IN THE STATE COURT OF BULLOCH COUNTY
STATE OF GEORGIA

MICHAEL GATTO AND KATHERINE GATTO, AS THE PERSONAL REPRESENTATIVES OF MICHAEL JOSEPH GATTO, DECEASED; AND MICHAEL GATTO AS ADMINISTRATOR OF THE ESTATE OF HIS SON, MICHAEL JOSEPH GATTO,	)	
Plaintiffs,	)	
VS.	)	CASE NO. ST16CV167
CITY OF STATESBORO, GEORGIA; SUE STARLING, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; AND JOHN DOE NOS. 1-10,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants filed Defendants' Motion for Summary Judgment in the above-referenced case on August 30, 2018. Plaintiffs filed a response. A hearing on the matter was held in open court on October 23, 2018.

I. Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must demonstrate there exists no genuine issue of material fact remaining to be tried, and that the undisputed facts, viewed in the light most favorable to the non-moving party warrant entry of judgment as a matter of law. O.C.G.A. section 9-11-56; Mears v.

Gulfstream Aerospace Corp., 225 Ga. App. 636 (1997). Summary judgment is to be awarded only where, as a matter of law, submission of the case to a jury is unnecessary. Moore v. Atlanta Transit Sys., 105 Ga. App. 70 (1961). Where there is a conflict in the evidence, a jury must determine the question. Cotton States Mutual Ins. Co. v. Hipps, 224 Ga. App. 756 (1997). In considering a motion for summary judgment, evidence should be construed most strongly against the movant, and if under any view of the case there appears to be a dispute as to any material issue of fact, summary judgment should not be granted. King v. Schaeffer, 115 Ga. App. 344 (1967).

II. Procedural Background

Plaintiffs filed a complaint initiating this action on October 26, 2016. The complaint named the City of Statesboro as a Defendant. The complaint alleged the City is a municipal corporation which has waived sovereign immunity by virtue of holding a liability insurance policy. The complaint also named Sue Starling as a defendant individually and in her official capacity as the Clerk of the City of Statesboro.

The complaint alleged that Michael Joseph Gatto (hereinafter "Decedent") was killed due to injuries sustained on August 27, 2014 while he was an invitee at a bar named Rude Rudy's near the campus of Georgia Southern University. The

complaint alleged Decedent was beaten by Grant James Spencer, an employee of and bouncer at Rude Rudy's. Spencer subsequently plead guilty to voluntary manslaughter for the death.

The original complaint alleged that the City issued a business license, occupational tax certificate and an alcohol license to Rudy Rudy's. The complaint alleged a history of criminal activity transpired at Rudy Rudy's prior to the Decedent's injuries. According to Plaintiffs, the bouncer was sentenced to a charge of underaged possession of alcohol on August 12, 2013 before beginning work at Rude Rudy's in September 2013. Spencer, according to the allegations, was charged with DUI, possession of false identification and other charges on April 19, 2014.

Plaintiffs' allegations in the complaint laid out a historical background concerning the City's enactment and enforcement of ordinances regulating the provision of alcohol by business establishments. The background included allegations that Defendant Starling failed to carry out her duties as Clerk in enforcing terms of the ordinances. Plaintiffs alleged Decedent's death at the hands of Spencer was the result of the City's failure to take action against Rude Rudy's alcohol license and to eliminate dangers to patrons such as Decedent.

More specifically, Count I of the complaint alleged negligence as a cause of action arising from a ministerial breach

and failure to supervise. Count I alleged Defendant Starling was negligent in her individual capacity caused by her breach of a ministerial duty to set due process hearings before the City upon notice of violations at Rude Rudy's. Count I alleged the City is liable for negligence caused by the negligence of its employees acting in the scope of their employment and for the City's failure to supervise Defendant Starling in relation to setting administrative hearings for violations occurring at Rude Rudy's.

Count II alleged nuisance. Count II contended Defendants' acts and omissions in allowing Rudy Rudy's to remain in operation and not revoke its alcohol and business license created a hazardous and dangerous nuisance that proximately caused the death of Decedent.

Count III of the original complaint alleged nuisance, as well. Count III was based on allegations that Defendant City created a nuisance by enacting ordinance changes which removed certain restrictions and requirements for issuance and maintenance of an alcohol license, such as allowing underaged persons with criminal records to act as bouncers and by abolishing an alcohol control board.

Count IV sought punitive damages and Count V sought expenses of litigation. The complaint contained claims against Defendant Starling individually and in her official capacity as

City Clerk. Plaintiffs subsequently filed a Motion to Dismiss without Prejudice their Official Capacity Claims against Sue Starling, which was granted by the Court.

On January 26, 2017, the Court granted Defendants' Motion for Partial Summary Judgment concerning punitive damages against Defendant City of Statesboro, Georgia contained in Count IV of Plaintiffs' Complaint. Furthermore, the Court granted a motion by Defendants to dismiss Count III of the complaint, which was titled "Nuisance Created by Statesboro's Changes to the Alcohol Ordinance". As prefaced with the title, the contents of Count III referred repeatedly and only to changes made by the City to its city ordinances on December 6, 2011.

In the January 26, 2017 order granting partial summary judgment on Count III of the original complaint, the Court noted that Count III appeared crafted so that it alleged a separate count based on the enactment of ordinances and thus a policy decision made on December 6, 2011. Put another way, the question before the Court was specifically whether an action by a municipality enacting or amending its code of ordinances is liable for a nuisance because of the environment which it creates.

The Court reviewed nuisance actions against cities and found that a municipal corporation, like any other individual or private corporation, may be liable for damages it causes a third

party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or municipal function. Mayor of City of Savannah v. Palmerio, 242 Ga. 419 (1978). However, this Court examined the guidelines to define a nuisance for which a city may be liable, to wit: (1) First, the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence; (2) Second, the act must be of some duration; and (3) Third, the city must have failed to act within a reasonable time after knowledge of the defect or dangerous condition. Rainey v. East Point, 173 Ga. App. 893 (1985); Bowman v. Gunnells, 243 Ga. 809 (1979).

After reviewing the treatment of nuisance cases by Georgia's appellate courts, this Court found the cases illustrated that a municipal nuisance is grounded in the concept of misfeasance. This Court did not find a case where nuisance included enactment of ordinances creating a dangerous environment or atmosphere and dismissed Count III.

The ruling granting partial summary judgment on Count III of the original complaint narrowed the focus of the inquiries to the relationship between the Defendants and Rude Rudy's only, which was the subject of the allegations in Counts I and II. However, a little over a week later on August 7, 2017, Plaintiff filed Plaintiffs' Amended Complaint which expanded the nature of its allegations to a level similar to that contained in Count III of

the original complaint. The amended complaint contained three counts under its causes of action. Count I continued to allege negligence for ministerial breach and failure to supervise; Count II continued to allege nuisance; and Count III alleged expenses of litigation, which was alleged as Count V in the original complaint.

Additionally, the amended complaint injected into the mix a new concept or entity which is termed "University Plaza Establishments". The factual allegations stated Rude Rudy's was a bar located in University Plaza. Paragraph 17 of the amended complaint stated: "In addition to Rude Rudy's, University Plaza was home to several other businesses that served alcohol, including specifically Retrievers, Rusty's Tavern, and Rum Runners (hereafter sometimes collective referred to as 'University Plaza Establishments')." Whereas the original complaint's allegations focused on Defendants' interaction with Rudy Rudy's through the issuance of business and alcohol licenses and criminal activity at the location, the amended complaint in essence replaced Rude Rudy's (or expanded as the case may be) with issuance of business and alcohol license and criminal activity at "University Plaza Establishments".

On May 10, 2018, Plaintiff filed Plaintiff' Second Amended Complaint. The second amended complaint in Count I alleges: "Negligence – Ministerial Breach and Failure to Supervise".

Count I alleged that Defendant Starling negligently breached a ministerial duty to set due process hearings while having knowledge of ordinance violations in University Plaza Establishments. Count I also alleged Defendant Statesboro is liable for negligence caused by its employee in the scope of employment and for failure to supervise Defendant Starling in her duty to set administrative hearings.

Count II of the second amended complaint is restyled in its heading to allege "Negligence – Ministerial Breach and Failure to Supervise." Plaintiffs allege that Defendant Statesboro breached a duty of ordinary care by renewing and allowing the renewal of business licenses of establishments in University Plaza.

Count III of the second amended complaint is entitled "Nuisance". Count III of the second amended complaint appears to track the allegations of Count II of the first amended complaint that Defendant City's allowing businesses in University Plaza to continue operation and failure to revoke alcohol and business licenses created a nuisance. Count III in the second amended complaint includes some factual expansions from Count II of the first amended complaint, such as alleging the city's knowledge of criminal activity included University Plaza and the University Plaza Establishments. Thus, through the original complaint and two amendments, the allegations of knowledge of criminal activity has expanded from Rude Rudy's to University Plaza Establishments

to University Plaza.

In the second amended complaint, there is a second Count III for "Expenses of Litigation". This Count parallels Count III of the first amended complaint, and appears as a typographical error and should be tagged Count IV in the second amended complaint.

On May 23, 2018, Defendants filed Defendants' Notice of Apportionment of Non-Party Fault. The pleading indicated apportionment may be sought by Defendants against eight nonparties, to wit: Michael Joseph Gatto (Decedent), Grant James Spencer, Jonathan Earl Starkey, Rudy Rudy's LLC, University Plaza, Inc. Derek Stan Todd, Luke Alexander Houser and Jake Devon Berman.

On July 27, 2018, Plaintiffs filed Plaintiffs' Third Amended Complaint. The Third Amended Complaint, like the second but unlike the original complaint, laid out a history of the granting of business license and occupational tax certificates not only to Rudy Rudy's, but to other establishments in the University Plaza where Rudy Rudy's is situated, to wit: Retrievers, Rum Runners and Rusty's Tavern. The subsequent complaints also include a section on "Criminal Dangerous Activity at University Plaza".

III. Undisputed Facts

It is undisputed that the City is a municipal corporation chartered in the State of Georgia and that Defendant Starling was employed as Clerk by the City. Rude Rudy's was an establishment within the city limits that served alcohol and was located in a shopping center or configuration of establishments around a parking lot known at University Plaza, which leased property to Rudy Rudy's and other establishments that served alcohol including Retrievers, Rusty's Tavern and Rum Runner's. It is undisputed that none of the other establishments situated in University Plaza had the same ownership as Rude Rudy's nor as that of University Plaza. The parking lot in University Plaza was owned and controlled by University Plaza, Inc., which had a sole owner and shareholder who had no ownership interests in any of the individual establishments leasing property there. There is no evidence that the parking lot or any other property in University Plaza was dedicated to the City or that the City maintained any ownership or direct control over any of the property that made up University Plaza.

It is undisputed that the City approved an alcohol license for Rude Rudy's on April 2, 2001 as well as an occupational tax certificate issued on August 27, 2014.

It is undisputed that the Decedent was arrested by the Athens-Clarke County Police Department on July 4, 2014 and was

charged with theft of services and underaged possession of alcohol. On August 5, 2014, the Decedent entered into a pre-trial intervention program agreement in which he agreed not to violate criminal laws, consume alcohol and enter bars or locations whose primary purpose is the sale of alcoholic beverages.

It is undisputed that Decedent was present in Rude Rudy's on the evening of August 27/28, 2014, less than a month after entering the pre-trial diversion agreement. While in Rude Rudy's the Decedent was drinking and in possession of a driver's license bearing a name other than his own. While in Rudy Rudy's, the Decedent was engaged in an interaction with Grant Spencer. It is undisputed that Spencer struck and killed the Decedent and is currently serving a term in prison for his actions.

IV. Summary of Allegations:

The following allegations are contained in the various counts of the Third Amended Complaint:

- Defendant Starling negligently breached a ministerial duty to set due process hearings upon her receipt of notice of violations charged against University Plaza Establishments.
- The City is liable for the negligence of Defendant Starling for failure to set due process hearings by virtue of her employment.

- The City is liable for failure to supervise Defendant Starling in relation to her duty to set administrative hearings arising from violations of law alleged at Rude Rudy's.
- Defendant City breached a duty of ordinary care by renewing or allowing the renewal of the alcohol and business licenses of University Plaza Establishments to sell alcohol to underage patrons and remain open to the public.
- The City's breach of duty of care in renewing the alcohol licenses and to remain in operation caused the severe beating and ultimate death of the Decedent.
- Defendants in allowing the University Plaza Establishments to remain in operation and not revoking their alcohol or business licenses constituted a nuisance, which proximately caused the severe beating and ultimate death of the Decedent.

IV. Defendants' Motion

Defendants' Motion for Summary Judgment seek a grant of summary judgment on Plaintiffs' negligence and nuisance claims contained in Counts I, II and III of the Third Amended Complaint. Defendants also seek summary judgment concerning Plaintiffs' claims for damages O.C.G.A. section 13-6-1 and for Decedent's conscious pain and suffering.

RULINGS:

A. PROXIMATE CAUSE

Defendant seeks a grant of summary judgment of the claims against the City and Defendant Starling on the claims of negligence and nuisance contained in Counts I, II and III contending an analysis under the undisputed evidence shows Defendants' actions are not the proximate causation of negligence or nuisance.

The burden is on the Defendants and not Plaintiffs to prevail in this summary judgment motion. But nonetheless, for Plaintiffs to prevail ultimately or even survive summary judgment on their negligence and nuisance claims, a bridge must exist between the intentional criminal action of Grant Spencer which resulted in Decedent's death and the alleged failure of a municipal corporation to adequately carry out its governmental licensing and regulating duties for a business which provides alcoholic beverages to the public. In particular, Defendants have raised the issue of whether any bridge exists under the undisputed facts in the record between the proximate causation of Decedent's death and the allegations against Defendants.

The first chasm that must be traversed is the traditional legal principal that the intervention of criminal conduct of a third person between a defendant's negligence and the plaintiff's injury breaks the causal chain so that the defendant's negligence

is not the proximate cause of the injury, even though the defendant's conduct gave an opportunity for the crime to take place.

Negligence is not actionable unless it is the proximate cause of the injury. Thomas v. Food Lion, 256 Ga. App. 880 (2002). Generally, an independent, intervening act of a third party, without which the injury would not have occurred, will not be treated as the proximate cause of the injury superseding any negligence of the defendant, unless the intervening criminal act is a reasonably foreseeable consequence of the defendant's act. In other words, the intervening criminal act of a third party, without which the injury would not have occurred, breaks the casual connection between the defendant's negligence and injury unless the criminal act was a reasonably foreseeable consequence of the defendant's conduct. Cotton v. Smith, 310 Ga. App. 428 (2011); Brown et al. v. All-Tech Investment Group, Inc. et al., 265 Ga. App. 889 (2004). (In Cotton, a high school turned a student over to a convicted felon who claimed to be the girl's uncle and who harmed the student). If the character of the intervening act claimed to break the connection between the original act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection is not broken, and the original wrong-doer is

responsible for all of the consequences resulting from the intervening act. The rule that an intervening and independent wrongful act of a third person producing the injury (and without which it would not have occurred, should be treated as the proximate cause, insulating and excluding the negligence of the defendant) would not apply if the defendant had reasonable grounds for apprehending that such wrongful act would not be committed. Cotton v. Smith, supra.

A wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. Dowdell v. Wilhelm, 305 Ga. App. 102 (2010) (in which the plaintiff widow's husband was shot by an escaped prisoner). Normally, questions of proximate cause are for the jury, but plain and indisputable cases may be decided by the court as a matter of law. The inquiry is not whether the defendant's conduct constituted a cause in fact of the injury, but whether the causal connection between that conduct and the injury is too remote for the law to countenance recovery. Id. Foreseeable consequences are those which are probable, according to ordinary and usual experience; those which, because they happen so frequently, may be expected to happen again. One is not bound to anticipate and foresee and provide against that which is unusual or that which is only remotely and slightly

probable. Brown et al. v. All-Tech Investment Group, Inc. et al., 265 Ga. App. 889 (2004)

A tortuous act may have several consequences, concurrent or successive, for all of which the first tort-feasor is responsible. It is not intervening consequences, but intervening causes, which relieve the original wrongdoer from liability. Brown et al. v. All-Tech Investment Group, Inc. et al., 265 Ga. App. 889 (2004), (in which a security company was sued by survivors and relatives of a shooting rampage of a disgruntled client in a trading firm). Summary judgment is appropriate in which the issue of proximate cause is so plain, palpable, and indisputable as to demand summary judgment. Id. An intervening cause is too remote to be foreseeable if it furnished only the condition or occasion of the injury. Cope v. Enterprise Rent-a-Car, 250 Ga. App.648 (2001) (in which a rental car agency was sued after the truck she rented broke down on the highway and she was attached by another motorist).

Even in cases in which the intervening cause is not a criminal act of a third person, it is well settled that there can be no proximate cause where there has intervened between the act of the defendant and the injury to the plaintiff, an independent, intervening, act or omission of someone other than the defendant and the injury to the plaintiff; being an independent, intervening actor admission, which was not foreseeable by

defendant, was not triggered by defendant's act, and which was sufficient of itself to cause the injury. But if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable and natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the casual connection is not broken, and the original wrong-doer is responsible for all the consequences of the act. Greenway v. Northside Hospital, 317 Ga. App. 371 (2012).

In Third Amended Complaint, the allegations center on the Defendants' issuance of city licenses and the failure to revoke the licenses. Given the principles cited above and the undisputed facts of this case, Plaintiffs' claims against Defendants are a bridge too far to establish proximate cause.[1] The foresight called upon of the Defendants in those actions or omissions was not only to foresee a possible intervening criminal act of a third person, but to anticipate a confluence of

[1] The saying "a bridge too far" comes from a non-fiction book published by Cornelius Ryan in 1974 detailing the story of Operation Market Garden in September 1944 in the European Theater of World War II. The allies attempted to break through German lines in the Netherlands by capturing a series of bridges, with the capture of each successive bridge being necessary to reach the last bridge crossing the Rhine River at Arnheim. Most of the bridges were captured, but reaching the span at Arnheim involved a level of complexity and timing that taxed the Allies' capacity and being dependent on virtually no unforeseen circumstances arising. The title of the book came from a comment by British Lt. Gen. Fredrick Browning who told General Bernard Montgomery before the operation that Arnheim may be a bridge too far. The phrase has become an idiom for an act or plan whose ambition overreaches its capability, resulting in or potentially leading to difficulty and failure.

intervening violations of the law. This is a tragic case in which one young man was killed and another imprisoned as a result of the injury inflicted. But the record nonetheless contains undisputed evidence not only that Spencer committed a homicide act in striking the Decedent, but also that the Decedent was engaged in one and possibly more violations of the law by purchasing alcohol, consuming alcohol and possessing a false identification, not to mention a violation of a pre-trial diversion agreement in which he had been directed and consented to refrain from such actions. These facts are referenced not to judge or condemn the Decedent who no doubt was wrongfully killed by Spencer; but the Court cannot ignore these undisputed facts in evaluating this situation and applying the standards of proximate causation contained in the law cited here.

The Defendants have cited numerous other factors which make the question of proximate cause even more attenuated, including:

- That the beating and death of the Decedent occurred on private property which was not under the dominion and control of Defendants;
- The bulk of the violations of which Plaintiffs claim Defendants had knowledge dealt with provision of alcohol to minors, and not to the activity of bouncers, injecting issues of similarity between the any notice or problems existing and the actual cause of injury;

- The unestablished assumption by Plaintiffs that the result of any due process hearings if held would have been closing or restricting the operation of Rude Rudy's, as opposed to the issuance of a warning, the imposition of fines or limited suspensions or even (as the term 'due process' leaves open) a finding of no violation.
- Concerning the claims of negligence, Defendants request for summary judgment is also supported the public duty doctrine found in City of Toccoa v. Pittman, 286 Ga. App. 213 (2007), which has many similarities to the instant case. In City of Toccoa, the decedent was killed during a brawl in billiard room that migrated to in a restaurant. The Plaintiffs claimed the city was negligent in not shutting down the billiard room and that it maintained a nuisance by allowing it to continue to operate. Defendant contends the public duty doctrine which shielded Toccoa from liability is applicable in this case. Under the public duty doctrine, liability does not attach where the duty owed by a governmental unit runs to the public in general and not to any particular member of the public, except where there is a special relationship between the governmental unit and the individual giving rise to a particular duty owed to that individual. A special relationship exists where: (1) a municipality made an explicit assurance, through promises or

actions, that it would act on behalf of the injured party; (2) the municipality had knowledge that inaction would lead to harm; and (3) the injured party justifiably and detrimentally relied on the municipality's explicit assurances. In the instant case, this Court agrees there is no showing of a special relationship or assurances between Defendants and the decedent. Further, even if assurances were present, the decedent did not detrimentally rely on any assurances for his welfare, given his disregard of his pre-trial diversion agreement in place at the time of his death.

The Court therefore grants Defendants' Motion for Summary Judgment on Counts I, II and III both the negligence and nuisance claims against both Defendants based on the issue of proximate causation.

This Court notes that by immediately amending the complaint after the grant of the motion for partial summary judgment and expanding the inquiry beyond the business of Rudy Rudy's where the assault took place and into the broader territory of University Plaza, Plaintiffs revealed a structural weakness in their claims that ultimately lead to this grant of summary judgment based on proximate cause. A focus on Rudy Rudy's alone found in the original complaint displays a palpable paucity of

proximate cause under the narrow exceptions allowed to pursue cities under nuisance law and for ministerial breaches of duty. The widening of the road in the amended complaints to include the numerous businesses and broader area of University Plaza moves in the direction of finding liability for cities for creating atmosphere or environments which have been thwarted by Georgia's Appellate Courts. The difficulty of basing a complaint in this case on the horns of this inherent dilemma are illustrated even further in the next section, which grants summary judgment to Defendants on grounds of sovereign immunity as well.

B. SOVEREIGN IMMUNITY

Defendants also contend the City and Defendant Starling are entitled to summary judgment on the negligence and nuisance claims due to sovereign immunity.

If establishing proximate causation in this case is a bridge too far, Plaintiffs efforts to avoid the application of sovereign immunity has from the beginning of this case resembled the proverbial hammering of a square peg into a round hole. The evolving complaints and expansion of the scope of the claims after the granting of the partial summary judgment by this Court not only displayed an inherent weakness in the proximate causation bridge as previously stated, but also reveal the

problems of basing nuisance and negligence claims against a municipality and a city clerk on the exercise of statutory authority to hold hearings on revocation or suspension of licenses issued by the governing authority.

As laid out earlier in the summary of allegations, the actions and/or omission by the City and its clerk which Plaintiffs contend lead to the Decedent's death are failure to set due process hearings for revocation of city licenses held by University Plaza businesses and the renewing of alcohol and business licenses.

Concerning the actions or omissions of Defendant constituting a nuisance, the first encounter of this Court with the concept was addressed in an order granting a partial summary judgment to Defendants on Count III of the original complaint. That Count put the question before this Court as to whether an action by a municipality enacting or amending its code of ordinances is liable for a nuisance because of the environment which it creates. It also gave this Court an opportunity to review nuisance actions against cities. While it was found that a municipal corporation, like any other individual or private corporation, may be liable for damages it causes a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or municipal function, this Court examined the guidelines to define a nuisance for which

a city may be liable. After reviewing the treatment of nuisance cases by Georgia's appellate courts, this Court found the cases illustrated that a municipal nuisance is grounded in the concept of misfeasance. This Court did not find a case where nuisance included enactment of ordinances creating a dangerous environment or atmosphere and dismissed Count III.

Concerning whether a failure to set due process hearings for revocation of city licenses and/or renewing of alcohol and business licenses created an atmosphere and for which a city could be held liable, further guidance was provided on June 26, 2018 in a ruling by a panel of the Court of Appeals of Georgia issued in City of Albany v. Stanford et al. (A18A0699). While the case may be physical precedent only, this Court not only finds the decision persuasive but consistent with many of the concerns foreshadowed by this Court in its granting partial summary judgment to Defendants on Count III of the original complaint in the instant action.

In City of Albany, the Court of Appeals faced a situation remarkably similar to the instant case. A decedent was shot and killed outside of an establishment named Brick City in the municipality of Albany. Plaintiffs alleged that the City of Albany issued an occupational tax certificate for Brick City to operate as a recording studio and multi-purpose entertainment facility, but that it was actually operating as a night club and

serving alcohol without a license. The police became aware of alcohol being served and of fights, drug use and sex involving minors at the location. The police reached out to the city code enforcement division in an attempt to close the business and also raided it, uncovering evidence of alcohol sales, weapons and drugs. Also, one of the owners was arrested for possession of marijuana and cited with selling alcohol without a license after a search warrant was executed on the premises. Despite a recommendation by the city's code enforcement division for revocation of Brick City's licenses, the city commission did not schedule a hearing on the recommendation and continued to re-issue licenses to the business. Plaintiffs alleged the city was aware that violent crime continued and that the decedent was shot and killed as a result of the dangerous conditions at Brick City. Plaintiffs filed a suit against the City of Albany and the owners of Brick City for nuisance and various negligence claims.

After a jury awarded damages to Plaintiffs, the City of Albany appealed the trial court's denial of its motion for judgment notwithstanding the verdict or for a new trial. The Court of Appeals reversed the trial court's denial of the motion. The Stanford Court found the City of Albany was entitled to sovereign immunity.

The Stanford Court rejected Plaintiffs' argument that an exception to sovereign immunity existed for nuisance actions

under the facts of the case. Citing City v. Thomasville v. Shank, 263 Ga. 624 (1993), the Stanford Court noted that the "nuisance exception" to sovereign immunity has been allowed against municipalities irrespective of whether it is exercising a governmental or ministerial function because the a municipal corporation cannot under the guise of performing a governmental function create a nuisance dangerous to life and health or take private property for public purpose without just and adequate compensation being first paid. This is rooted in the concept that the government may not take or damage private property for public purposes without just and adequate compensation. Thus, the Stanford Court said, the nuisance exception is not an exception at all but a proper recognition that the Constitution requires just compensation for takings and therefore cannot be understood to afford immunity in such cases.

But, the Stanford Court added, such an exception for cases triggering application of the eminent domain clause of the Constitution does not apply in a case such as the Albany circumstances where the "damage" is injury to a person or loss of life. Rather, in these cases, Plaintiffs must be able to point to some statutory or constitutional provision waiving a City's sovereign immunity.

The Stanford Court then rejected the Plaintiffs' argument that sovereign immunity was waived under O.C.G.A. section 36-33-

1(b) "[f]or neglect to perform or for improper or unskillful or performance of ministerial duties[.]" Recognizing the dual public and private character of a municipal corporation with governmental/legislative functions and private/ministerial functions, the Court noted a municipality is entitled to assert immunity when it undertakes to perform for the state duties which the state itself might perform, but which have been delegated to a municipality. The governmental functions which entitle a municipality to immunity are those of a purely public nature, intended for the benefit of the public at large, without pretense or private gain to the municipality. A ministerial function, on the other hand, may involve liability for the negligent performance of a function involving the exercise of some private franchise, or some franchise conferred upon the municipality for the private provision or convenience of the municipality or for the convenience of its citizens alone, in which the general public has no interest. Thus, the courts must examine whether abatement of a nuisance arising in the case before it is a governmental or ministerial function.

In the Stanford case, the Court concluded the city's opting not to revoke the occupational tax certificate for Brick City was a governmental function and an activity undertaken for public benefit rather than for revenue production, and thus the City of Albany was shielded from a nuisance claim by sovereign immunity.

The Stanford Court thus ruled the Plaintiffs had not demonstrated that the criminal activity at Brick City was a nuisance maintained by the City resulting in damage to private property or that the act of issuing and/or failing to revoke an occupational tax certificate is a ministerial act for which the General Assembly has waived sovereign immunity.

In a concurrence, it was pointed out that no Georgia appellate court has 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 to the property.

Based on the persuasive nature of the Stanford case and this Court's own previous analysis in its order granting partial summary judgment, the Court grants summary judgment in the instant case to the City on grounds of sovereign immunity for the nuisance claims against the City.

This Court also finds the principals in the Stanford and other opinions also bear on the negligence claims against the City and its Clerk. Even outside the perimeters of the Stanford opinion, Georgia law has established a city has no sovereign immunity when it is engaged in a proprietary or ministerial function as opposed to a governmental function. Stated again, a proprietary function is one that could be performed by a private entity and thus is not an essential governmental function.

McCrary Engineering Corp. v. City of Bowdin, 170 Ga. App. 462 (1984). But, a city has sovereign immunity when it performs governmental functions except as waived by the purchase of liability insurance.

The allegations in this case are similar to the situation in Calloway v. City of Warner Robins, 336 Ga. App. 714 (2016), which involved a suit by parents against a city that negligently issued a day care business license to a facility which had left their son in a hot car resulting in the child's death. The Court of Appeals in Calloway also ruled the suit was barred by sovereign immunity.

The distinction between sovereign immunity for ministerial duties or governmental functions arise from protections for municipal corporations found in the Article IX, Section II, Paragraph IX of the Georgia Constitution, unless that immunity is waived by the General Assembly. With particular regard to municipal corporations, our General Assembly has enacted OCGA § 36-33-1 which reiterates that "it is the public policy of the State of Georgia that there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages." OCGA § 36-33-1 (a). The same statute, however, also provides for a narrow waiver of a municipal corporation's sovereign immunity, expressly providing in subsection (b) that

"municipal corporations shall not be liable for failure to perform or for errors in performing their legislative or judicial powers. For neglect to perform or for improper or unskillful performance of their ministerial duties, they shall be liable." OCGA § 36-33-1 (b). This provision has for more than a century been interpreted to mean that municipal corporations are immune from liability for acts taken in performance of a governmental function but may be liable for the negligent performance of their ministerial duties. The propriety of the trial court's ruling on the motion for summary judgment thus turns on whether the city and the clerk's issuance of a business license involved a governmental function.

The Calloway Court held a municipality's issuance of a permit or license is a governmental function. See also City of Thomson v. Davis, 92 Ga. App. 216, 218-219 (1) (88 SE2d 300) (1955) (municipality's act of granting or revoking a business license constitutes a governmental function). Under the doctrine of sovereign immunity, a municipality is exempt from liability for an injury resulting from the failure to exercise [governmental functions] or from their improper or negligent exercise." Mitcham, supra at 579 (2) (citation omitted. See also Hurley v. City of Atlanta, 208 Ga. 457, 458 (67 SE2d 571) (1951) (city not liable for negligent performance of governmental function).

This is buttressed by O.C.G.A. section 3-3-2 which requires a city or county permit to sell alcohol. The statute specifically grants to local governments "discretionary powers within the guidelines of due process set forth in this Code section as to the granting, or refusal, suspension, or revocation of the permits or licenses…." Thus, by yoking the power with due process, the Georgia General Assembly appears to have placed the very actions that form the base of Plaintiffs' nuisance and negligence claims in the discretionary realm both in name and substance.

Concerning Defendant Starling as Clerk, the Georgia Constitution in Article I, Section II, Paragraph IX also confers sovereign immunity on officers and employees of cities. Cameron v. Lange, 274 Ga. 122 (2001). The purpose of this official immunity is to protect government officials and employees who exercise discretion in performing their duties no matter how poor their judgment. See Schmidt v. Adams, 211 Ga. APP. 156 (1993). Public employees are protected from personal liability regardless of whether there is liability insurance for discretionary acts carried out without actual malice or actual intent to cause injury. Considine v. Murphy, 327 Ga. App. 110 (2014); Gilbert v. Richardson, 264 Ga. 752 (1994). For governmental officers and employees, a ministerial act is one that is simple, absolute, and definite, arising under conditions admitted or proved to exist,

and requiring the execution of a specific duty; while a discretionary act calls for the exercise of personal deliberation and judgment, which in turns entails examining the facts, reaching reasoned conclusions and acting on them in a way not specifically directed. Grammens v. Dollar, 287 Ga. 618 (2010).

Plaintiffs' claims against Defendant Starling are akin to the decision in Calloway v. City of Warner Robins, 336 Ga. App. 714 (2016) in which the Plaintiffs claim the city clerk which was sued in an individual capacity was not entitled to the protection of sovereign immunity. However, as in Calloway, a review of the complaints in that case plainly contradict the argument and reveals the posture of Defendant Starling is as a defendant sued in her official capacity. The complaint in Calloway also stated that "[a]t all times relevant to the facts set forth in this Complaint, Defendant Mattox [clerk] was acting under her authority as city clerk to further the business of the City." Suits against public employees in their official capacities are in reality suits against the state and, therefore, involve sovereign immunity. Cameron v. Lang, 274 Ga. 122, 126 (3) (549 SE2d 341) (2001). Plaintiffs herein are therefore precluded from pursuing their negligence claims against Defendant in her official capacity.

Finally, Plaintiffs contend sovereign immunity has been waived in this case by the City's purchase of an insurance

policy. The Georgia Constitution states in Article IX, Section II, Paragraph IX that the General Assembly may waive the immunity of municipalities by law, thus conferring sovereign immunity on municipalities unless waived by the General Assembly. In turn, the General Assembly has declared in O.C.G.A. section 36-33-1(a) that it is the public policy "that there is no waiver of sovereign immunity of municipal corporations and [that] such municipal corporations shall be immune from liability for damages." However, section 36-33-1(b) declares that cities may be liable for improper or unskillful performance of their ministerial duties. Where a city performs what has traditionally been a governmental function, such as providing sewer services or fir protection, the city has immunity unless it has purchased liability insurance which would cover these acts. O.C.G.A. section 36-33-1(a) waives the immunity for the purchase of insurance which "covers an occurrence for which the defense of sovereign immunity is available, and then only to the extent of the limits of such insurance policy."

An analysis of the insurance policy held by Defendants in this case shows it contains endorsements retaining the City's sovereign immunity. Specifically, the policy contains the following language, "We have no duty to pay damages on your behalf under this policy unless the defenses of sovereign and governmental immunity are inapplicable to you." It is further

stated, "This policy and any coverages associated therewith does not constitute, nor reflect an intent by you, to waive or forego any defenses of sovereign and governmental immunity available to any Insured, whether based upon statute(s), common law or otherwise, including Georgia Code Section 36-33-1, or any amendments."

In this ruling, this Court accepts Defendants' proposition that, in the absence of coverage, sovereign immunity has not been waived by the mere purchase of the policy. See Chamlee v. Henry County Board of Education, 239 Ga. App. 185 (1999).[2]

[2] This proposition is supported by the enactment of O.C.G.A. section 33-92-2. This code section makes clear the nature of the waiver for motor vehicles to forestall arguments that if there is no insurance then there is no waiver under O.C.G.A. section 33-24-51. Thus, if Defendants argument were not sound in this case, the Georgia General Assembly could and should make enactments to end the argument, as was done with motor vehicle claims.

To summarize, as a result of the findings and rulings contained herein, Defendants' Motion for Summary Judgment is granted for both the City of Statesboro and Defendant Starling on the negligence and nuisance claims contained in Counts I, II and III of Plaintiffs' Third Amended Complaint on grounds of proximate causation and sovereign immunity. Given this ruling, the derivative claims in Count IV fall as well.

SO ORDERED, this 24th day of October, 2018.

/s/ *Gary L. Mikell*
Judge Gary L. Mikell,
State Court of Bulloch County