between the purported negligence and the Decedent's death. Summary judgment is due for these and other reasons.

### **SUMMARY OF UNDISPUTED MATERIAL FACTS**

#### **A. The City's Government.**

The City is a municipal corporation with a government consisting of a Mayor and a five-member City Council. (SMF 1-2)<sup>1</sup> The City officially acts by and through the Mayor<sup>2</sup> and City Council, who have the authority to adopt ordinances, resolutions, or motions pursuant to a quorum of votes at a properly noticed, public meeting.<sup>3</sup> (SMF 3-6)

The City operates as a "City Council-City Manager" form of government, whereby the City Council serves as the legislative branch, with the City Manager<sup>4</sup> supervising the City's various department heads. (SMF 16-19) In addition, the positions of City Attorney,<sup>5</sup> Municipal Court

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<sup>1</sup> Due to the volume of the record, Defendants cite to the salient paragraphs of their Statement of Theories of Recovery and Material Facts as to Which There is no Genuine Dispute as "SMF." Thus, a citation to "SMF 1" and "SMF 44" directs the Court to the record evidence and/or the absence of record evidence cited in paragraphs 1 and 44 of the SMF.

<sup>2</sup> Bill Hatcher served as the Mayor from January 2006 - December 2009; Joe Brannen from January 2010-December 2013; and Jan Moore between January-August 28, 2014. (SMF 7-10)

<sup>3</sup> From January 2009-December 2009, the Council was comprised of Thomas Blicht, Joe Brannen, Will Britt, Travis Chance, and Gary Lewis. From 2010 to August 28, 2012, the Council included Britt, Chance, Lewis, Blicht, and John Riggs. Between January 2013 and August 28, 2014, Britt, Chance, Lewis, Riggs, and Phil Boyum. (SMF 11-14)

<sup>4</sup> Shane Haynes served as the City Manager between July 2008 and September 2010; Frank Parker between October 6, 2010 and June 24, 2014; and Robert Cheshire between June 25, 2014 and August 28, 2014. (SMF 21-23)

<sup>5</sup> Sam L. Brannen was the City Attorney between 1966 and January 6, 2011; Michael L. Graves, Jr. served as the "Staff Attorney" from April or May of 2010 until on or about August 15, 2011; and J. Alvin Leaphart, IV served as the City Attorney between mid-December 2011 and August 28, 2014. (SMF 69, 77, 79-80)

Judge,<sup>6</sup> and City Clerk are appointed and supervised by the Council. (SMF 16) Ms. Starling has been the City Clerk since mid-August, 2008.<sup>7</sup> (SMF 25)

**B. Relevant Factual Background.**

**1. Municipal and State-Issued Alcohol Licenses.**

O.C.G.A. § 3-3-2 requires a city or county permit to manufacture, distribute, or sell alcohol, and grants local governing authorities “*discretionary powers within the guidelines of due process . . . as to the granting or refusal, suspension, or revocation of the permits or licenses...*” (SMF 26) (Emphasis added). Furthermore, O.C.G.A. § 3-3-2(b) provides that:

The *granting or refusal* and the *suspension or revocation* of the permits or licenses shall be in accordance with the following guidelines of due process: (1) The governing authority shall set forth ascertainable standards in the local licensing ordinance upon which all decisions pertaining to these permits or licenses shall be based; (2) All decisions approving, denying, suspending, or revoking the permits or licenses shall be in writing, with the reasons therefor stated...; and (3) Upon timely application, any applicant aggrieved by the decision of the governing authority regarding a permit or license shall be afforded a hearing with an opportunity to present evidence and cross-examine opposing witnesses.

(SMF 27) (Emphasis added). A state license issued by the Georgia Department of Revenue (“DOR”) is required. If a local license is revoked, a state license automatically becomes invalid; likewise, if a state license is revoked, a local license becomes invalid. (SMF 29)<sup>8</sup>

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<sup>6</sup> The Honorable W. Keith Barber has served as the City’s Municipal Court Judge since March 2010. (SMF 120) Prior to that, he was employed as City Solicitor. (Id.)

<sup>7</sup> Prior to Ms. Starling, Judy McCorkle held the City Clerk position between 1994 and mid-August 2008. (SMF 24)

<sup>8</sup> Actions against a state-issued license by the DOR’s Alcohol and Tobacco Division are also subject to due process requirements as well as the right to appeal. (SMF 28)

**2. Relevant History of the City’s Alcohol Ordinances.**

**a. 1997 to 2007 – Requirement of a “Final Disposition” Prior to Suspension or Revocation of an Alcohol License.**

On March 18, 1997, Chapter 6 of the City’s Code of Ordinances was replaced “in its entirety” by a new Chapter. (SMF 30) Section 6-35(a) of the new ordinance provided as follows:

Upon *final disposition* of a case by any court of competent jurisdiction, a license *may* be suspended or revoked by the Mayor and City Council for any violation of this and/or other City Ordinances....

(SMF 31) (Emphasis added.) The “final disposition” language remained until 2007. (SMF 36)

**b. Creation and Powers of the Alcohol Control Board.**

Section 6-4 of the April 17, 2001 version of the City’s Ordinances provided for the existence of an Alcohol Control Board (“ACB”) consisting of a combination of council members and citizens. (SMF 33) Thereafter, until December 6, 2011, the ACB – rather than the City Clerk – was vested with powers such as: (1) screening alcohol license applications; (2) granting or denying an applicant’s desired license; and (3) deciding whether to renew licenses. (SMF 34-35, 39-41) Between April 17, 2001 and September 17, 2007, the ACB was empowered to suspend or revoke alcohol licenses following a hearing. (SMF 36-37, 44, 46)

**c. The City’s Pre-December 6, 2011 Ordinances.**

The alcohol ordinances underwent additional revisions between September 17, 2007 and December 6, 2011 (the “Pre-December 6, 2011 Ordinances”). However, during that period, the salient ordinance sections set forth below remained the same:

Section 6-3(b)(1)-(7) provided as follows:

- (b) The violation of any of the provisions of this chapter, including the maximum occupant load, shall be *grounds* for suspension or revocation...:
  - (1) For the first violation, there shall be a three-day suspension of the license.
  - (2) For the second violation, the date of occurrence of which is within any 24-

month period of the first violation, there shall be a ten-day suspension of the license.

(3) For the third violation, the date of occurrence of which is within any 24-month period of the first violation, there shall be a 30-day suspension of the license.

(4) For the fourth violation, the date of occurrence of which is within any 24-month period of the first violation, there shall be *either* a 90-day suspension of the license, *or* revocation of the license.

(5) For any violation beyond the fourth, the date of occurrence of which is within any 24-month period of the first violation, the license shall be revoked.

(6) Any suspension or revocation shall begin on the seventh day after the suspension or revocation decision was made by the mayor and city council.

(7) Any suspension or revocation of a license *shall first require notice* to the license holder of a due process hearing as required by section 6-35 herein.

(SMF 38) (Emphasis added). Section 6-35(a) of the Pre-December 6, 2011 Ordinances contained the following sentence: “A license *may* be suspended or revoked by the mayor and city council for any violation of this chapter....” (SMF 43) (Emphasis added.)

Section 6-35(a) provided for a two-step suspension or revocation process whereby, following receipt of some type of notice concerning a violation:

The city clerk shall schedule a due process hearing before the [ACB] for any license holder *alleged to have violated* any provision of this chapter, by sending at least 14 days prior to the date of the due process hearing, a certified letter to the license holder containing the date, time, and location of the hearing, the date and *nature of the allegations*, and the license holder’s right to be represented by an attorney and to present evidence.

(SMF 44-50) (Emphasis added.) Section 6-35(b) instructed that the ACB was to conduct an initial hearing in accordance with O.C.G.A. § 3-3-2, and then “forward its *written recommendation* on the matter to the mayor and city council.” (SMF 44, 46) (Emphasis added.) “*Upon receipt of the written recommendations,*” the City Clerk was to send a second letter to the licensee regarding an additional hearing with the same level of detail. (SMF 47) But neither Section 6-35(a) nor (c) contained any directive as to *when* any such due process hearing must be heard relative to the violation, nor the *process* by which the City Clerk was supposed to receive notice of an alleged violation issued by law enforcement. (SMF 48-49)

The Pre-December 6, 2011 Ordinances also required alcohol licensees to send quarterly reports, referred to as “50/50” reports, to establish that at least 50% of their sales within the preceding quarter were from the non-alcohol sales. (SMF 51) These reports had to be “certified” as true by the licensee under penalty of perjury. (SMF 52) Section 6-84(b) required licensees to submit “[a]ny other documents, reports, records, or books as shall be required *by the [ACB] to confirm the accuracy of the reported information.*” (SMF 51) (Emphasis added). No provision set forth within the Pre-December 6, 2011 Ordinances directed the City Clerk or the Council to confirm the accuracy of the certified information reported or to audit the information reported. (SMF 52)

**d. The City’s December 6, 2011 Ordinances.**

On December 6, 2011, the City Council again replaced Charter 6 “in its entirety.” (SMF 53)

Thereafter, until August 28, 2014, Section 6-3(b) provided as follows:

(b) The violation of any of the provisions of this chapter *may* be grounds for suspension or revocation by the mayor and city council. . . :

(1) For the first violation, there *may* be a warning *or* a one-day suspension of the license.

(2) For the second violation, the date of occurrence of which is within any 12-month period of the first violation, there may be a three-day suspension of the license.

(3) For the third violation, the date of occurrence of which is within any 12-month period of the first violation, there may be a 10-day suspension of the license.

(4) For the fourth violation, the date of occurrence of which is within any 12-month period of the first violation, there may be a 30-day suspension of the license.

(5) For any violation beyond the fourth, the date of occurrence of which is within any 12-month period of the first violation, the license may be revoked.

(6) Any suspension or revocation shall begin after the suspension or revocation decision was made by the mayor and city council.

(7) Any suspension or revocation of a license *shall first require notice* to the license holder of a due process hearing as required by section 6-35 herein.

(SMF 54) (Emphasis added).

The ACB was officially abolished with the adoption of the December 6, 2011 Ordinances.

(SMF 55) In addition, Section 6-35(a) of the December 6, 2011 Ordinances removed the two-step

hearing process. (SMF 59-61) While the requirement to “schedule a due process hearing ... for any license holder *alleged to have violated* any provision of this chapter” remained, there was still no directive as to *when* any such due process hearing must be heard relative to the violation, nor any directive as to the *process* by which the Clerk was supposed to receive notice of an alleged violation. (SMF 60, 62)

Finally, Section 6-84(b) was amended to provide that the licensees who submitted certified 50/50 or “consumption on the premises” reports could also be required to submit any additional documents or information “as shall be required *by the mayor and city council....*” (Emphasis added). (SMF 64). But again, no provision directed the City Clerk or the City Council to confirm or audit the certified information reported by licensees. (SMF 65) All of the on-premises-consumption reports prepared between 2009 and 2014 regarding Rude Rudy’s were sworn to their accuracy under penalty of perjury, and none of the reports disclosed violations. (SMF 66)

**3. The City’s Longstanding Internal Procedure for Providing Notice to the City Clerk of Alleged Violations of the Alcohol Ordinances.**

Ms. McCorkle served as the City Clerk from 1994 until mid-August 2008, and was replaced by Ms. Starling. (SMF 70-71) In turn, Lyn Dedge served as the City’s Tax Clerk between 1992 and April 20, 2009, and was replaced by Teresa Skinner, who held the Tax Clerk position between then and August 28, 2014. (SMF 72-73) These individuals testified that their standard practice of receiving notice of an alleged violation of the alcohol ordinances, and the concomitant need to schedule a hearing, was precipitated by receiving an actual citation from either the Statesboro Police Department (“SPD”) or the DOR. (SMF 67) Thus, if the City Clerk’s office did not receive an actual citation alleging an alcohol violation, there was nothing to schedule, and the practice was to await receipt of citations from the SPD. (SMF 68) This practice, of course, makes common sense,

because the City Clerk – like all other non-sworn peace officers employed by the City – lacks the ability to issue citations to individuals or businesses for alleged violations of law. (SMF 200) In addition, the City Clerk lacks day-to-day knowledge of police activity, as she does not work for that department. (SMF 76)

**4. The City Clerk’s Internal Procedure for Awaiting Municipal Court Adjudication Prior to Scheduling a Due Process Hearing.**

As noted, between 1997 and 2007 the City’s ordinances referenced the “final disposition of a case by any court of competent jurisdiction” as a prerequisite to the Council’s or the ACB’s ability to suspend or revoke an alcohol license. It is also undisputed that former City Attorney Brannen advised Ms. McCorkle to wait and determine whether an individual accused of an alcohol-related violation that could be imputed to an alcohol licensee “had been adjudicated guilty on the municipal court side before [she] could bring an administrative hearing” against the licensee. (SMF 74) Both Ms. McCorkle and Mrs. Dedge testified that during McCorkle’s tenure as the City Clerk, their practice was to wait to schedule a hearing against a licensee until *after* there was an adjudication of guilt at the municipal court levied against the underlying criminal offender. (SMF 75)

The practice implemented by Ms. Dedge and Ms. McCorkle continued when Ms. Skinner and Ms. Starling replaced them. (SMF 76) Attorney Brannen continued serving as the City Attorney until he passed in early 2011; Michael Graves served as the “Staff Attorney” from April or May 2010 until August 15, 2011; at which point the City did not have a City Attorney until the hiring of Alvin Leaphart in mid-December 2011; and Mr. Leaphart continued in that role through August 28, 2014. (SMF 69, 77, 79) Notably, there is no evidence that either Mr. Graves nor Mr. Leaphart ever met with Ms. Skinner or Ms. Starling to explain how the City’s alcohol ordinances

functioned in regards to administrative hearings, and never instructed them that the prior procedure for waiting for an adjudication had or should be changed. (SMF 78, 80)

**5. University Plaza, Inc. and the “University Plaza Establishments”.**

Between 1990 and August 28, 2014, Mr. Ramsey was the sole owner of University Plaza. (SMF 81) There is no evidence that the City, its current or former Clerk, its current or former Manager, any current or former employee of the SPD, its current or former Mayors, or any current or former councilmen had any ownership interest in University Plaza. (SMF 82)

It is also undisputed that University Plaza’s tenants *controlled* (1) the space within the properties they leased; (2) how their employees were trained and supervised; and (3) which employees served alcohol, who was served, and how much was served. (SMF 83) However, none of the tenants owned or controlled any portion of the *parking lot* at University Plaza. (SMF 84-85) There is no evidence that the City *ever* issued an alcohol license to University Plaza, Inc. (SMF 87) The parking lot at University Plaza was *privately owned*, rather than a public street or sidewalk controlled by the City. (SMF 84-85) 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)

On April 2, 2001, the City approved an alcohol license application for Retrievers, Inc. (“Retriever’s”). (SMF 89) The City’s records have always indicated that owner and licensee of the business was Jason Franklin. (SMF 91)

On July 16, 2002, the City's ACB approved an alcohol license application for Chrysha, Inc. d/b/a Rum Runners. (SMF 92) The City's records have always indicated that Jim Stafford was the owner/operator of Chrysha, Inc. d/b/a Rum Runners.<sup>9</sup> (SMF 94)

On October 19, 2005, the City's ACB approved an alcohol license for Jonathan Starkey d/b/a Rude Rudy's to serve beer and wine. (SMF 96) Then, on August 28, 2006, the City's ACB approved Rude Rudy's to sell liquor, a decision that was upheld on appeal by the City Council. (SMF 98-99) The City Clerk's records pertaining to Rude Rudy's have always indicated that Mr. Starkey was its sole owner/operator. (SMF 100) In addition, Mr. Starkey testified that he was the sole owner of Rude Rudy's until it closed, and that no one other than himself had a financial interest in the establishment. (SMF 101) Mr. Ramsey and Derek Todd, the former manager of Rude Rudy's, gave similar testimony. (SMF 102-103) While a number of witnesses testified that *speculated* one or both of the Britt brothers may have had an undisclosed financial interest in Rude Rudy's, both Will and Trey Britt affirmatively denied under oath that they had any ownership or financial interest in Rude Rudy's. (SMF 104)

On or about December 18, 2007, the ACB approved an alcohol license application for Rusty's Tavern. (SMF 105) The City's records have always indicated that Joshua "Rusty" Ledford was the owner/operator of Rusty's Tavern.<sup>10</sup> (SMF 107)

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<sup>9</sup> Will and Trey Britt also denied under oath that they ever had a financial interest in or otherwise provided any financial backing to Rum Runners or Mr. Stafford. (SMF 95)

<sup>10</sup> Will and Trey Britt were asked about a recent FBI raid, and both invoked their 5<sup>th</sup> Amendment privilege against self-incrimination when asked whether "documents or other records obtained by the FBI in that search show indications of your having a financial interest in one or more businesses at University Plaza during the year 2014." (SMF 108-109) However, Will Britt denied, and did not invoke the 5<sup>th</sup> Amendment, when asked if he owned either Rude Rudy's or Rum Runners, and also denied (1) that he did not want violations of the alcohol ordinance against Rude Rudy's to be heard by the City Council, (2) that he did not want violations to be brought up before City Council by the SPD or DOR against Rude Rudy's, and (3) that he did not want any violations

There is no record evidence that the City, its current or former City Clerks, its current or former Managers, any current or former employees of the SPD, its current or former Mayors, Chance, Riggs, Lewis, or Boyum have ever had any ownership or financial interest in Retriever's, Rusty's Tavern, Rum Runners, or Rude Rudy's. (SMF 111-112)

**6. Citations Alleging Alcohol Ordinance Violations Involving the University Plaza Establishment Between 2009 and August 2014.**

**a. 2009 to May 2011 – Abolition of the ACB and Personnel Changes.**

In May 2009, the City Clerk was notified of an alleged alcohol ordinance violation by Rusty's Tavern, and scheduled a hearing before the ACB, which voted to issue a 3-day suspension of the license. (SMF 114-116) The City Council upheld the 3-day suspension. (SMF 117-118)

Even though the ACB "existed" on paper until the adoption of the December 6, 2011 Ordinances, it held its last meeting on December 14, 2009 and thereafter did not function until it was formally abolished. (SMF 119) However, the final decision maker, the City Council and Mayor, still functioned. Meanwhile, several significant personnel and departmental changes took place.<sup>11</sup> Then, in February and May of 2011, Ms. Starling learned of and scheduled due process hearings against the alcohol licensees of Rusty's Tavern, Kevin's Food Mart, Sunny Food Mart, Buffalo's, Christopher's, Holiday Pizza, and Millhouse. (SMF 126-27, 129-30). The hearing against Rusty's Tavern resulted in a 10-day suspension of its alcohol license by unanimous vote of the City Council, against other businesses at University Plaza to be brought before the City Council for a hearing. (SMF 110)

<sup>11</sup> In addition to Ms. McCorkle and Ms. Dedge leaving their respective positions in 2008 and 2009, in March 2010 Keith Barber resigned the City Solicitor position and accepted the position of Municipal Court Judge. (SMF 120) A few months later, the positions held by Stan York (Chief of Police), Frank Roach (SPD Lieutenant), Dennis Merrifield (Fire Chief), Emerson Melton (Fire Captain), and Mike Smith (Fire Captain) were eliminated in a reorganization and restructuring of the police and fire departments. (SMF 120-122) Wendell Turner was subsequently promoted to the position of Public Safety Director (SMF 123); a short-time later, the City Manager, Shane Haynes, was terminated (SMF 124); and in January 2011, Attorney Brannen passed away. (SMF 69)

whereas (also by unanimous vote) the remaining businesses were given a “warning,” without any suspension. (SMF 128-132).

**b. July 2011 Citations, Mr. Leaphart’s Dismissal of Underlying Criminal Actions, and Ms. Starling’s Lack of Knowledge.**

In July 2011, the SPD conducted compliance checks resulting in the issuance of 42 uniform traffic citations (“UTC”). (SMF 133) Of the 42 UTC’s, six were issued to individuals employed by the Rude Rudy’s establishment for alleged violations of the “hours of sale” provisions set forth within the Pre-December 6, 2011 alcohol ordinances, and one was issued for allegedly “Charging Cover Charge Which Discriminates [Against] Gender.” (SMF 134) The UTC’s involving Rude Rudy’s ordered the individual alleged offenders to appear at the Municipal Court on January 10, 2012. (SMF 135) No other University Plaza Establishments were cited in July 2011. (SMF 136)

Following the July 2011 operation, on August 3, 2011 Michael Graves emailed Rob Bryan and Scott Brunson of the SPD, stating “Council is holding all alcohol violations until a later time. I wanted to give you a heads up.” (SMF 137) Graves sent the 8/3/2011 email because he was leaving his employment with the City the very next week. (SMF 138) When Graves sent the email to Brunson and Bryan, he expected them to “hold [the previously-issued citations] until another city attorney was in place,” and was simply communicating that they should not expect the citations to be heard by the City Council until that time. (SMF 139)

The July 2011 citations were still pending in municipal court when Leaphart was hired as the City Attorney/Solicitor in December 2011, and he became aware of the citations. (SMF 141-143) By that time, however, the December 6, 2011 Ordinance had been enacted, the non-functioning ACB abolished, and the Ordinance under which the July 2011 citations were issued replaced “in its entirety.” (SMF 144) In addition, it was Leaphart’s misunderstanding that a formal decision had

been made that due process hearings against the licensees associated with the July 2011 citations were not going to be heard by the City Council, which caused him to question whether it would be appropriate to go forward with the prosecution of the individuals. (SMF 145) While there is a dispute as to whether former City Manager Parker told, recommended, or advised Mr. Leaphart to dismiss the citations, what is *materially undisputed* is that Mr. Leaphart, acting as the City Solicitor, is the person who made the final decision to dismiss the charges, in fact dismissed the charges, and exercised his prosecutorial discretion when doing so. (SMF 146)<sup>12</sup> Critically, there is no record evidence that Ms. Starling ever received *written or actual notice* of the nature of the alleged violations concerning Rude Rudy's issued by the SPD in July 2011 prior to August 28, 2014. (SMF 148) There is also no record evidence which demonstrates that Ms. Starling ever received copies of any of the actual citations issued by the SPD in July 2011, or any information from the municipal court or Mr. Leaphart concerning the dismissal of the underlying charges. (SMF 149-150) There is also no evidence that the City Council ever actually "voted" or otherwise decided that due process hearings should be put on hold, and there is no evidence that the City Council ever issued a directive to the City Clerk, the SPD, or anyone else that they should not enforce the ordinances at any time between 2011 and August 28, 2014. (SMF 243)

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<sup>12</sup> To the extent Plaintiffs purport that Mr. Leaphart's action constitute negligence or legal malpractice, they have not proffered any expert testimony to this effect. In addition, 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). This doctrine would also preclude a finding of liability against the City premised on Mr. Leaphart's actions.

**c. Minimal Citations Involving University Plaza from 2012-2014.**

There is no record evidence that any citations involving violations of the December 6, 2011 Ordinances were issued to the licensee or employees of Rum Runners between July 24, 2011 and August 28, 2014. (SMF 151, 152) In addition, no citations were issued to Rude Rudy's, Rusty's Tavern, or Retriever's between July 24, 2011 and March 27, 2013. (SMF 152)

In March and August 2013, the SPD conducted city-wide compliance checks focused on underage alcohol sales using confidential informants. As a result of these operations, an employee of Rude Rudy's was cited on March 28, 2013 (SMF 154); employees of Rusty's Tavern were cited on March 28, 2013 and August 22, 2013 (SMF 157); and an employee of Retrievers was cited on August 22, 2013, all for alleged violating state laws prohibiting the underage sale of alcohol. (SMF 159). There is no evidence that either the SPD or the DOR issued any other alcohol-related citations to employees of Rusty's Tavern or Retrievers until after August 28, 2014. (SMF 158, 160). As for Rude Rudy's, the March 28, 2013 citation was "dismissed without adjudication of guilt" at the municipal court on May 14, 2013. (SMF 155)

The only evidence of the City Clerk's receipt of any type of notice concerning the March and August 2013 citations is reflected in an August 23, 2013 email from Wendell Turner to Mr. Leaphart, with a "cc:" to Mr. Parker, Ms. Starling, and Rob Bryan, in which he wrote:

FYI...attached is the list documenting violations for alcohol establishments during recent PD operations. Call Sgt. Patrick Harrelson if you have any questions. All were cited with a UTC.

(SMF 161) Mr. Turner's 8/23/2013 email forwarded a separate email from Bryan to Turner, Brunson, and other SPD employees, in which Mr. Bryan wrote, in part, as follows:

The business [sic] listed below sold to Underage sources last night during the Alcohol Compliance Check, the business [sic] checked last night were licensed for on premises consumption. Attached is a copy of all business [sic] that were checked

during the month of August. A total of 14 businesses were found to be in violation of State Law during the month of August. 21 were found to be in violation in March when the first round of compliance checks were conducted.

(SF 161-162) The attachment to Bryan's email contained a spreadsheet prepared by Sgt. Patrick Harrelson which related to the City-wide 2013 compliance checks, containing the name of each licensee, the date of attempted sale, the address of the licensee, and whether there was a sale. (SMF 164) However, the *actual UTC's* referenced by Mr. Turner were *not attached*. (SMF 165) There is no evidence that Starling *ever* received either the actual citations or copy of same referenced in Turner's 8/23/2013 or any subsequent information from the municipal court. (SMF 166)

SPD employees also issued UTC's involving alleged violations of Section 6-88(c), concerning "noise or activity which is disturbing to the surrounding neighborhood," to the manager of Rude Rudy's on February 23, March 8, March 9, and May 4, 2014. (SMF 167) After becoming aware of the four "noise" citations and taking steps to ensure the bar made efforts to remedy the issue, SPD Major Scott Brunson recommended to Mr. Leaphart that the underlying criminal citations be dismissed or reduced to a warning. (SMF 168) Mr. Leaphart then exercised his prosecutorial discretion and dismissed the three noise ordinance citations, which were marked with a "warning" label, because the noise had already been abated. (SMF 169) There is no evidence that before Mr. Leaphart exercised his prosecutorial discretion, he was aware of any gifts, gratuities, and/or favors, such as concert tickets, that Mr. Brunson had allegedly received from Mr. Starkey. (SMF 170) There is also no evidence that Ms. Starling ever received written or actual notice of the noise citations, let alone copies of the UTC's or the final disposition at the municipal court level. (SMF 171-174)

There is no evidence any alcohol-related citations were issued to the licensee or employees of Rude Rudy's between May 6, 2014 and August 28, 2014. (SMF 156, 175) Also, there is no

evidence the DOR's Alcohol and Tobacco Division *ever* issued a citation involving alleged alcohol violations against Rude Rudy's or its employees between August 1, 2009 and August 28, 2014 despite a presence in the City and despite conducting compliance checks and other operations. (SMF 176-180) Thus, of the various alleged violations referenced, only one was issued to an employee at Rude Rudy's that involved an alleged underage sale of alcohol (the March 28, 2013 citation to an employee of Rude Rudy's) and it was dismissed. Thus, even if all citations were prosecuted in municipal court, even if Ms. Starling had proper notice of all of the citations, and even if the ACB or the City Council heard the alleged violations in the form of a due process hearing, it is highly unlikely that Rude Rudy's would not have been open for business on August 27-28, 2014.

7. **The Decedent's Arrest and Violation of His Pre-Trial Agreement.**

On July 4, 2014, the Decedent was arrested in Athens and charged with theft of services and underage possession or consumption of alcohol. (SMF 181-182) On August 5, 2014, he entered into a Pretrial Intervention Agreement whereby he agreed to, among other things: (a) **“not violate any criminal laws”**; (b) **“not drink or consume any alcoholic beverage or have any alcoholic beverages in your possession”**; and (c) **“not visit, enter, or contact any *bar, liquor store, night club or other location* whose primary purpose is the sale or distribution of alcoholic beverages.”** (SMF 183)

It is undisputed that Rude Rudy's primary source of revenue came through the sale of alcohol. It is also undisputed that irrespective of the Court's Order and his own agreement: (1) the Decedent drank alcohol between August 5, 2014 and August 28, 2014; (2) the Decedent drank alcohol at Rude Rudy's and purchased alcohol for underage persons who were present there; (3) the Decedent did so through the use of a fake ID; and (4) further that the Decedent was attacked and beaten by Spencer on August 28, 2014, ultimately dying from his injuries, and just prior to the

attack, the Decedent was standing at the bar, where he had been accused of attempting to steal tip money while trying to purchase additional alcoholic beverages. (SMF 184-196) On October 11, 2016, Spencer pled guilty to the voluntary manslaughter of the Decedent. (SMF 197)

### **ARGUMENT AND CITATION OF AUTHORITY**

#### **A. Summary Judgment Standard.**

Summary judgment is appropriate if the movant demonstrates that “there is no genuine issue as to *any* material fact. . . .” O.C.G.A. § 9 -11-56(c) (emphasis added). The movant need not conclusively prove the opposite of each element of the non-moving party’s prima facie case; rather, the movant must only show that there is an absence of record evidence to support at least one essential element. See Lau’s Corp. v. Haskins, 261 Ga. 491, 494 (1991). In opposition to this motion, Plaintiffs may not rely upon speculative hearsay or other inadmissible evidence, because “[e]vidence offered on motion for summary judgment is held to the same standards of admissibility as evidence at trial, and evidence inadmissible at trial is generally inadmissible [in a] motion for summary judgment.” HCP III Woodstock, Inc. v. Healthcare Services Group, Inc., 254 Ga. App. 242, 244 (2002).<sup>13</sup> As shown below, Plaintiffs’ case is “based solely on [] inference[s] drawn from circumstantial evidence,” which have been “flatly denied by [the Defendants]...In the face of such unequivocal direct evidence, [Plaintiffs are] not entitled to depend on [] inference[s] drawn from circumstantial evidence to carry [their] claim to a jury.” See Steele v. Cincinnati Ins. Co., 171 Ga. App. 499, 500 (1984).

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<sup>13</sup> See also Green v. Sams, 209 Ga. App. 491, 498 (1993) (“[A]n inference cannot be based upon evidence which is too uncertain or which raises merely a conjecture or possibility.”); Rowell v. McCue, 188 Ga. App. 528, 531 (1988) (a finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists.).

**B. The City of Statesboro is Entitled to Sovereign Immunity.**

For the reasons noted in the *Memorandum of Law in Support of the City's Motion for Summary Judgment Pursuant to the Doctrine of Sovereign Immunity*, which is adopted by referenced here, an unambiguous insurance policy endorsement precludes coverage for the claims against the City, and decisions concerning the issuance, renewal, and revocation of alcohol licenses and occupational tax certificates are “governmental.” Thus, the City is entitled to sovereign immunity. See O.C.G.A. § 36-33-1(a)-(b).

**C. Plaintiffs' Ante Litem Notice Failed to Place the City on Proper Notice of the Nuisance Claim Set Forth in Plaintiffs' FAC.**

The issuance of a proper *ante litem* notice under O.C.G.A. § 36-33-5 is a prerequisite to suit against a municipality. Subsection (b) of the statute provides as follows:

Within six months of the happening of the event upon which a claim against a municipal corporation is predicated, the person, firm, or corporation having the claim shall present the claim in writing to the governing authority of the municipality corporation for adjustment, stating the time, place, and extent of the injury, *as nearly as practicable*, and the *negligence which caused the injury*. No action shall be entertained by the courts against the municipal corporation until the cause of action therein has first been presented to the governing authority for adjustment.

O.C.G.A. § 36-33-5(b) (emphasis added). See also Atlanta Taxicab Co. Owners Assn. v. City of Atlanta, 281 Ga. 342, 350 (5) (2006). No tort action may be entertained against a municipality until the cause of action has first been so presented to the governing authority for adjustment, because giving of the notice in the *manner* and *time* required by the statute is a condition precedent to the maintenance of a suit thereon. See Schaefer v. Mayor and Council of City of Athens, 120 Ga. App. 301, 302 (1969); Owens v. City of Greenville, 290 Ga. 557, 561 (4) (2012) (same). “[T]here is no precise standard for determining whether any given ante-litem notice is substantively sufficient.” Owens, 290 Ga. at 561 (4). But in Owens, our Supreme Court looked to the relevant language of

O.C.G.A. § 36-33-5 (b) to determine whether a particular *ante litem* notice substantially complied with that subsection, and noted that what is required is a description of “the time, place, and extent of the injury, *as nearly as practicable*.” *Id.* at 562 (4) (Emphasis supplied). See also Colvin v. City of Thomasville, 269 Ga. App. 173, 174 (2004) (“To substantially comply with OCGA § 36-33-5(b), the claimant must put the municipality on notice . . . in a general way, [of] the time, place, and extent of the injury, as well as the general nature of the complaint.”).<sup>14</sup>

Prior to this action, on February 18, 2015, Plaintiffs’ counsel issued a written notice of claim to the City, a copy of which is attached to the Third Amended Complaint (“TAC”). (SMF 234, TAC Ex. 2.) The notice in question mentions the fact that the Decedent was killed at or near the premises of Rude Rudy’s, and alleges that the City’s negligence, gross negligence, recklessness, or intentional conduct caused his death in a variety of ways, including by failing to enforce municipal liquor laws and failing to abate a known nuisance. (SMF 235). However, while the notice states that the “beating death of Michael Joseph Gatto . . . occurred within the limits of the City of Statesboro at or near the premises of Rude Rudy’s, LLC,” it contains absolutely *no mention* of any of the other “University Plaza Establishments” that are central to the Plaintiffs’ *current* claim (*i.e.*, Retrievers, Rum Runners, and Rusty’s Tavern), let alone the fact that the City licensed any of those establishments and thereby created a nuisance at *each* of the four establishments and/or that the

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<sup>14</sup> See, e.g., City of Moultrie v. Price, 310 Ga. App. 672, 673 (2011) (ante litem notice found insufficient where complaint alleged losses due to a fire on his property that occurred due to Moultrie’s alleged negligent maintenance of a power line, but the notice failed to state that the fire was caused by the city’s negligence); Arenas v. Georgia Dept. of Corrections, 2018 WL 988099, \*12 (S.D. Ga. Feb. 20, 2018) (“[T]he Court finds that the ante litem notice was insufficient to put the state on notice of potential negligence claims in the response to Tavera’s death. Nothing in the notice would have alerted Defendant GDOC that Plaintiff would have a claim based on the negligence of the individual officers that responded to Tavera’s suicide.”); Simmons v. Mayor and Alderman of City of Savannah, 303 Ga. App. 452, 455 (2010) (“Simmons’ ante litem notice was insufficient. The notice, while giving the date and the particulars of Simmons’ fall, failed to properly or even generally identify where the incident actually occurred.”).

City's negligence and failure to revoke *every single one* of those businesses' alcohol and/or "business licenses" caused or contributed to the Decedent's death. (SMF 236); TAC ¶¶ 117-141, 146-156). The ante litem notice also does not contain any mention of the allegation that "allowing Rude Rudy's, Retriever's, Rum Runners, and Rusty's Tavern to remain in operation despite having knowledge of the repeated criminal activity at the University Plaza Establishments as set forth herein, caused the severe beating and ultimate death of Michael Joseph Gatto." (*Id.* ¶ 156; SMF 237.)

In short, while the notice may have provided sufficient information to put the City on notice of negligence and nuisance claims arising out of the licensing of Rude Rudy's, it completely failed to provide notice of any claims attached to the licensing of Retrievers, Rum Runners, Rusty's Tavern, *and* Rude Rudy's, and is in fact silent as to this. *See, e.g., Arenas*, 2018 WL 988099, \*12; *Simmons*, 303 Ga. App. at 455. Concomitantly, because the current negligence and new nuisance claims are not based on the licensing of Rude Rudy's, but rather the licensing, renewal, and alleged creation of a nuisance at *all* of the "University Plaza Establishments," the negligence claims against the City are also subject to dismissal for failure to comply with O.C.G.A. § 36-33-5(b).

**D. Plaintiffs' Negligence Claims Against the City and Ms. Starling are Barred by the Public Duty Doctrine.**

Plaintiffs' negligence claims against the City and Ms. Starling are also barred by the public duty doctrine. That doctrine was adopted by the Georgia Supreme Court in *City of Rome v. Jordan*, 263 Ga. 26 (1993), to answer the question of whether a duty exists upon which a municipality can be held liable for the failure to provide police protection to an individual citizen. Observing that "[t]he threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes the plaintiff a duty of care," the Court concluded,

Where *failure* to provide *police protection* is alleged, there can be no liability based on a municipality's duty to protect the general public. However ... where there is a *special relationship* between the individual and the municipality which sets the individual apart from the general public and engenders a special duty owed to that individual, the municipality may be subject to liability for the *nonfeasance* of its police department.

Id. at 28-29 (emphasis supplied). To establish a "special relationship" and defeat the public duty doctrine in actions involving "nonfeasance," three elements must be proven: (1) an explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party; (2) knowledge on the part of the municipality that inaction could lead to harm; and (3) justifiable and detrimental reliance by the injured party on the municipality's undertaking. Id. at 29.

The appellate courts have since clarified that the "public duty doctrine does not apply to limit liability where a claim of active negligence (misfeasance), rather than a mere failure to act (nonfeasance) is alleged." Stephenson v. City of Doraville, 294 Ga. 220, 221 (2013). Yet, in doing so, the Georgia Supreme Court has instructed that mere "delay taking action" or "failure to do anything" in response to a law enforcement issue does not equate to active negligence, which is more akin to "actively hinder[ing]" someone or otherwise actively "increas[ing] the risk of harm." Id. at 222-226. See also Tilley v. City of Hapeville, 218 Ga. App. 39, 41 (1995) (public duty doctrine applied where officer failed to warn or direct motorist away from an abandoned car parked on the highway); City of Rome, 263 Ga. at 30(3) (plaintiff's reliance, based solely on her belief that the police were coming to help her and not on any promise made to her by the police, was not justified).

Subsequent decisions have also explained that the public duty doctrine is applicable in cases involving the context of "police protection." See Clive v. Gregory, 280 Ga. App. 836, 839(1) (2006). That said, the Georgia Supreme Court has instructed that the scope of the public duty doctrine is *broader* than cases "involving police protection in general" and can include a range of

“other protective police services.” Rowe v. Coffey, 270 Ga. 715, 715 (1)-(2) (1999) (holding negligence action against county, sheriff, road superintendents and their employees, and deputy sheriffs, alleging that road was improperly inspected, maintained and/or barricaded by defendants, was barred by the public duty doctrine). In addition, following the decision in Rowe, the Georgia Court of Appeals held that the public duty doctrine **applied to bar claims against the City of Toccoa arising out of that city’s issuance of alcohol licenses, and the failure to revoke such licenses and/or to otherwise take action against those licenses** notwithstanding the fact that the city’s police department had been dispatched to break up fights at the business, was aware of repeated alcohol-related violations, and yet the city failed to take administrative action against those licenses prior to the death of the decedent. See City of Toccoa v. Pittman, 286 Ga. App. 213, 213-216 (2007) (certiorari denied). In Pittman, the business attempted to circumvent the application of the public duty doctrine by asserting the “doctrine only applies in the police protection context, not in a case such as this one, which involves the government’s administrative actions.” Id. at 215-216. However, the Court of Appeals rejected that argument, because the evidence showed that the city’s police department “enforces compliance” with “municipal ordinances,” resulting in the conclusion that “[t]his is essentially a police protection case.” Id. at 216.

In light of the foregoing case law, and particularly Pittman, and the facts of this matter, the public duty doctrine is applicable in this action. The undisputed evidence shows that, as in Pittman, while Plaintiffs’ negligence claims are centered upon the alleged failure of the City and Ms. Starling to take administrative action against Rude Rudy’s, the need to take such action is alleged to have been based on Rude Rudy’s and the other University Plaza Establishments’ alleged violations of the alcohol ordinances, as reflected in UTC’s issued by the SPD, and the City’s alleged knowledge of the “many repeated incidents of criminal and dangerous activity occurring at the University Plaza,”

which Plaintiffs attempt to show through police incident reports, dispatch summary reports, and the testimony of various SPD officers. The evidence in this case, as in Pittman, is that the SPD is responsible for enforcing and issuing citations for violations of the City's alcohol ordinances and other criminal laws, that the SPD's citations lead to prosecutions in the municipal court which are a condition precedent to administrative due process hearings, that the City Clerk and other City non-POST-certified employees lack the ability to write such citations, and that the SPD is responsible for enforcing suspensions imposed on licensees. (SMF 67-68, 75, 133, 137, 154, 157, 162, 198-200) Therefore, just like Pittman, this is a police protection case.

It also cannot reasonably be disputed that this case involves the alleged failure to act (*i.e.*, nonfeasance) as compared to a case involving active negligence (*i.e.*, misfeasance). In this regard, Plaintiffs' Complaint alleges repeatedly that the Defendants *failed to do certain things*, which they claim resulted in the death of their son. See, e.g., TAC ¶¶ 73 ("No due process hearing was scheduled or occurred..."), 74 ("No action was taken by Defendants Statesboro or Starling..."), 78 ("City of Statesboro [] decline[d] to enforce its existing ordinances relating to the protection of the public"), 79 ("no alcohol ordinance compliance checks were carried out by the [SPD] from July of 2011 until March of 2013"), 140 ("If the City Code had been followed by Defendants Statesboro and Starling, Rude Rudy's would not have held its alcohol license in August 2014 and Michael Joseph Gatto would not have been at Rude Rudy's"), 141 ("Defendants failed to exercise reasonable care to eliminate the danger or to otherwise protect the City's citizens and the patrons of Rude Rudy's, Retrievers, Rum Runners, and Rusty's Tavern . . . from the known risks of serious bodily injury or death."). Thus, both requirements for the public duty doctrine have been met.

Finally, Plaintiffs' cannot establish the "special relationship" exception to the doctrine. Plaintiffs admitted at their depositions and in response to the City's Requests for Admissions there is

no evidence that any current or former employee of the SPD or the City in general had ever spoken with the Decedent at any time prior to August 28, 2014. There is no evidence that any current or former employee of the SPD or the City ever represented, promised, or assured that they and/or the SPD or the City would act on behalf of the Decedent to prevent, assist, or respond to any actions or omissions of anyone employed by Rude Rudy's or any other University Plaza Establishment. (SMF 201-204). Accordingly, "even assuming knowledge on the part of the City [could be established] that [the Decedent] might be harmed as a result of [the Defendants' alleged] nonfeasance, it is clear that [Plaintiffs] failed to meet the first and third requirements for establishing the existence of a special relationship." Stephenson, 294 Ga. at 227. Thus, summary judgment is due to both Defendants under the public duty doctrine.

**E. Ms. Starling is Entitled to Official Immunity.**

There is a "big difference" between suits brought against public servants in their official capacities as compared to their individual capacities. See City of Atlanta v. Harbor Grove Apts., 308 Ga. App. 57, 58 (2011). Official capacity claims are, in essence, suits against the public employer itself, "[b]ecause any recovery of damages would be paid out of the public purse." Bd. Of Comm'rs v. Johnson, 311 Ga. App. 867, 872 (2011) (citing Gilbert v. Richardson, 264 Ga. 744, 746 n. 4 (1994)). Public employees "sued in their official capacities are entitled to invoke the protection afforded by sovereign immunity." Id. at 872. In contrast, public employees "sued in their individual capacities face potential personal liability for any damages," but are afforded "official immunity for discretionary actions taken within the scope of their official authority, done without malice or intent to injure." Id. In the instant case, Plaintiffs already dismissed the "official capacity" claims against Ms. Starling, leaving only the claims asserted against her as an individual.

In Georgia, official immunity "protects individual public agents from personal liability for

discretionary actions taken within the scope of their official authority, and done without willfulness, malice, or corruption.” Cameron v. Lang, 274 Ga. 122, 123 (2001) (internal quotations omitted). See also Hennessey v. Webb, 245 Ga. 329, 330-31 (1980). An act is regarded as within the scope of an official’s “discretionary authority” for purposes of official immunity if it is one that “calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them **in a way not specifically directed.**” Harry v. Glynn County, 269 Ga. 503, 505 (1998) (quoting Schulze v. DeKalb County, 230 Ga. App. 305 (1998)) (Emphasis added); Partain v. Maddox, 131 Ga. App. 778, 783 (1974) (discretionary acts are those flowing from “the power and duty to exercise judgment and discretion.”). On the other hand, a “ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty.” Common Cause/Georgia v. City of Atlanta, 279 Ga. 480, 482(2) (2005). Instructions or procedures sufficient “to cause an act to become merely ministerial must be so clear, definite and certain as merely to require the execution of a relatively simple, specific duty.” Barnard v. Turner County, 306 Ga. App. 235, 238 (1) (2010).

**1. The Scheduling of Due Process Hearings Requires Discretion.**

Plaintiffs allege that “Defendant Starling negligently breached her ministerial duty to set due process hearings before Defendant Statesboro’s Mayor and City Council upon her receipt of notice of violations charged against the University Plaza Establishments.” (TAC ¶ 148.) Their theory erroneously appears to be based on the assertion that the Section 6-35 of the Pre- and post-December 6, 2011 Ordinances provides that:

The city clerk *shall* schedule a due process hearing before the [ACB or the City Council, depending on which version of the ordinance was in place] for any license holder *alleged to have violated* any provision of this chapter, by sending at least 14

days prior to the date of the due process hearing, a certified letter to the license holder containing the date, time, and location of the hearing, the date and nature of the allegations, and the license holder's right to be represented by an attorney and to present evidence.

(Emphasis added). However, as shown above, during all relevant time periods, Section 6-35 never contained **any directive** as to *when* due process hearings must be scheduled and heard by either the ACB or the City relative to the violation, thus leaving the City Clerk discretion as to how and when to schedule such hearings. (SMF 45, 48-49, 50, 62) In addition, it is undisputed that Section 6-35 was completely silent as to the *process* by which the City Clerk was supposed to receive notice of an alleged violation issued by law enforcement. (SMF 49, 62)

In light of the complete absence of statutory or ordinance-driven direction as to the above issues, the evidence establishes that at all times relevant to the TAC, the City Clerk's office established internal procedures for waiting on the adjudication of underlying criminal citations at the municipal court level prior to scheduling a due process hearing. (SMF 67-68) In addition, the process for receiving notice of actual alleged violations via a copy of the UTC, and the concomitant need to schedule a hearing, was established despite unclear procedures as being precipitated by the Clerk's office receiving a citation from either the SPD or the DOR. (SMF 69-80) Because neither of these practices was "specifically directed" in the ordinances, controlling precedent requires the Court to conclude that Ms. Starling's actions or inactions with respect to the scheduling of due process hearings was discretionary, rather than ministerial.<sup>15</sup>

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<sup>15</sup> In addition, as shown above, the City Clerk has never had any duty at all to audit or otherwise question or confirm "50/50" on premise consumption reports, which are certified and submitted under penalty of perjury. (SMF 52, 65) In addition, there is no evidence that Ms. Starling individually or the City Council knew that any information contained on reports submitted by Rude Rudy's or other University Plaza Establishments were false. (SMF 66) Mr. Starkey even admitted that all 50/50 reports Rude Rudy's submitted under penalty of perjury showed food sales accounted for at least 50% of sales. (SMF 66 at n. 21).

**2. There is No Evidence of Malice.**

Because of the strong public policy underlying official immunity; *i.e.*, “[to] preserve the public employee’s independence of action without fear of lawsuits and to prevent a review of his or her judgment in hindsight,” Cameron, 274 Ga. at 123, a plaintiff must meet an exacting standard; to be sure, nothing short of specific evidence of a “*deliberate intention to do wrong*” will suffice to overcome the defense. Adams v. Hazelwood, 271 Ga. 414, 414, 520 S.E.2d 896 (1999). (Emphasis added.) Evidence of “ill will” alone is insufficient to deprive an individual of official immunity. Id. See also May v. Fulton County, 925 F. Supp. 760, 776 (N.D. Ga. 1995) (even evidence of inappropriate conduct by a public official is insufficient to overcome official immunity in absence of showing that conduct was malicious or willful), *rev’d in part on other grounds*, 101 F.3d 709 (11th Cir. 1996).

Plaintiffs cannot make this demanding and essential evidentiary showing, as there is simply no evidence to support a finding that Ms. Starling took any actions with respect to Rude Rudy’s or any other University Plaza Establishment that were malicious. Plaintiffs have presented no evidence whatsoever regarding Ms. Starling’s purported motives. Conversely, Ms. Starling has affirmatively testified that her actions were made in good faith reliance based upon practices she learned from her predecessors, which were based upon the advice of the former City Attorney, that all of her actions were taken in the course of her official capacity, and that they were in no way motivated by personal animosity, malice, ill-will, or a desire to harm Plaintiffs or the Decedent, or to benefit Rude Rudy’s or anyone else. (SMF 244) “In the face of such unequivocal direct evidence, [Plaintiffs] are not entitled to depend on an inference drawn from purely circumstantial evidence to carry [their] claim to a jury.” Steele, 171 Ga. App. at 500. See also Rowell, 188 Ga. App. at 531 (a finding which may be inferred but not demanded by circumstantial evidence has no probative value against positive and

uncontradicted evidence that no such fact exists). Accordingly, Ms. Starling is entitled to official immunity.

**3. Ms. Starling Did Now Owe Any Duty to Plaintiffs or the Decedent with Respect to the Scheduling of Due Process Hearings.**

Assuming *arguendo* that even if duties related to the scheduling of due process hearings were ministerial, rather than discretionary, Plaintiffs' claims for relief against Ms. Starling still fail. Negligence requires proof of (1) a legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty. See Lowry v. Cochran, 305 Ga. App. 240, 246 (2010); City of Douglasville v. Queen, 270 Ga. 770(1) (1999).

With respect to the first element, Georgia law couches the concept of legal duty in terms of reasonableness. It does not, in most circumstances, impose an absolute duty to avoid injuring others. See T.J. Morris Co. v. Dykes, 197 Ga. App. 392(3) (1990). For example, a third party does not owe a duty to an employer to refrain from injuring the employer's employee. See Traina Enterprises, Inc. v. RaceTrac Petroleum, Inc., 241 Ga. App. 18 (1999). Similarly, Georgia does not recognize a duty to disseminate information in the absence of a special relationship between the parties. See Shortmacy v. N. Atlanta Internal Med., P.C., 252 Ga. App. 321, 326-27 (2001) (explaining general absence of such duty and holding physician had no special relationship giving rise to duty of care with motorists injured in collision with driver to whom physician had given a narcotic). As a general rule, "there is no duty to control the conduct of third persons to prevent them from causing

physical harm to others.” See Bradley Center, supra; Landis v. Rockdale County, 212 Ga. App. 700, 703 (1994) (accord).

In light of the foregoing, to the extent Ms. Starling owed any duty in connection with the scheduling of due process hearings, whether ministerial or discretionary, she did not owe any such duty to the Plaintiffs or to the Decedent. She either owed that duty to the City or to the general public. She certainly did not owe any such duty to the Decedent, who had been specifically ordered not to consume alcoholic beverages and to avoid establishments like Rude Rudy’s just over three weeks prior to his death.

**4. Ms. Starling Did Not Actually Breach Any “Duty” Related to the Scheduling of Due Process Hearings with Respect to the July 2011 and 2014 Citations Involving Rude Rudy’s.**

Assuming *arguendo* that even if Ms. Starling’s “duty” to schedule due process hearings was both ministerial, rather than discretionary, and actually owed to the Decedent, the evidence nevertheless demonstrates that she never received written or actual notice of any of the July 2011 citations that were issued by the SPD. **Ms. Starling is not omniscient, and nothing in the ordinances required her to schedule a hearing on an alleged violation of which she had *no knowledge*.** (SMF 50, 63) Even if she had received proper notice, the Pre-December 6, 2011 Ordinances required Ms. Starling to first schedule a due process hearing before the ACB, which had ***not even been functioning*** and ***did not exist*** except on paper between December 2009 and December 5, 2011. (SMF 44-49, 119) As such, it was impossible for Ms. Starling to schedule due process hearings on the July 2011 citations – which she did not receive – without possibly violating the due process rights of the licensees in question.

It is also undisputed that Ms. Starling received no written or other notice about the four “noise” citations issued to Rude Rudy’s manager, Derek Todd, in February, March and May of 2014.

(SMF 171-174) In the absence of evidence of such notice, it is impossible to conclude that she breached any duty related to those citations either.<sup>16</sup>

**F. The City Breached No Duty Owed to the Plaintiffs with Respect to the Renewal and/or Failure to Revoke Alcohol Licenses.**

Just as Ms. Starling owed no duty to the Plaintiffs or the Decedent with respect to the scheduling of hearings pertaining to decisions to grant, renew, suspend, or revoke alcohol licenses, the same is true with the City, even if the public duty doctrine is not otherwise applicable. Between December 6, 2011 and August 28, 2014, Section 6-3 of the City's ordinances made clear through the use of the term "may" rather than "shall", that the penalty provisions were discretionary, rather than mandatory. (SMF 43, 54, 58) In addition, at all times relevant to this cause of action, Section 6-35 has indicated that "a license *may* be suspended or revoked by the Mayor and City Council," which likewise injects the element of discretion into such decisions. (*Id.*) Finally, O.C.G.A. § 3-3-2 grants local governing authorities "*discretionary* powers within the guidelines of due process . . . as to the granting or refusal, suspension, or revocation of the permits or licenses..." (SMF 26)

O.C.G.A. § 36-33-2 expressly provides that "[w]here municipal corporations are not required by statute to perform an act, they may not be held liable for exercising their discretion in failing to perform the act." As a matter of law, the City cannot be held liable for exercising its discretion in failing to revoke or otherwise take action upon the licenses issued to the University Plaza Establishments. See City of Douglasville v. Queen, 270 Ga. 770, 772 (1999) (City was not negligent regarding deaths of children killed by train when they walked on railroad tracks to reach place to

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<sup>16</sup> To the extent it is Plaintiffs' position that other forms of "criminal activity" purportedly occurring in or around University Plaza – such as fights, open container violations, the use of fake ID's, and underage possession – constitute violations of the City's alcohol ordinances (which is expressly disputed, see SMF 113, there is also no evidence that Ms. Starling was aware of such activity at University Plaza. (SMF 245)

watch parade, as city was under no statutory obligation to notify railroad company that parade was taking place, request that trains reduce speed, warn parade spectators of danger of tracks, etc.).

**G. The Defendants Breached No Duty Owed to the Plaintiffs with Respect to the Renewal and/or Failure to Revoke Occupational Tax Certificates or Business Licenses.**

The City does not dispute that it issued occupational tax certificates to the University Plaza Establishments. (SMF 90, 93, 99, 106) The City also does not dispute that these licenses contain small print which refer to them as a “business license.” (SMF 247) However, the *material* undisputed fact is that these documents are not actually “licenses” to conduct business in the City that either the City or Ms. Starling could somehow revoke, and thereby shut down a business. (SMF 217-228)

In Georgia, it is a common misnomer to label an occupational tax certificate issued by a municipality as a “business license” when it is simply a receipt for the payment of county or municipal occupation taxes – which is exactly what the City’s occupational tax certificates represent in this case. (SMF 219-220) Occupational taxes are imposed by the City as revenue-raising, rather than regulatory, measures. Indeed, O.C.G.A. § 48-13-5(a) specifically defines ‘Occupation tax’ as “a tax levied on persons, partnerships, corporations, or other entities for engaging in an occupation, profession, or business and enacted by a local government as a revenue-raising ordinance or resolution,” which is the exact same definition that the City’s Code of Ordinances uses to defined the term “Occupation tax.” See City Code of Ordinance Sec. 18-101 (“Occupation tax means a tax levied on persons, partnerships, corporations, or other entities for engaging in an occupation, profession or business and enacted by the City of Statesboro for the purpose of raising revenue”). Thus, an occupational tax certificate simply reflects the payment of this administrative tax to the City, and is not a license to do business that can be revoked. See id. (“Occupation tax certificate

means a document issued by the City of Statesboro acknowledging payment of the occupation tax and administrative fee.). (SMF 219-220) It has been longstanding Georgia law that all occupation taxes are “imposed for the purpose of collecting revenue; and, although the mode of doing so is frequently called licensing, the real purpose is to enforce the collection of the municipal revenue.” Peginis v. City of Atlanta, 132 Ga. 302 (1909). Thus, “municipal authorities are not vested with a discretion to grant or refuse licenses or to revoke such licenses at the will of the grantor.” Id.<sup>17</sup> See also City Code of Ordinance Sec. 18-113 (“Payment of an occupation tax shall not be required prior to the commencement of business.”).

In light of the foregoing, neither the City nor the City Clerk (Ms. Starling) may be held liable in negligence for renewing or failing to attempt to revoke the occupational tax certificates issued to University Plaza Establishments. In fact, even if the Defendants had wanted to do so, an examination of the City’s Code would reveal that Chapter 18’s enforcement provisions are limited to actions to issue executions against individuals for taxes or fees which are owed and owing, and the imposition of civil penalties. (SMF 225-227) Thus, to the extent Plaintiffs’ negligence claim is premised upon the renewal and/or failure to revoke occupational tax certificates issued to Rude Rudy’s or the other University Plaza Establishments, their theory is baseless.

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<sup>17</sup> Georgia law distinguishes between occupation taxes and regulatory fees throughout Article 1, Chapter 13 of Title 48 of the Georgia Code, and these same distinctions are seen in Chapter 18 of the City’s Code of Ordinances. In both of these sources of authority, regulatory fees differ in that they are described as payments, whether designated as license or permit fees or any other name, which are actually required by a local government as an exercise of its police power. See O.C.G.A. § 48-13-5(6); see also City Code of Ordinances Sec. 18-101 (defining ‘Regulatory fee’ as “the payment required by the city as an exercise of its police power as part of or as an aid to regulation of an occupation, profession or business, the amount of which shall approximate the reasonable cost of the actual regulatory activity performed by the city.”). Here, the undisputed evidence demonstrates that neither Rude Rudy’s nor any of the other University Plaza Establishments were subject to regulatory fees by the City. (SMF 228)

**H. Defendants Did Not Cause the Decedent's Death.**

Finally, and perhaps most obviously, as shown below, any causal nexus between what the City and/or Ms. Starling may have been able to accomplish with respect to a given entity and the events leading to the Decedent's death is far too attenuated to establish proximate cause.

**1. Spencer's Criminal Intervening Act Breaks Any Causal Nexus.**

When the criminal conduct of a third person intervenes between the defendant's negligence and the plaintiff's injury and is the immediate and efficient cause of injury, the causal chain is broken so that the defendant's negligence is not the proximate cause of injury, even where the defendant's conduct gave an opportunity for the crime to take place. See Warner v. Arnold, 133 Ga. App. 174, 176 (1974) (When "there has intervened between the defendant's negligence and the injury and independent, illegal act of a third person producing the injury, and without which it would not have occurred, such independent criminal act should be treated as the proximate cause, insulating and excluding the negligence of the defendant."). Under such circumstances, whether or not a defendant can reasonably foresee the possibility of a third person's criminal act is a key factor in determining the defendant's liability for such an act.

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 establish the foreseeability of a third-party criminal act. 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.”). In addition, “[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 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).

There is no evidence that Ms. Starling had notice of any prior criminal acts occurring at Rude Rudy’s – or anywhere else at University Plaza – before August 28, 2014. (SMF 245.) There is a complete absence of any record evidence of attacks at Rude Rudy’s that are “substantially similar” to the beating that Spencer inflicted upon the Decedent. (SMF 205-207) There is no evidence of any other bouncer, whether on or off-duty, attacking an underage patron suspected of committing theft. In addition, while Plaintiffs may attempt to introduce evidence of fights and affrays that occurred in the parking lot of University Plaza, there is no evidence that the *City* was aware of any such activity

having ever occurred inside of Rude Rudy's, let alone evidence that the City was aware of prior substantially similar attacks inside of the establishment. Moreover, since the "substantially similar" caselaw set forth above pertains to property owners, and the City did not own or otherwise control either the University Plaza Establishments or the private parking lot that Plaintiffs so heavily focus on, nor did Ms. Starling, the element of foreseeability is even further lacking here.

**2. Plaintiffs Cannot Establish Proximate Causation.**

The mere fact that one event chronologically follows another alone is insufficient to establish a causal relationship between them. See Langston v. Allen, 268 Ga. 733(3) (1997); Walls v. Moreland Altobelli Assoc., Inc., 290 Ga. App. 199(1) (2008). In situations in which there exists a mere "possibility" of causation, proximate cause cannot be established, even by expert testimony.<sup>18</sup> See Gay v. Redland Baptist Church, 288 Ga. App. 28, 29 (2007); Head v. Sears Roebuck & Co., 233 Ga. App. 344 (1998); Bankers Health & Life. Inso. Co. v. Fryhofer, 114 Ga. App. 107, 111 (1996). When the defendant's negligence cannot be shown to be the direct, immediate, or efficient cause of the injury or when all causal connection is absent, the plaintiff has failed to establish an essential element of liability, and he will not be entitled to recovery. See McKinney v. Burke, 108 Ga. App. 501, 505 (1963); Bonard v. Lowe's Home Centers, Inc., 224 Ga. App. 85 (1996). Notably, the question of proximate cause "may be decided as a matter of law [when] the evidence shows clearly and palpably that the jury could reasonably draw but one conclusion, that the defendant's acts were

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<sup>18</sup> Villareal v. TGM Eagle's Pointe, Inc., 249 Ga. App. 147, 151 (2001) (Observing that "the plaintiffs' contention that an inspection would have prevented the fire is based upon mere speculation, which is insufficient to show proximate cause or to withstand summary judgment."); Damian for PFGBI, LLC v. Nelson Mullins Riley & Scarborough, LLP, 2017 WL 4303916, \* 12 (N.D. Ga. Sept. 28, 2017) ("Assuming, for the moment, that Defendants were negligent in their representation of PFGBI and that such negligence facilitated the closing of the Bankshares transaction, that negligence is still so remote from PFGBI's losses that any causal connection is speculative at best. Proximate cause demands more than speculation or the mere possibility of causation.").

not the proximate cause of the injury.” Atlanta Gas Light Co. v. Gresham, 260 Ga. 391, 393 (4) (1990); accord Beasley v. A Better Gas Co., 269 Ga. App. 426, 427–28 (1) (2004). This is such a “clear and palpable” case, resting tenuously on pure and utter speculation.

Plaintiffs’ theory of negligence is based on the assertion that the City Council necessarily would have voted to revoke Rude Rudy’s and the other University Plaza Establishments’ licenses if either the SPD had conducted more alcohol-related compliance checks and/or if the City Clerk had scheduled due process hearings on the citations the SPD did write. In turn, they speculate that Rude Rudy’s and the other establishments in question would not have been open on the fateful night of the Decedent’s death, and as a result he never would have been attacked by Mr. Spencer. These theories fail for multiple obvious reasons.

*First*, the concept that the City’s and/or 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. The Decedent, in violation of his own Intervention Agreement, entered Rude Rudy’s on August 27, 2014 via fake ID for the purposes of drinking alcoholic beverages, while underage and with the heightened awareness of his own knowledge of his less than 4-week-old intervention agreement. It was at Rude Rudy’s that an alleged off-duty bouncer beat him to death. There is no causal nexus whatsoever between violations at the other establishments and violations at Rude Rudy’s. (SMF 181-204)

*Second*, even if one were to speculate that (1) the ACB had not been informally disbanded at the time the July 2011 citations against Rude Rudy’s were written, (2) Ms. Starling had received notice of those citations and scheduled due process hearings against Rude Rudy’s, *and* (3) the City Council heard those violations, it is still impossible – even accepting each of those assumptions – to predict what punishment, if any, the City Council actually may have imposed, let alone whether the

requisite proof against Rude Rudy's would have been established to sustain the burden of proving an actual "violation" of the ordinance. Aside from pointing to the underlying UTC's and/or incident reports, Plaintiffs have no proof of what was observed by the citing officers, what types of witnesses they would have made, whether they would have been available for a hearing that was never scheduled, and what the establishment's attorneys or legal representatives might have been able to show or argue. (SMF 153) The same logic holds true with respect to the single citation issued in March 2013 and the four issued in March and May of 2014.<sup>19</sup> (SMF 167).

*Third*, the concept that the City could have summarily failed to renew or revoke an alcohol license has no legal support. As noted, O.C.G.A. § 3-3-2(b) requires that City's provide due process rights when considering whether or not to grant, renew, suspend, or revoke an alcohol license. (SMF 26) In addition, when a municipal ordinance sets forth criteria which, if met, results in the issuance of a license, and specifies that such a license may only be suspended or revoked upon a showing of cause, the ordinance creates a protectable property interest in the license. See Goldrush II et al. v. City of Marietta, 267 Ga. 683, 695 (1997) ("Since Marietta's city code sets forth the criteria which, if met, results in the issuance of a license, and specifies that a liquor license issued by the city can be suspended or revoked only upon a showing of cause, the city code created a protectable property interest in the license.") Moreover, Plaintiffs' speculative theory fails to recognize the fact that one whose protected property interest is taken away by a body such as a city council has the *right to*

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<sup>19</sup> In addition, because the look-back window for enforcing penalties against an establishment was 12 months between December 6, 2011 and August 28, 2014, the maximum number of "violations" the City Council theoretically may have found against Rude Rudy's based on the underlying citations at any point during that time period would have been four, i.e., either by finding four violations between March 28, 2013 and March 9, 2014, or four violations between February 23, 2014 and May 2014. The maximum suspension under the ordinance allowed that the City "may" have been up to thirty days, likely depending on how the first was treated, i.e., as a "warning" or as a one-day suspension. (SMF 54)

*appeal* such decision by filing a writ of certiorari. See Rozier v. Mayor & Aldermen of the City of Savannah, 310 Ga. App. 178 (2011); Soerries v. City of Columbus, 222 Ga. App. 745 (1996). See also O.C.G.A. § 5-4-1. Notably, when a writ of certiorari is filed under such circumstances, it acts as *supersedeas* of the underlying decision, thus delaying the ultimate revocation of an alcohol license. See O.C.G.A. § 5-4-19 (“The writ of certiorari, when granted in civil cases, shall operate as a supersedeas of the judgment until the final hearing in the superior court.”). This procedural remedy makes the Plaintiffs’ theory all the more speculative and improbable, because it not only means that any revocation would have been subject to an appeal to a higher authority, but also that if such an appeal were filed, it is even more difficult to predict *when* the suspension or revocation actually would have been effective, let alone if the underlying penalty would or would not have been reversed. This is the precise type of speculative and innuendo-based theory of recovery that Georgia jurisprudence prohibits in negligence cases.

**3. The Decedent’s Own Intervening Conduct Bars Recovery.**

The Decedent’s intentional and intervening conduct bars any recovery in this action. It is undisputed that the Decedent was arrested in Athens, GA on July 4, 2014, and in connection with that arrest and the resulting charges, entered into the Pretrial Intervention Program Agreement. That Agreement forbade him from violating the law, consuming alcohol, and entering an establishment with the primary purpose of generating revenue from the sale of alcohol. Yet, every single one of those prohibitions and directives were ignored by the Decedent on the night in question when he came to Rude Rudy’s, drank alcohol, and purchased alcohol for his underage friends. (SMF 181-197)

Under Georgia law, an original tortfeasor’s chain of causation may be broken by an intervening or supervening act of another if a new cause intervenes, which is of itself sufficient to

stand as the cause of the misfortune. See Granger v. MST Transp., LLC, 329 Ga. App. 268(1) (2014). The proximate cause in such circumstances is considered the “last wrongful act” rather than the original one. See Kline v. KDB, Inc., 295 Ga. App. 789(4) (2009). When this situation occurs, the intervening and unexpected second wrongful act makes the original wrongful act too remote to be the proximate cause of the injury. See, e.g., Stegall v. Central Georgia Electric Membership Corp., 221 Ga. App. 187 (1996) (not foreseeable that after strong warning to the contrary, a defective electric circuit breaker would be turned back on before proper repairs were made); Howard v. McFarland, 237 Ga. App. 483 (1999) (intervening fraudulent acts of another not foreseeable); Meinders v. Forson & White, 210 Ga. App. 612 (1993) (negligence of plaintiff’s first attorney in failing to perfect service was superseded by second attorney’s negligence in failing to do the same thing).

The facts and circumstances of this case mandate a finding that Decedent’s negligent and intentionally wrongful acts in knowingly violating his Pretrial Agreement by being present at Rude Rudy’s, and otherwise violating the law while there, superseded any negligence of the City or Ms. Starling (the existence of which is denied). Simply put, if the Decedent had not committed these violations, and simply avoided Rude Rudy’s as he had been ordered and agreed to do, the unfortunate incident would not have occurred. Plaintiffs would have this Court believe that Decedent had no responsibility for the events that led to his death. Such is clearly not the case. Had he simply honored his Pretrial Intervention Agreement and not entered Rude Rudy’s on August 27, 2014, he may be alive today.<sup>20</sup>

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<sup>20</sup> “A claim for negligent [supervision or] retention is necessarily derivative and can only survive summary judgment to the extent that the underlying substantive claims survive the same.” MARTA v. Mosley, 280 Ga. App. 486, 489 (2006). See also Morris v. United States, 2007 U.S. Dist. LEXIS 26708, at \*28-29 (N.D. Ga. April 11, 2007) (same); Hospital Auth. of

## CONCLUSION

This is a tragic case involving the death of a young man. But it should have never been filed against the City of Statesboro or Sue Starling. The many defenses set forth in this motion necessitate judgment in their favor and an award of all other appropriate relief.

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

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Valdosta/Loundes County v. Fender, 342 Ga. App. 13 (2017) (“Like claims based on respondeat superior, claims ... for the negligent hiring, training, supervision, and retention of an employee are derivative...”). Thus, Plaintiffs’ respondeat superior, negligent supervision, and general negligence claims against the City must be dismissed for this additional reason.

