IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

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

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' NUISANCE AND DAMAGES CLAIMS**

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> **"Huddle House has cited no cases holding a city liable for nuisance for injuries resulting from the criminal acts of third parties committed on or near the premises of a private business."** *City of Toccoa v. Pittman*, 286 Ga. App. 213, 217 648 S.E.2d 733, 738 (Ga. App. 2007)
>
> **"There is no case law indicating that a municipality may be held liable for creating or maintaining a nuisance on private property held by another."** *City of Albany v. Stanford et al.*, 815 S.E.2d 322, 330, n.3 (Ga. App. 2018) (Gobeil, J., concurring fully and specially.)

## INTRODUCTION

On August 28, 2014, Grant Spencer ("Spencer") killed Michael Joseph Gatto ("the Decedent") following an altercation that started inside the premises of Rude Rudy's and ended in the parking lot of University Plaza, Inc. ("University Plaza"). It is undisputed that Rude Rudy's primary revenue was generated through the sale of alcohol. Pursuant to a pretrial intervention agreement signed by the Decedent less than a month before his death, he agreed not to be present at places like Rude Rudy's on the night in question, let alone to be drinking alcohol or otherwise violating the law (such as by using a false identification card or purchasing alcohol for minors). Neither Rude Rudy's nor University Plaza were owned, operated, or managed by the City of Statesboro ("the City") or its City Clerk, Sue Starling. Rather, Rude Rudy's was owned and

operated by Jonathan Starkey, and University Plaza – which maintained control over the parking lot in which the Decedent was thrown and left to die – was owned and operated by Holmes 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 claims against the City and Ms. Starling (a public servant), who they apparently believe are better candidates for potentially satisfying a money judgment.

Plaintiffs have sued the City and Ms. Starling under both a negligence and a nuisance theory of recovery. This motion addresses only the *nuisance* claim (and certain claimed damages), which is based on the flawed premise that the City should have shut down Rude Rudy's (and several other establishments located at University Plaza that have no connection to the Decedent's death) by revoking its occupational tax certificate and alcohol licenses, and/or by attempting to do so by obtaining an injunction in a public nuisance action. 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' pre-suit ante litem notice failed to place the City on proper notice of their nuisance claim. *Third*, it is undisputed that neither the City nor Ms. Starling owned the property where Rude Rudy's was situated, and neither had any involvement or control whatsoever in the operation and management of Rude Rudy's. It is also undisputed that Grant Spencer pled guilty to the homicide of the Decedent and committed a criminal act. Therefore, this case is controlled by

City of Toccoa v. Pittman, 286 Ga. App. 213 (2007) and City of Albany v. Stanford, 815 S.E.2d 322 (Ga. App. 2018) (*physical precedent only*), in which the Georgia Court of Appeals twice rejected the exact same theory of recovery Plaintiffs are attempting here. In both cases, the Court of Appeals noted that "[the plaintiff] has cited no cases holding a city liable for nuisance for injuries resulting from the criminal acts of third parties committed on or near the premises of a private business." Pittman, 286 Ga. App. at 217; Stanford, 815 S.E.2d at 330, n. 3 (Gobeil, J., concurring). The rulings in both Pittman and Stanford are based on the longstanding rule that municipalities are simply not liable for failing to abate an alleged nuisance maintained by a private person or business on private property, unless the nuisance obstructs a public street or sidewalk or imperils the safety of travelers on any such street or sidewalk or amounts of a "taking" of private property. In addition, public nuisance claims have never been found applicable to individuals such as Ms. Starling. *Fourth*, there is insufficient evidence that Rude Rudy's (or other University Plaza Establishment) *was* a public nuisance, and Plaintiffs lack standing to pursue a private nuisance. *Finally*, any nexus between what the Defendants may have been able to accomplish with respect to that entity and the events leading to the Decedent's death is far too attenuated to establish proximate cause. For these reasons, summary judgment is due on the nuisance claims. In addition, because Plaintiffs' underlying claims fail as a matter of law, and there is otherwise no evidence of bad faith or stubborn litigiousness, and no evidence of conscious pain and suffering, Defendants are entitled to summary judgment on Plaintiffs' claims for attorneys' fees and for conscious pain.

## 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 2-3.)[1] The City officially acts by and through the Mayor[2] 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.[3] (SMF 4-6).

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[4] supervising the City's various department heads. (SMF 4-6). In addition, the positions of City Attorney,[5] Municipal Court Judge,[6] and City Clerk are appointed and supervised by the Council. (SMF 16-20). Ms. Starling has been the City Clerk since mid-August, 2008.[7] (SMF 25).

**B. <u>Relevant Factual Background</u>.**

**1. <u>Municipal and State-Issued Alcohol Licenses</u>.**

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[1] 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.

[2] 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 8-10),

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

[4] 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).

[5] 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 and City Solicitor between mid-December 2011 and August 28, 2014. (SMF 69, 77, 79)

[6] 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. (SMF 120).

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

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…" (Emphasis added). (SMF 27) 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.

(Emphasis added.) (SMF 27). In addition, a state license issued by the Georgia Department of Revenue ("DOR") is required. (SMF 28). If a local license is revoked, a state license becomes invalid; likewise, if a state license is revoked, a local license becomes invalid.[8] (SMF 29).

**2. <u>Relevant History of the City's Alcohol Ordinances</u>.**

Here, the Defendants adopt and incorporate by reference the summary of undisputed facts and citations related to the history of the City's Alcohol Ordinances as set forth in Section B.2, Summary of Undisputed Material Facts, of their *Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Plaintiffs' Negligence Claims*.

**3. <u>The City's Longstanding Internal Procedure for Providing Notice to the City Clerk of Alleged Violations of the Alcohol Ordinances</u>.**

Defendants adopt and incorporate by reference the summary of undisputed facts and citations related to the history of the City's Alcohol Ordinances as set forth in Section B.3., Summary of Undisputed Material Facts, of their *Memorandum of Law in Support of Defendants'*

[8] 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).

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**4. <u>The City Clerk's Internal Procedure for Awaiting Municipal Court Adjudication Prior to Scheduling a Due Process Hearing</u>.**

Defendants adopt and incorporate by reference the summary of undisputed facts and citations related to the history of the City's Alcohol Ordinances as set forth in Section B.4., Summary of Undisputed Material Facts, of their *Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Plaintiffs' Negligence Claims.*

**5. <u>University Plaza, Inc. and the "University Plaza Establishments"</u>.**

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 City Clerks, its current or former Managers, any current or former employees of the SPD, its current or former Mayors, or any current or former councilpersons 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, of particular importance to this motion, none of the tenants owned or controlled any portion of the ***parking lot*** at University Plaza. (SMF 84, 85). The parking lot at University Plaza was ***privately owned***, rather than a public street or sidewalk controlled by the City. (SMF 81,82, 85) There is also no evidence that the City *ever* issued an alcohol license to University Plaza, Inc. (SMF 87) 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 <u>not</u> 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. ("Retrievers"). (SMF 89) The City's records have always indicated that the owner and licensee of Retrievers was Jason Franklin. (SMF 91) On July 16, 2002, the 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.[9] (SMF 94) 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. (SMF 107)

On October 19, 2005, the 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 ACB approved Rude Rudy's to sell liquor, a decision that was upheld on appeal by the City Council. (SMF 98) The City Clerk's records pertaining to Rude Rudy's have always indicated that Mr. Starkey was its sole owner/operator. (SMF 100) 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 they *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)[10]

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[9] 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)

[10] Will and Trey Britt were asked about a recent FBI raid, and both invoked their 5th 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

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)

**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) Meanwhile, several significant personnel and departmental changes took place.[11] (SMF 120-125) In January, February and May of 2011, Ms. Starling learned of and scheduled due process hearings against the alcohol licensees of Rusty's Tavern,

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one or more businesses at University Plaza during the year 2014." (SMF 108) However, Will Britt denied, and did not invoke the 5th 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 against other businesses at University Plaza to be brought before the City Council for a hearing. (SMF 110)

[11] 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 121) Wendell Turner was subsequently promoted to the position of Public Safety Director; a short-time later, the City Manager, Shane Haynes, was terminated; and in January 2011, Attorney Brannen passed away. (SMF 123-125)

Kevin's Food Mart, Sunny Food Mart, Buffalo's, Christopher's, Holiday Pizza, and Millhouse. (SMF 126-131). The hearing against Rusty's Tavern resulted in a 10-day suspension of its alcohol license by unanimous vote of the City Council, whereas (also by unanimous vote) the remaining businesses were given a "warning," without any suspension. (Id.)

**b. July 2011 Citations, Leaphart's Dismissal of Underlying Criminal Actions, and 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." Five of the "hours of sale" citations were issued for the exact same even on the exact same night – making it unlikely that any court or administrative body would have viewed these are five separate violations related to a singular incident. (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 testified he sent the 8/3/2011 email because he was leaving his employment with the City the next week, and 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 138, 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 142-143) 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) 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)[12] Critically, there is no evidence that 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 147,148) There is also no evidence which demonstrates that Starling ever received copies of any of the 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

[12] 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).

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)

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

There is no 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 152) No citations were issued to Rude Rudy's, Rusty's Tavern, or Retriever's between July 24, 2011 and March 27, 2013. (SMF 136, 151)

In March and August 2013, the SPD conducted city-wide compliance checked 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; employees of Rusty's Tavern were cited on March 28, 2013 and August 22, 2013; and an employee of Retrievers was cited on August 22, 2013, all for alleged violating state laws prohibiting the underage sale of alcohol. (SMF 154-159) 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 to 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.

(SMF 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 163) However, the *actual UTC's* referenced by Mr. Turner were *not attached* and contain no information about the specific violations in each case, or the name of any individual who was cited. (SMF 165) There is no evidence that Starling ***ever*** received either the actual or copy of citations 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 noise ordinance citations, which were marked with a "warning" label. (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 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 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 being within DOR Special Agent Ron Huckabee's jurisdiction and despite his unit's frequent compliance operations in the City. (SMF 176-179)

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

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 voluntarily agreed, with the assistance of his counsel, 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. (SMF 184) It is also undisputed that: (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 i.d; (4) the Decedent was attacked and beaten by Spencer on August 28, 2014, ultimately dying from his injuries; and (5) 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 185-196) On October 11, 2016, Spencer pled guilty to the voluntary manslaughter of the Decedent. (SMF 197)

**C. Plaintiffs' Nuisance Claims.**

Plaintiffs' operative nuisance claim is set forth in their Third Amended Complaint ("TAC"), which was filed on July 27, 2018. Notably, the TAC's nuisance claim differs substantially from the Count II nuisance claim set forth within the original Complaint (but is quite similar to the original Count III nuisance claim that has already been dismissed)[13] 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, they 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). For each of the reasons set forth below, the Defendants are entitled to summary judgment on Plaintiffs' nuisance claims.

[13] Count III of the original 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. The Court dismissed that "environmental" claim in response to the Defendants' Motion for Partial Judgment on the Pleadings in an order dated January 30, 2017. Yet, in Count III of the Third Amended Complaint, Plaintiffs have attempted to disguise virtually the same claim by limiting it to establishments in an area of the City known as University Plaza. It is the same leopard with the same spots.

## 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). 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 opposition to a] motion for summary judgment." HCP III Woodstock, Inc. v. Healthcare Services Group, Inc., 254 Ga. App. 242, 244 (2002). 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).[14]

### B. The City 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

[14] 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.); Brewer v. Schacht, 235 Ga. App. 313, 318 (1998) ("Unsupported inferences or conjecture regarding a defendant's motivation [does] not suffice to show malice."); Johnson v. Auto/Mend, Inc., 183 Ga. App. 311, 311 (1987) (no tortious interference when there was nothing, beyond conclusory allegations, to controvert defendant's showing that they acted in what they believed to be the best interests of the business and without malicious intent).

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' TAC.**

Defendants adopt and incorporate by reference the argument and citation of authority set forth in Section C, Argument and Citation of Authority, of their *Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Plaintiffs' Negligence Claims*, pertaining to the insufficiency of the *ante litem* notice. The City also notes that while O.C.G.A. § 36-33-5(b) specifically refers to "negligence" claims, the Georgia Supreme Court has consistently found the statute applicable to nuisance claims as well. See City of Walnut Grove v. Questco, Ltd., 275 Ga. 266(2) (2002) (holding trial court properly dismissed nuisance claims against a city due to an insufficient *ante litem* notice); Turner v. City of Tallapoosa, 289 Ga. 138, 142 (2011) (same). Again, the pre-suit *ante litem* notice contains no reference to establishments other than Rude Rudy's. Concomitantly, because the TAC's nuisance claim is not based just on the licensing of Rude Rudy's, but rather the alleged creation of a nuisance at the "University Plaza Establishments," the entire claim is subject to dismissal for failure to comply with O.C.G.A. § 36-33-5(b).

**D. Even if Plaintiffs Could Pursue the TAC's Nuisance Claim, They Failed to Prove Essential Elements of the Claim.**

For the reasons above, Defendants are entitled to judgment as a matter of law on Plaintiffs' nuisance claim. But even if there was a waiver of sovereign immunity and even if Plaintiffs had properly preserved the right to pursue the TAC's nuisance claim, (which they did not) they cannot prove the essential elements of that claim.

Establishing the maintenance, cause, or creation of a public nuisance against a

municipality is an exceedingly difficult and exacting standard. To be liable for allegedly creating, causing, or maintaining a nuisance, a plaintiff must establish, among other elements, that: (1) the defect or degree of misfeasance by the municipality was to such a degree that it actually *exceeded* the concept of mere negligence; (2) the *acts* purportedly causing, creating, or maintaining the nuisance were of *duration*, rather than isolated; (3) the city failed to act within a reasonable time after actual or constructive knowledge of the defect or dangerous condition; and (4) that the nuisance was the proximate cause of the plaintiff's harm. See, e.g., Rainey v. City of East Point, 173 Ga. App. 893, 894 (1985) (citing City of Bowman v. Gunnells, 243 Ga. 809(2) (1979)); Toyo Tire North American Mfg., Inc. v. Davis, 299 Ga. 155, 158(2) (2016) ("Causation is an essential element of nuisance…"). In the instant case, there is no genuine issue of material fact which creates a material dispute as to each of the above-referenced essential elements.

**1. The City Did Not Maintain, Create, Cause, or Control any Alleged Nuisance at the University Plaza Establishments.**

Plaintiffs allege that the City and Ms. Starling maintained, created, caused, and/or controlled a "nuisance" at University Plaza by licensing four businesses that were located there: Rude Rudy's, Retrievers, Rum Runners, and Rusty's Tavern. (TAC ¶¶ 24-54, 158-164). Plaintiffs further allege that despite the Defendants' purported knowledge of criminal activity occurring at University Plaza prior to August 27-28, 2014, they renewed and failed to revoke the alcohol and business licenses of the University Plaza Establishments, which they claim proximately caused the Decedent's death. (Id. at ¶¶ 161-164). Plaintiffs' claim is fatally flawed, because this theory of recovery has been rejected by clear and controlling precedent.

It is undisputed Rude Rudy's was owned by Jonathan Starkey; Retrievers was owned by Jason Franklin; Rum Runners was owned by Jim Stafford; and Rusty's Tavern was owned by James "Rusty" Ledford. (SMF 89 to 107). More importantly, regardless of actual or allegedly

hidden ownership, there is no evidence that any of these private establishments were owned or operated by the City, let alone that the City and/or Ms. Starling had any responsibility for hiring, firing, training, or managing any employees who worked at those entities. (SMF 112) It is also undisputed that each of those businesses were located at University Plaza, which was managed by its sole member, Mr. Ramsey (SMF 81), and that while each of the "University Plaza Establishments" leased rental space from University Plaza, control over the parking lot was at all times maintained by University Plaza. (SMF 83.) There is also no evidence that the City issued an "alcohol license" to University Plaza, Inc. (SMF 87). While Plaintiffs have speculated that Will or Trey Britt may have had some secret interest in Rum Runners or Rude Rudy's, they denied as much and, in any event, their alleged interest in those establishments and any others is immaterial.[15] In addition, the Britt's invocation of the 5th Amendment cannot create disputed fact as to the issue – neither Will Britt nor Trey Britt is a party to this case, and Trey Britt has never been employed by the City. Trey Britt is not Will Britt, and Will Britt is not the City.[16]

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[15] As noted above, the City's Charter provides that the municipal government of the City consists of a Mayor and a five-member City Council, that the City acts by and through the Mayor and City Council, who have, among other powers, the authority to contract and to be contracted with on behalf of the City, and that "three councilmembers shall constitute a quorum and shall be authorized to transact the business of the council." (SMF 2-4.) Therefore, Mr. Britt, as an individual and private citizen, is not the "City." In other words, even if Mr. Britt had some secret undisclosed interest in Rum Runners or even Rude Rudy's, because the City, as a corporate body, acts by and through its collective Mayor and City Council, the individual alleged personal financial interests of a single City Council member have absolutely no bearing on whether or not the City itself (or Starling, for that matter) owned or otherwise maintained control or accepted a dedication over Rum Runners, Rude Rudy's, or any other University Plaza establishment. See City of Atlanta v. Kleber, 285 Ga. 413, 419 (2009) ("[I]n order to become responsible [for the alleged cause, creation, or maintenance of a nuisance], a municipality must actively take control over the property in question or accept a dedication of that property."); Stanfield v. Glynn County, 280 Ga. 785, 786(1) (2006) (county not liable for nuisance where it neither owned nor was charged with maintaining a waste facility, even though it approved construction and building permits for the facility in question).

[16] In Georgia, the invocation of the 5th Amendment permits, but does not require, the factfinder to draw an adverse inference that a party's testimony would be unfavorable to that

These material undisputed facts are fatal to Plaintiffs' claims, because the longstanding

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party in a civil action. See Simpson v. Simpson, 233 Ga. 17, 21 (1974) (adverse inference against defendant was proper because **both** the defendant and the third-party refused to testify); Green v. McKesson Corporation, No. 2002-CV-48407, 2005 WL 5239705 (Ga. Super. Dec. 05, 2005) ("although the Plaintiffs may be ultimately be entitled to an instruction that the jury may draw adverse inferences against [the defendant] based upon the officers' invocations of their Fifth Amendment privileges, the Court declines to apply such inferences at summary judgment."). Here, no adverse inference can be drawn against the City because **neither Will Britt nor Trey Britt is a party to this action.** But even if the Court were to consider drawing any alleged adverse inference in ruling on summary judgment, it would not support an argument that Will or Trey Britt held an interest in any of the University Plaza Establishments. An adverse inference from invocation of the privilege "is based upon an implied admission that a truthful answer would tend to prove that the witness had committed the act." Simpson, 233 Ga. at 21. Here, the questions to which Trey and Will Britt invoked the privilege was whether documents obtained an FBI raid might show that they had a financial interest in one or more businesses at University Plaza during the year 2014. (SMF 109). Thus, even if Will Britt or Trey Britt's responses created an implied admission that *documents* show they owned an interest in one or more businesses at University Plaza in the year 2014, this would not resolve (1) whether they, *in fact*, did own an interest in one or more businesses at University Plaza, and (2) more importantly, whether they **actually had** an interest in the University Plaza Establishments. Indeed, there were several businesses at University Plaza other than the University Plaza Establishments in which Will or Trey Britt could have held an interest, as well as other businesses that did not even sell alcohol, including a "Fast N' Easy." (Ramsey Dep. 15:7-18). In addition, insofar as Will Britt expressly denied he had an interest in Rum Runners and Rude Rudy's, but then invoked the 5th Amendment when asked generally about the "University Plaza Establishments," any inference would necessarily have to be limited to a business other than Rude Rudy's or Rum Runners (such as Rusty's Tavern, Retrievers, or Fast N'Easy). In this regard, the case is similar to Perez v. Atlanta Check Cashers, Inc., 302 Ga. App. 864, 870-71 (2010). In Perez, a former employee filed a motion for class certification of identity fraud and invasion of privacy claims against his former employer seeking to add a class comprising other past and present employees. In denying the motion, the court found that individual facts regarding whether employees consented to documents being submitted on their behalf would predominate in the case. The plaintiff argued that the need for individualized evidence could be avoided based on a former manager refusing to answer questions related to forged applicant signatures in his deposition based of the Fifth Amendment. The court held that even if the responses constituted implied admissions that there were applications with forged signatures, it did not resolve the issue of whether any particular proposed class member had their signature forged. In fact, the court stated in a footnote, "We need not resolve under what circumstances a nonparty witness's invocation of the privilege can be used to draw an adverse inference against a party." Perez, 302 Ga. App. at 871, n. 9. Like Perez, even if the responses constitute implied admissions that Will or Trey Britt, both of whom are non-parties, owned an interest in a University Plaza business, this would not resolve the issue of whether Will or Trey Britt owned an interest in the University Plaza Establishments. Thus, no adverse inference can or should be drawn against the City, particularly with respect to Rude Rudy's and Rum Runners.

rule, both in Georgia and elsewhere, is that municipalities may not be held liable for failing or refusing to abate a purported nuisance maintained by a private person on private property, *unless* the nuisance obstructs a public street or sidewalk or imperils the safety of travelers on the street or sidewalk. See Stanford, 815 S.E.2d at 327 ("Thus, because Plaintiffs have not demonstrated that the criminal activity at Brick City was a nuisance maintained by the City resulting in damage to private property…the City is protected from suit") and 329 ("Further, given the rationale for the municipality exception – that the government may not unreasonably interfere with private property rights – I see no basis for extending the exception to include claims arising from a private nuisance."); Mayor & Council of Dalton v. Wilson, 118 Ga. 100, 104 (1903) (Holding that a municipal corporation is not liable for failure or refusal to abate a nuisance maintained by a private individual on private property, and not of such a character as to obstruct a public street or imperil the safety of travelers thereon); see also 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.59.30, at 477-78 (3d ed. Rev. 2003) ("As the duty of a municipal corporation to abate nuisances created or maintained on private property has been traditionally characterized as governmental…a municipality ordinarily will not be liable for failure to abate such a nuisance…"); JOSEPH A. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES § 358, at 518-19 (1906) ("And the rule is declared to be well settled that no action for damages will lie against a municipal corporation for failure to abate a nuisance maintained by a private individual on private property, where such nuisance in no way amounts to an obstruction of a public street or in any way imperils the safety of travelers upon the street."). Even assuming that Rude Rudy's or the other University Plaza Establishments constituted a legal nuisance – which is expressly disputed – it was maintained by private business owners on private property, and there is no evidence that any such nuisance obstructed a

*public* street or sidewalk or imperiled the safety of travelers on any such street or sidewalk, let alone that the Decedent was attacked on any such public street or sidewalk. It is undisputed that the attack began inside Rude Rudy's. (SMF 190-193). It is undisputed that the attack did not occur on a public street or sidewalk. (Id.). Longstanding precedent bars Plaintiffs' claims as a matter of law.

Critically, the Georgia Court of Appeals re-affirmed this principle in a case with facts that are virtually on all-fours with the facts purportedly giving rise to Plaintiffs' claims. In Pittman, the third-party plaintiff alleged that the City of Toccoa was liable in nuisance for not shutting down the business where the plaintiffs' decedent was killed, despite licensing the establishment and having knowledge of illegal activity occurring there. The Court of Appeals rejected this theory of liability, not on the basis of sovereign immunity, but because "**the [third-party plaintiff] has cited *no cases* holding a city liable for nuisance for injuries resulting from the criminal acts of third parties committed on or near the premises of a private business.**" 286 Ga. App. at 217 (Emphasis added). The complete dearth of any caselaw supporting the Plaintiffs' theories in this case was also noted in Judge Gobeil's concurring opinion in Stanford:

> Moreover, to the extent cases have indicated that a municipality could be held liable for a public nuisance, such cases have involved nuisances situated on property owned or controlled by a city. See Spooner v. City of Camilla, 256 Ga. App. 179, 183 (2) (b), 568 S.E.2d 109 (2002) (plaintiff contended that city had maintained a nuisance (a mining pit filled with water on a city-owned property)); City of Vidalia v. Brown, 237 Ga. App. 831, 835 (2), 516 S.E.2d 851 (1999) (plaintiff claimed city had maintained a nuisance within the city-owned right-of-way). **There is *no case law* indicating that a municipality may be held liable for creating or maintaining a nuisance on private property held by another.**

Stanford, 815 S.E.2d 330, n. 3 (Gobeil, J., concurring). Simply put, there has *never* been a reported decision in this State in which a municipality has ever been held liable in nuisance for

injuries caused by third-party crime on private property. Because Pittman remains good and controlling precedent, Stanford reaffirmed the logic of Pittman, and there being no meaningful difference between the facts of the Pittman and Stanford cases and the facts in this case, the outcome should be the same. See also CHARLES R. ADAMS, GEORGIA LAW OF TORTS § 27:1, Nuisance ("There is no liability for maintenance of a nuisance by another, absent some valid agency relationship.")[17]

**2. Plaintiffs Have Failed to Establish That Rude Rudy's or the Other University Plaza Establishments Constitute a Public or Private Nuisance.**

Georgia law recognizes two types of nuisances: public and private. While it is unclear from the TAC whether Plaintiffs are alleging a public or private nuisance, what is not unclear is that Plaintiffs have failed to generate admissible evidence that either type of nuisance existed at University Plaza.

**a. Plaintiffs Have Not Demonstrated That Every Patron Who Patronized University Plaza Establishments Was Harmed and That Defendants' Acts Were Continuous or Regularly Repetitious.**

"A public nuisance is one which damages *all persons* who come within the sphere of its operations, though it may vary in its effects on individuals." O.C.G.A. § 41-1-2 (emphasis added). In addition, to constitute a public nuisance, there must be evidence of interference with a *public right*. See City of Douglasville v. Queen, 270 Ga. 770, 774 (1999) ("A public nuisance exists if the act complained of affects *rights* which are *common to all* within a particular area.") (Emphasis added); Cox v. De Jarnette, 104 Ga. App. 664, 676-77 (1961) (A public nuisance

[17] Plaintiffs' assertion that the City's alleged knowledge of criminal activity in or around the University Plaza Establishments was tantamount to control over the private property also fails. In order for a municipality to be liable in nuisance, the City had to have "knowledge of the condition *and* control over it." Banks v. City of Brunswick, 529 F. Supp. 696, 699 (S.D. Ga. 1981) (emphasis added). Knowledge of a condition on private property combined with failure to act upon such knowledge does not create control over that condition.

requires "some act or omission which obstructs or causes inconvenience to the public in the exercise of rights common to all."). See also Restatement (Second) of Torts § 821B, "Public Nuisance," cmt. g. (1979) ("There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and *not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured*.") (Emphasis added). See also Stanford, 815 S.E.2d at 330 (Noting that a public nuisance claim "is traditionally recognized as an unreasonable interference with a right ***common to the general public***.") (Gobeil, J., concurring) (citations omitted and emphasis supplied). Moreover, while a public nuisance claim does not require that "every person within the nuisance's sphere of operations must have actually been hurt or injured," such as all individuals in a given community who reside near the nuisance, it nevertheless must be shown that "**it injures those members of the public who *actually come into contact with it*.**" CHARLES R. ADAMS, GEORGIA LAW OF TORTS § 27:2, Public Nuisance (emphasis added). In other words, if Rude Rudy's or the other University Plaza Establishments were actually a public nuisance, all of those patrons who actually entered its sphere of operations must have been hurt or inconvenienced in some form or fashion and the interference must have also represented a right common to all members of the public (such as the right to traverse a public street).

As noted above, there is no evidence that every single person who entered the University Plaza Establishments was harmed. (SMF 205-207).[18] There is also no evidence that any person

[18] The record establishes that over the course of five years, Rum Runners was never actually cited with an alcohol ordinance violation, Retrievers was cited a single time, Rusty's Tavern four times, and Rude Rudy's 12, yet 11 of those were dismissed and not criminally prosecuted at the municipal court level. (SMF 246) In addition, while Plaintiffs often attempt to cite to the criminal activity purportedly occurring in the parking lot of University Plaza, the alcohol ordinances do not implicate such activity to businesses, especially when they do not own or control the parking lot. (SMF 85, 113.) Therefore, the inadmissible and irrelevant criminal

other than the Decedent was attacked and beaten unconscious by an on or off-duty bouncer at a University Plaza Establishment. (SMF 206). Multiple witnesses in this case affirmed that they had never witnessed or heard about any altercation similar to the one that injured the Decedent. (SMF 207). It is undisputed that Decedent had been to both Rum Runners and Rude Rudy's on occasions prior to the evening of August 27-28, 2014, and there is no evidence that he suffered any physical harm on those occasions. (SMF 185-187). And finally, there is no evidence of any right common to the public to patronize Rude Rudy's or any of the other University Plaza Establishments. See Cox v. De Jarnette, 104 Ga. App. 664, 676-677 (1961) (holding that slippery steps and a landing at a church, which violated city ordinances, were not a public nuisance because there was not a right common to all members of the public to use the steps and landing). Thus, in addition to the fact that Plaintiffs cannot demonstrate that every person who "came into contact" with the University Plaza Establishments was harmed, Plaintiffs' nuisance claim fails for the additional reason that the right to be present at and/or drink alcohol at the University Plaza Establishments, or the *individual right* to be free from an *assault* at such an establishment by a third party such as Mr. Spencer, are clearly not rights common to all members of the public, and certainly were not rights possessed by the Decedent: an eighteen-year-old who was specifically court-ordered not to consume alcohol at the time or to enter an establishment with the primary purpose of generating revenues through the sale of alcohol.

Moreover, to establish a public nuisance, a plaintiff must show that "the act complained of is of some *duration* and the maintenance of the act or defect must be *continuous* or *regularly repetitious*." Pittman, 286 Ga. App. at 216 (emphasis added). Therefore, "[a] one-time occurrence does not amount to a nuisance." Id. (citing Hibbs v. City of Riverdale, 267 Ga. 337,

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activity in the parking lot does not thereby establish, let alone support, that Rude Rudy's, Retrievers, Rusty's Tavern, or Rum Runners constituted a public nuisance.

338 (1996) (holding that a city assumed no responsibility for any nuisance created by a subdivision's storm drainage systems merely because it approved a construction project)). See also Goode v. City of Atlanta, 274 Ga. App. 233, 236 (2005) (holding that the trial court properly granted summary judgment on claim of nuisance because even if the city's negligence caused a water main to break and cause damage to Goode's home, an "isolated act of negligence cannot form the basis of a nuisance claim."). "To the contrary, in order to become responsible [for the alleged cause, creation, or maintenance of a nuisance], a municipality must *actively take control* over the property in question or *accept a dedication* of that property." City of Atlanta v. Kleber, 285 Ga. 413, 419 (2009) (citing Merlino v. City of Atlanta, 283 Ga. 186(2) (2008)) (emphasis added).

In the instant case, Plaintiffs' nuisance claim is based on the assertion that "Defendants Statesboro and Starlings' acts and omissions in allowing Rude Rudy's, Retrievers, Rum Runner's, and Rusty's Tavern to remain in operation and not revoking their alcohol and/or business licenses . . . created a hazardous and dangerous condition at the University Plaza Establishments, which constituted a nuisance…." (TAC ¶ 160). While the Defendants concede that the City issued Rude Rudy's alcohol licenses in 2005 and 2006, as well as an occupational tax certificate, and subsequently renewed them on an annual basis through August 28, 2014 (and similarly did so for the other University Plaza Establishments over the same general time frame), these were isolated acts of license and renewal that are simply not the type of repetitive acts which can legally give rise to a public nuisance for which the City may be held liable. See Stanfield v. Glynn County, 280 Ga. 785, 786(1) (2006) (county not liable for nuisance where it neither owned nor was charged with maintaining a waste facility, even though it approved construction and building permits for the facility in question); Pittman, 286 Ga. App. at 738;

Stanford, 815 S.E.2d at 327.

**b. Plaintiffs Cannot Establish a Private Nuisance.**

Unlike a public nuisance, a "private nuisance is one limited in its injurious effects to one or a few individuals." O.C.G.A. § 41-1-2. See also Stanford, 815 S.E.2d at 328 ("Although sounding in tort, a private nuisance claim is generally viewed as a remedy for the interference with an owner's or occupier's interest in real property.") (Gobeil, J., concurring). Both the one creating the nuisance originally and any subsequent owners of the property who contribute to it may be liable. See Ingles Markets, Inc. v. Kempler, 317 Ga. App. 190(2) (2012); Foxchase, LLLP v. Cliatt, 254 Ga. App. 239(1) (2002). However, an actionable private nuisance must involve an invasion of an interest in the use and enjoyment of the plaintiff's land, which is "specially injurious to an individual by reason of its proximity to his home." Stanley v. City of Macon, 95 Ga. App. 108, 112 (1957); Cox, 104 Ga. App. at 664(2).

Once again, neither the City nor Ms. Starling owned or otherwise had any agency relationship with Rude Rudy's or the other University Plaza Establishments. See City of Thompson v. Davis, 92 Ga. App. 216, 219(2) (1955) (The granting of a license for a business is not a contract with the municipality). There is no evidence – let alone any allegation set forth in the TAC – that either the Plaintiffs or the Decedent owned or resided at any of the University Plaza Establishments. Just like the absence of public nuisance cases, there is also "no case in which Georgia's appellate courts have found a municipality liable for a private nuisance where the alleged nuisance resulted in personal injury to a member of the public, as opposed to the owner or occupier of the property." Stanford, 815 S.E.2d at 328 (Gobeil, Jr., concurring). To the extent Plaintiffs characterize the criminal activity or ordinance violations at University Plaza as a private nuisance, such characterization is neither supported by the facts or the law.

**E. Defendant Sue Starling Cannot Be Held Liable for a Public or Private Nuisance Claim as a Matter of Law.**

As noted above, and in the many cases cited throughout this brief, to be liable for allegedly creating, causing, or maintaining a nuisance, a plaintiff must establish, among other elements, that: (1) the defect or degree of misfeasance by the ***municipality*** was to such a degree that it exceeded mere negligence; (2) the acts of the ***municipality*** purportedly causing, creating, or maintaining the nuisance were of duration, rather than isolated; and (3) the ***municipality*** failed to act within a reasonable time after actual or constructive knowledge of the defect or dangerous condition; and (4) that the nuisance was the proximate cause of the plaintiff's harm. See, e.g., Rainey, 173 Ga. App. at 894 (citing City of Bowman v. Gunnells, 243 Ga. 809(2) (1979)). As is the case with virtually all of the Plaintiffs' theories of relief, there does not appear to be any reported decision in which an individual public official such as Ms. Starling was ever found liable in the context of a municipal nuisance action. Even if such an action were possible, Ms. Starling is entitled to official immunity for the reasons set forth in the *Memorandum of Law in Support of Defendants Motion for Summary Judgment as to Plaintiffs' Negligence Claims*. Naming Ms. Starling as a party to this claim was frivolous and deserves to be remedied in the form of summary judgment and post-judgment sanctions.

**F. The City Breached No Duty to Abate a Nuisance Caused by Private Persons on Private Property.**

Georgia nuisance law instructs that where a "municipality did not perform an act creating the dangerous condition, . . . the failure of the municipality to rectify the dangerous condition must be in violation of a duty to act." Mayor of Savannah v. Palmerio, 242 Ga. 419, 426-27 (1978). This principal is further codified in O.C.G.A. § 36-33-2, which 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." See also Bowen v. Little, 139 Ga. App. 176, 176 (1976) ("In the absence of law or ordinance requiring the defendant City of Ocilla to erect a traffic light at an intersection named in this complaint, as a result of which the plaintiff was allegedly injured, the erection and maintenance of such signal is discretionary, and it cannot be held liable for mere failure to perform such act."). Compare Hibbs v. City of Riverdale, 267 Ga. 337, 338 (1996) (a city may be held liable where it "negligently constructs or undertakes to maintain a sewer or drainage system which cause the repeated flooding of property.").

Plaintiffs argue the Defendants breached a duty by (1) failing to attempt to abate the alleged nuisance by pursuing an injunction; (2) failing to revoke occupational tax certificates issued to the University Plaza Establishments; and (3) failing to revoke City-issued alcohol licenses issued to the University Plaza Establishments. Each theory fails.

**1. The Defendants Cannot Be Held Liable for Failing to Pursue a Nuisance Action.**

The City had permissive authority, rather than a mandatory duty, to pursue a public nuisance action against the University Plaza Establishments. Georgia law allows the "district attorney, solicitor-general, city attorney, or county attorney on behalf of the public" to pursue a public nuisance action, but does not *mandate* that such officials actually pursue a public nuisance action. O.C.G.A. § 41-2-2. (SMF 209) The City's Code of Ordinances likewise provided that any such action was subject to discretionary nonfeasance. See Section 38-29(a) of the City's "Nuisance" ordinance ("A proceeding to abate a public nuisance *may* be commenced under this chapter by filing a complaint in the name of the city against the respondent in the municipal court, specifically setting forth therein the facts of the alleged nuisance.") (Emphasis added). (SMF 210-212.)

In light of the foregoing, the City cannot be held liable for exercising its discretion in

failing to abate the nuisance since doing so did not violate any duty to act. See O.C.G.A. § 36-33-2; see also MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24:92 (Stating that a city may not be liable for unsuccessful attempts or failure in the governmental function to abate public nuisances). As explained further, even if the City had attempted to abate a nuisance at the University Plaza Establishments, Plaintiffs cannot establish that the City would have carried its burden of proof in any such action, that the court would have actually found in the City's favor, and/or that the establishment in question would not have appealed to the Superior Court (or a higher court) or what that court may have done.

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

Defendants adopt and incorporate by reference the argument and evidence set forth in Section G, Argument and Citation of Authority, of their *Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Plaintiffs' Negligence Claims*, pertaining to the lack of any duty pertaining to occupational tax certificates.

**3. The City Had No Duty to Revoke or Suspend Liquor Licenses.**

Defendants adopt and incorporate by reference the argument and evidence set forth in Section F, Argument and Citation of Authority, of their *Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Plaintiffs' Negligence Claims*, pertaining to the lack of any duty pertaining to the failure to revoke alcohol licenses.

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

Defendants adopt and incorporate by reference the argument and evidence set forth in Section H, Argument and Citation of Authority, of their *Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Plaintiffs' Negligence Claims*, pertaining to the

lack of any causal nexus between what the City or Ms. Starling may have been able to accomplish with respect to Rude Rudy's and the events leading to the Decedent's death.

In addition to the arguments pertaining to Spencer's criminal intervening act, the complete and utter lack of proximate cause, and the Decedent's own intervening conduct, Defendants note that Plaintiffs' nuisance abatement argument is particularly unavailing. In this regard, Section 38-27 of the City's Code of Ordinances provides as follows: "The municipal court shall have jurisdiction to try issues concerning the existence and abatement of public nuisances within the geographical limits of the city in accordance with the provisions of O.C.G.A. § 41-2-5." (SMF 211). In turn, Section 38-29(a) provides that "[a] proceeding to abate a public nuisance *may* be commenced under this chapter by filing a complaint in the name of the city against the respondent in the municipal court, specifically setting forth therein the facts of the alleged nuisance." (Emphasis added). (SMF 212). Section 38-30 provides that, "[a]t the hearing, the burden shall be upon the city to prove its complaint by competent evidence. The responding party(s) shall have the right to file an answer to the complaint and to appear in person or by counsel, to present evidence and to cross-examine the city's witnesses." (SMF 214) Section 38-32 provides that "[w]here the abatement action does not commence in the superior court, review of a court order requiring the repair, alteration, improvement, or demolition of a dwelling, building, or structure shall be by direct appeal to the superior court under O.C.G.A. § 5-3-29." And, as this Court is aware, any direct appeal to the superior court under O.C.G.A. § 5-3-29 is subject to de novo review. ("An appeal to the superior court in any case where not otherwise provided by law is a de novo investigation. It brings up the whole record from the court below; and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not. Either party is entitled to be heard on the whole merits of the

case."). Finally, any further order from the Superior Court would be subject to a discretionary appeal to Georgia's appellate courts pursuant to O.C.G.A. § 5-6-35.

In light of the foregoing, the concept that the City or Ms. Starling could have simply revoked Rude Rudy's or any other business's occupational tax certificate or alcohol license, or otherwise "abated" the nuisance by pursuing a public nuisance action in either municipal or superior court, is absurd. Such a theory requires speculation, guesswork, and innuendo about what may or might not have been accomplishable if such an action were commenced. Without any form of legal expert testimony in this manner, Plaintiffs' theory falls flat on its face.

**H. Summary Judgment is Due on Plaintiffs' O.C.G.A. § 13-6-11 Claim.**

An O.C.G.A. § 13-6-11 claim is derivative, and can only survive to the extent any underlying claims survive. See, e.g., Wright v. Apartment Investment and Mgmt. Co., 315 Ga. App. 587, 590 (2012) (because plaintiff's tort claim for fraud failed, its derivative claim for attorney's fees also failed). Therefore, summary judgment is warranted insofar as all of Plaintiffs' underlying claims are subject to dismissal.

Even if Plaintiffs' underlying negligence and nuisance claims were not subject to dismissal, summary judgment is nevertheless required. Attorneys' fees are not recoverable under O.C.G.A. § 13-6-11 so long as the evidence shows only that "a genuine dispute exists – whether of law or fact, on liability or amount of damages, or on any comparable issue." Buffalo Cab. Co. v. Williams, 126 Ga. App. 522, 525 (1972). "[W]here a bona fide controversy exists, attorney's fees may be awarded under O.C.G.A. § 13-6-11 only where the party sought to be charged has acted in bad faith in the underlying transaction." Latham v. Faul, 265 Ga. 107, 108 (1995); see also David G. Brown, P.E., Inc. v. Kent, 274 Ga. 849, 850 (2002) (noting that § 13-6-11 awards must be based on "conduct arising from the transaction underlying the cause of action being

litigated, not conduct during the course of the litigation itself."). "[B]ad faith" involves demonstrating a "so sue me" attitude even when *no bona fide controversy* exists. See Free v. Lankford & Assocs., Inc., 284 Ga. App. 328, 331 (2006) (reversing award of fees based on lack of evidence of a "so sue me" attitude prior to litigation and bona fide, legitimate arguments).

The Defendants have demonstrated that a bona fide defense exists on each of Plaintiffs' claims. Indeed, the Plaintiffs, not the Defendants, are the parties asserting positions that have never been accepted by any court in this state. There is simply no evidence to support a claim of bad faith, let alone a "so sue me" attitude on the part of either the City of Ms. Starling despite having absolutely no legitimate counter-arguments to the Plaintiffs' theories. Thus, attorney's fees may not be recovered.

## I. Plaintiffs Cannot Establish the Decedent Suffered any Conscious Pain.

Georgia law generally allows recovery for a decedent's pain and suffering in wrongful death actions. However, where "there is no evidence the decedent exhibited consciousness of pain, recovery for the decedent's pain and suffering is not permitted." Grant v. Georgia Pac. Corp., 239 Ga. App. 748, 751 (1999); Complaint of Farrell Lines Inc., (S. S. African Neptune), 389 F. Supp. 194, 205 (S.D. Ga. 1975) ("[T]here must be evidence to support a finding that pain and suffering was experienced by the decedent."). The plaintiff must put forth evidence demonstrating the victim was consciously experiencing pain and suffering. See Curtis v. United States, No. 3:15-CV-176-TCB, 2017 WL 3498709, at *10–11 (N.D. Ga. Aug. 3, 2017) (concluding decedent was not conscious following crash because plaintiffs "were not able to adduce any evidence that [victim] was conscious after the crash and when medical help arrived.").

The undisputed evidence establishes the following: (1) when SPD Ofc. Amanda Lane arrived at Rude Rudy's on August 28, 2014 at around 12:45 a.m., the Decedent was found unconscious, bleeding from the ears, laying on his left side, and "unable to respond to any comments given by me or others"; (2) McGinnis Clark (bar patron), Ailish Ryan (bar patron), Matt Cira (bar patron and friend of the Decedent), Colton Spieth (bar patron and friend of the Decedent), Taylor Burroughs (bartender), Grant Spencer (the assailant), Sami McDaniels (bar patron and friend of the Decedent), and former Statesboro Police Officer Thomas Woodrum each testified that the Decedent appeared immediately unconscious following the initial punch by Spencer; and (3) Plaintiff Katherine Gatto also admitted that when she saw the Decedent in the hospital, at no time did he ever exhibit any consciousness, and that none of the doctors told her he had regained consciousness after being struck in the head. (SMF 229-233)

In summary, there is no evidence that the Decedent was consciously suffering prior to his demise and following the initial blow. As a result, while the entire case is subject to dismissal, should any aspect of Plaintiffs' claims somehow survive notwithstanding the clear and controlling precedent set forth herein, their claim for conscious pain and suffering must not.

## CONCLUSION

This Court need only review the decisions in Pittman and Stanford to determine the outcome of this motion. Based on those decisions, summary judgment is due.

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

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IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

| | | |
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| 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 **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' NUISANCE AND DAMAGES CLAIMS** 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 C. Stivarius, Jr..
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