

No. SC-2025-0293

IN THE SUPREME COURT OF ALABAMA

CITY OF MOUNTAIN BROOK, ALABAMA,
Appellant/Defendant,

vs.

RODNEY E. MILLER and MARY LEAH MILLER,
Appellees/Plaintiffs.

On Appeal from the Circuit Court of Jefferson County, Alabama
Case No. CV-2024-901073

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

 I. THE CITY DID NOT “MISREPRESENT” ANYTHING 8

 II. ALABAMA LAW IS CLEAR: THE MILLERS WERE REQUIRED TO
 PROVE NEGLIGENCE 12

 A. Flooding claims arising out of municipal stormwater
 infrastructure require negligence 12

 B. The fact that the City’s stormwater pipe is in a dedicated
 easement does not obviate the requirement to prove
 negligence 15

 C. *Beatty* is inapposite 16

 III. THERE IS NO EVIDENCE OF NEGLIGENT MAINTENANCE 19

 IV. SUBSTANTIVE IMMUNITY PROTECTS THE CITY 24

 V. THE MILLERS’ PARADE OF HORRIBLES IS INAPPOSITE 33

 VI. THE TRIAL COURT ERRED IN ENTERING SUMMARY
 JUDGMENT AGAINST THE CITY 34

 A. Prescription 35

 B. Act of God 37

 C. Coming to the Nuisance 38

CONCLUSION 39

CERTIFICATE OF COMPLIANCE 41

CERTIFICATE OF SERVICE 42

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page(s)</u>
<i>Andrews v. Hatten</i> , 794 So. 2d 1184 (Ala. Civ. App. 2001)	37
<i>Atlanta v. Williams</i> , 128 S.E.2d 41 (Ga. 1962)	16
<i>Birmingham v. Fairfield</i> , 375 So. 2d 438 (Ala. 1979)	13, 16
<i>Bradford v. Stanley</i> , 355 So. 2d 328 (Ala. 1978)	38
<i>Britt v. City of Hoover</i> , SC-2024-0530, 2025 Ala. LEXIS 54 (Ala. May 16, 2025).....	13, 31, 33, 34
<i>Byrd v. City of Citronelle</i> , 937 So. 2d 515 (Ala. 2006)	20
<i>City of Bessemer v. Chambers</i> , 242 Ala. 666; 8 So. 2d 163 (1942)	14
<i>City of Birmingham v. Leberte</i> , 773 So. 2d 440 (Ala. 2000)	22
<i>City of Mobile v. Jackson</i> , 474 So. 2d 644 (Ala. 1985)	32, 38
<i>City of Montgomery v. Couturier</i> , 373 So. 2d 625 (Ala. 1979)	36
<i>City of Mountain Brook v. Beatty</i> , 295 So. 2d 391 (Ala. 1974)	6-8, 12, 16-17, 19, 24, 30-31, 33-34

<i>Crommelin v. Cox</i> , 30 Ala. 318 (Ala. 1857)	39
<i>Ex parte City of Muscle Shoals</i> , 2025 Ala. LEXIS 30 (Ala. Mar. 28, 2025).....	15, 32, 33
<i>Fahrman v. City of Orange Beach</i> , 2025 WL 1007962 (2025)	32
<i>Hilliard v. Huntsville</i> , 585 So. 2d 889 (Ala. 1991)	14
<i>Kennedy v. Montgomery</i> , 423 So. 2d 187 (Ala. 1982)	12
<i>Locke v. City of Mobile</i> , 851 So. 2d 446 (Ala. 2002)	12
<i>Long v. City of Athens</i> , 24 So. 3d 1110 (Ala. Civ. App. 2009)	20
<i>Long v. Jefferson County</i> , 623 So. 2d 1130 (Ala. 1993)	15
<i>Martin Bldg. Co. v. Imperial Laundry Co.</i> , 124 So. 82 (Ala. 1929)	39
<i>Mayor of Huntsville v. Ewing</i> , 22 So. 984 (Ala. 1897)	22, 23
<i>Mountain Brook Estates, Inc. v. Solomon</i> , 23 So. 2d 1 (Ala. 1945)	38
<i>Reichert v. City of Mobile</i> , 776 So. 2d 761 (2000).....	22
<i>Rich v. City of Mobile</i> , 410 So. 2d 385 (Ala. 1982)	31, 33

Royal Auto., Inc. v. City of Vestavia Hills,
995 So. 2d 154 (Ala. 2008) 14

Smith v. City of Birmingham,
2025 WL 2680098 (2025) 31

Stewart v. Shook Hill Rd. Prop. Owners’ Ass’n,
726 So. 2d 694 (Ala. Civ. App. 1998) 36

Terry v. City of Sheffield,
484 So. 2d 389 (Ala. 1986) 20, 21

STATE STATUTES

ALA. CODE § 11-47-190 13

ALA. CODE § 11-50-50 6, 7, 12, 15, 17

ALA. CODE § 11-50-51 15

SUMMARY OF THE ARGUMENT

This appeal turns on the City of Mountain Brook's (the "City") duty. The Millers emphatically argue the City is strictly liable for monetary and permanent injunctive relief because the City's stormwater drainage pipes, which were overwhelmed by a 50-year rain event on May 15, 2023, are located in a dedicated easement. According to the Millers, that fact alone makes "the City's arguments regarding negligence [] immaterial." Appellees' Br. at 66.

That is not the law. Alabama cities can only be held liable for *negligence* in maintaining or constructing stormwater drainage infrastructure, regardless of whether a stormwater pipe is located in a public right of way or in a dedicated easement. Indeed, the statutory provision which authorizes cities to construct and maintain stormwater drainage systems expressly contemplates that those systems will be on both "public" *and* "private" property, *i.e.*, in easements. ALA. CODE § 11-50-50.

The Millers rely almost exclusively on *City of Mountain Brook v. Beatty*, citing that case approximately 30 times in their brief. That reliance is misplaced. *Beatty* addressed a prescriptive easement for

drainage, a type of easement this Court described as “rarely litigated in this state.” 295 So. 2d 388, 390 (Ala. 1974). Unlike *Beatty*, this case does not involve a prescriptive easement over a natural ditch. Unlike *Beatty*, this case involves municipal stormwater drainage pipes. Unlike *Beatty*, the City’s duty to maintain stormwater drainage infrastructure within its dedicated easement on the Millers’ property does not derive from any “prescriptive right,” *cf. id.*, but rather from a statutory right (ALA. CODE § 11-50-50). *Beatty* is simply inapplicable to this case. The City’s research did not locate (and the Millers do not cite) any Alabama appellate case reaching the unprecedented result the Millers urge here, *i.e.*, that cities are strictly liable for damages and permanent injunctive relief whenever flooding occurs because municipal stormwater pipes located in dedicated easements are overwhelmed.

The Millers’ arguments with respect to negligent maintenance are also unavailing as they do not address the cases which hold that an alleged failure to enlarge stormwater drainage pipes is not negligent maintenance. Those cases control, the Millers’ failure to address them leaves that undisputed, and the absence of substantial evidence of

negligent maintenance compels reversal and entry of judgment in the City's favor.

Substantive immunity also protects the City in this case. The Millers singularly focus on *Beatty* and argue the only duty owed by the City is to them. That argument ignores the Millers' own claims, which criticize the City's management of the stormwater system as a whole, and ignores the record in this case, which shows the City's decision not to implement Schoel's 3-Phase Plan to upgrade its stormwater *system* (not just one pipe on the Millers' property) was unquestionably a public policy decision which affected numerous other citizens—to whom the City also owes a duty—and therefore is protected by substantive immunity.

ARGUMENT

I. THE CITY DID NOT “MISREPRESENT” ANYTHING.

The Millers repeatedly accuse the City of “misrepresent[ing] that the trial court entered summary judgment on the Millers' negligence claim.” Appellees' Br. at 10. *See also id.* at 27, 51. The City addresses that accusation at the outset.

Section I-C of the trial court's Order is titled “**Negligent Maintenance.**” C. 1157. The first sentence of that section states

“Plaintiffs asserted a negligent maintenance claim.” *Id.* It concludes with a finding that “Defendant has failed to provide appropriate upkeep of its drainage system. According to *Reichert*, such a failure constitutes negligent maintenance, which serves as the negligence theory under *City of Birmingham* that further supports Plaintiffs’ request for an injunction.” C. 1158.

Following the entry of the trial court’s Order, the parties filed a “**Joint** Motion to Clarify” that the Order was a final judgment. C. 1165 (emphasis added). In that joint motion, the parties stated as follows:

2. This Court’s April 4, 2025 Order did just that. While it does not expressly state that it is a final order, the Order granted in full the relief Plaintiffs seek in this lawsuit including a permanent injunction and an award of damages to Plaintiffs in the amount of \$80,441.15. (Doc. 301). It also addresses each of the Plaintiffs’ claims, including their claim for “Negligent Maintenance.” (*Id.* at § I-c).

C. 1165-166. Simply put, the plain language of both the trial court’s Order and the parties’ joint motion directly disprove the Millers’ accusation that the trial court’s Order did not address their claim for negligent maintenance.

The Millers also accuse the City of “falsely claim[ing] the flooding cannot be prevented.” Appellees’ Br. at 60. Walter Schoel testified as follows:

14. Based on Schoel’s studies and modeling it was determined that the proposed drainage project would not reasonably mitigate flooding at the residence located at 2801 Montevallo Road. ...

15. In summary, the flooding as experienced at 2801 Montevallo Rd, including the May 15, 2023 event, is primarily due to the low elevation of the finished basement relative to adjacent stormwater infrastructure and surrounding topography. In Schoel’s professional opinion, the only reasonable measure to eliminate flooding of the structure at 2801 Montevallo Rd would be to floodproof the structure.

16. ... The assessment that the project would not meaningfully improve conditions at 2801 Montevallo Road was communicated by Schoel to Ms. Andrews, the property owner at the time.

C. 786-787.¹ The Millers’ record citations are not to the contrary. For example, the Millers cite City Council Minutes that generally discuss Schoel’s project and contain a bullet point which reads “Confident in mitigating potential impacts of flooding.” C. 940. That cited quote does

¹ Schoel’s testimony is consistent with hydrologist David Hains, who testified that “Schoel studied the issue [in 2004], and we determined that there were not any improvements that the City could perform which would solve the flooding problem at 2801 Montevallo Road[.]” C. 679.

not refer to the Millers' property but rather to the impact Schoel's 3-Phase Project would have on the Heathermoor area (downstream of the Miller property). *Id.*; see also C. 513 ("To offset potential increases in the depths of flooding to the lots along Heathermoor Rd, the improvements identified in the preliminary design will need to be implemented concurrent with the Upper Canterbury and Overhill/Surrey Rd phases.").

The Millers also cite Schoel's draft Summary Report, but that report simply states the project would increase pipe capacity and reduce flooding on lots located on Surrey Road, Overhill Road, and Montevallo Road. C. 511. See C. 424 (this was a "general statement" referring to all lots between Surrey Road and Montevallo Road); C. 515 (Simpson Exhibit 71 - photo depicting where flooding occurs on several lots in this area). Schoel's draft report did not say the 3-Phase Project would prevent the historical flooding on the Millers' property.

II. ALABAMA LAW IS CLEAR: THE MILLERS WERE REQUIRED TO PROVE NEGLIGENCE.

The Millers cite *Beatty* throughout their brief, repeatedly arguing that *Beatty* imposes a strict liability standard and renders the City's arguments regarding negligence "immaterial." *See* Appellees' Br. at 66.²

A. Flooding claims arising out of municipal stormwater infrastructure require negligence.

It is a settled principle of Alabama law that municipalities can only be held liable for their negligence in designing, constructing, or maintaining stormwater pipes. As this Court has repeatedly held, "[p]ursuant to Ala. Code 1975, §§ 11-50-50 to -56, 'municipalities are authorized to construct and maintain drainage systems.' ... A municipality is not required to exercise this authority; however, once it does, a duty of care arises and a municipality becomes liable for its own negligence." *Locke v. City of Mobile*, 851 So. 2d 446, 449 n.2 (Ala. 2002) (citations omitted). *See also Kennedy v. Montgomery*, 423 So. 2d 187, 188-89 (Ala. 1982) ("Once the authority to construct or maintain a drainage

² *See also id.* at 21 n.2 ("an underlying negligence theory is not relevant or determinative for purposes of a nuisance claim when an easement is involved."), at 36 n.6 ("*Beatty* does not require an underlying negligence theory").

system is exercised, a duty of care exists, and a municipality may be liable for damages proximately caused by its negligence. ... This reflects the familiar tort principle that liability may arise from the negligent performance of a voluntary undertaking.”) (citations omitted).³

The requirement that a plaintiff prove negligence in a municipal flooding case applies regardless of the theory of liability or the relief sought. This Court has been clear with respect to injunctive relief,

[O]ur prior decisions consistently support defendant’s contention that proof of negligence is required to sustain injunctive relief ordering abatement of a nuisance when the conduct giving rise to the conditions complained of was expressly authorized by legislative act.

[...]

It is clear that the exercise of any of the foregoing powers could result in injury to the person or property of another so as to fall within the purview of our broad statutory definition of a nuisance; it is also clear, however, that the drastic remedy of abatement by injunction is not available to an injured party unless the authorized instrumentality was negligently constructed or maintained.

Birmingham v. Fairfield, 375 So. 2d 438, 441-42 (Ala. 1979).

³ This requirement of negligence is consistent with the municipal immunity statute, ALA. CODE § 11-47-190. *Britt v. City of Hoover*, SC-2024-0530, 2025 Ala. LEXIS 54, at *5-7 (Ala. May 16, 2025) (Mitchell, J., concurring).

The same is true when a plaintiff seeks monetary damages for trespass and nuisance:

[A]n actionable nuisance claim against a municipality is dependent upon the plaintiff's ability to maintain a claim under § 11-47-190.

In *City of Bessemer v. Chambers*, 242 Ala. 666, 8 So. 2d 163 (1942), this Court considered whether, in addition to an action alleging liability arising under what is now § 11-47-190, an independent nuisance action could be maintained against a municipality. The Court answered in the negative, stating that “the limitation of liability in that statute necessarily means to exclude liability on any other count.” *Chambers*, 242 Ala. at 669, 8 So. 2d at 165. Therefore, it follows that the viability of a negligence action against a municipality under § 11-47-190 determines the success or failure of a nuisance action based upon the same facts.

Hilliard v. Huntsville, 585 So. 2d 889, 892-93 (Ala. 1991). Thus, when plaintiffs’ “negligent-maintenance claims fail, their nuisance and trespass claims must also fail.” *Royal Auto., Inc. v. City of Vestavia Hills*, 995 So. 2d 154, 160 (Ala. 2008). Under this settled law, the Millers cannot avoid the requirement that they actually prove negligence by merely characterizing this matter as “a simple nuisance and trespass case.” *Cf. Appellees’ Br.* at 16.

B. The fact that the City’s stormwater pipe is in a dedicated easement does not obviate the requirement to prove negligence.

ALA. CODE § 11-50-50 gives cities the authority to construct and maintain stormwater drainage systems on both “private” and “public property.” Municipal stormwater drainage systems can typically only be on “private” property if a city has an easement. Indeed, § 11-50-51 specifically contemplates that stormwater drainage systems may be in “easements.”

Whether the City’s drainage pipes are in a “public” right-of-way or on “private” property in a City-owned easement is a distinction without a difference for purposes of the City’s duty. In both situations, a plaintiff must prove that the city’s *negligent* maintenance or construction of that pipe caused the plaintiff’s claimed injury. *See* § I-A *supra*. *See also Long v. Jefferson County*, 623 So. 2d 1130, 1135 (Ala. 1993) (recognizing that, in a case involving an underground sewer pipe in an easement on private property, “cities and counties are generally responsible for damage caused by the *negligent* operation and maintenance of sewers and drains under their control”) (emphasis added); *Ex parte City of Muscle Shoals*, 2025 Ala. LEXIS 30, at *17, 22-24 (Ala. Mar. 28, 2025) (where, as

part of a planned solution to flooding, a city “obtained an easement” to pump water from a pond located on private property, this Court articulated “[t]he material question [as] whether the City may be held liable for that decision, i.e., whether that decision led to a *negligent* design that created a defect in the pond.”) (emphasis added).

C. *Beatty* is inapposite.

Beatty “did not turn upon the liability of a municipality when it acts under statutory authority to create municipal drainage improvements” and “is not apropos” in such cases. *Birmingham*, 375 So. 2d at 443-44. Rather, *Beatty* involved “the City’s acquisition of a *prescriptive easement* for drainage,” *id.* at 443, which *Beatty* recognized “has rarely been litigated in this state.” 295 So. 2d at 391. *Beatty* held “[t]he *prescriptive* right to drain carries with it the corresponding duty to maintain the ditch in such a condition that the water cast in the ditch by the city not cause it to overflow.” *Id.* at 394 (emphasis added).⁴

This case does not involve a prescriptive easement over a natural ditch, but rather involves a stormwater drainage system of pipes located

⁴ *Beatty* principally relied on *Atlanta v. Williams*, 128 S.E.2d 41 (Ga. 1962). The Millers also rely on *Williams*. Appellees’ Br. at 18. *Williams* also involved “an easement by prescription.” 128 S.E.2d at 42.

on both public and private property. The City’s duty to maintain stormwater drainage infrastructure within its dedicated easements derives not from a “prescriptive right,” *cf. id.*, but rather from statutory authority. ALA. CODE § 11-50-50. *Beatty* simply does not apply here.

The Millers nonetheless argue “[t]he City and Amicus Cities fail to explain why an easement holder who acquires an easement by prescription is bound by scope and purpose and cannot overflow but an easement holder who acquires an easement by some other means (i.e., a recorded easement) is not bound by scope and purpose and can go beyond the width of the easement resulting in flooding to adjacent property.” Appellees’ Br. at 33. That argument misunderstands the issue.

Where a city has a prescriptive easement (which *Beatty* noted is “rare”), a city’s right to use the property located within the prescriptive easement is limited, as a matter of law, to the extent of its use for the requisite prescriptive period. In contrast, where a city has a dedicated easement for stormwater drainage, it has the statutory right to construct and/or maintain stormwater drainage infrastructure within that easement. Storms may overwhelm a city’s pipes in a dedicated easement (as happened on May 15, 2023), but to successfully sue a city in that

situation, a plaintiff must prove the city negligently constructed or maintained those pipes.

In addition to being contrary to settled Alabama law, the Millers' position that negligence is not required here ignores the nature of stormwater infrastructure. Like all municipal stormwater drainage systems, the City's stormwater drainage system at issue in this case consists of a network of pipes located in easements and on public property. Indeed, Schoel's Preliminary Design Plan depicts the City's stormwater system in this area and reflects pipes located on both private property (in easements) and in the City's right-of-way on Canterbury Road, Montevallo Road, and Overhill Road. C. 469-483.

According to the Millers, a different standard of liability applies depending on whether a particular section of pipe is in an easement (where the Millers argue that strict liability applies) or in a right-of-way (where the Millers concede a showing of negligence is required, *see* Appellees' Br. at 29). However, municipal stormwater drainage systems are just that – a system. Sections of stormwater pipe located in dedicated easements and sections located in a right-of-way are often continuations

of the same pipe. Applying different standards of liability to those pipes is unworkable and finds no support in Alabama law.

The Millers chastise the Amici for not “point[ing] to at least one instance in the past fifty years where the *Beatty* holding (or general easement law) created the havoc they warn of.” Appellees’ Br. at 59-60. That argument simply proves the Amici’s (and the City’s) point: *Beatty* has *never* been interpreted to impose strict liability on a city simply because stormwater drainpipes are in a dedicated easement.

III. THERE IS NO EVIDENCE OF NEGLIGENT MAINTENANCE.

Once a city exercises its authority to either construct or maintain stormwater infrastructure, a city can be “liable for its own negligence.” §I-A *supra*. But here, the Millers disavowed any negligent design/construction claim, C. 906, acknowledging such a claim would be barred by the statute of limitations and “have no validity.” R. 71-72, 124. With respect to negligent maintenance, the Millers argued they “alleged and proved the City’s drainage system is ‘no longer adequate’ and that it ‘has become overloaded, which has rendered [it] too small for the services now required of [it].” Appellees’ Br. at 76.

The City (and Amici) extensively discussed *Byrd v. City of Citronelle*, 937 So. 2d 515 (Ala. 2006) and *Long v. City of Athens*, 24 So. 3d 1110 (Ala. Civ. App. 2009). Those cases foreclose this theory of liability and make clear that an alleged failure to upgrade and enlarge stormwater pipes will not sustain a negligent maintenance claim. Appellant’s Br. at 37-40; *Byrd*, 937 So. 2d at 522 (holding “restrictive [undersized]” pipes “are clearly matters of design and construction” and “not substantial evidence indicating any negligence by the City in maintaining the ditch”); *Long*, 24 So. 3d 1115-1116 (holding “enlarging culverts ... and requiring detention and retention ponds for developments upstream of the Long property ... speak to matters of design, as did the conditions cited in *Byrd*” and therefore the plaintiffs “failed to present substantial evidence indicating that the City did not adequately maintain the drainage systems”). The Millers do not mention *Byrd* or *Long*, much less explain why they are not controlling here.

Instead, the Millers cite *Terry v. City of Sheffield*, 484 So. 2d 389 (Ala. 1986) for the proposition that “negligent maintenance involves ‘maintaining the system after it is built’ and includes making modifications and remedying the condition when a municipality has

notice that its drain has been rendered too small for the service required of it and overflows onto someone's property." Appellees' Br. at 69. The pipes at issue in *Terry* were not stormwater pipes but rather sanitary sewer pipes. 484 So. 2d 389. Citing "evidence of the long history of ground water flowing directly into the manhole to the sanitary sewer line located in the street immediately in front of the Terrys' property, as well as the City employee's admission that water was getting into the sewer line," *Terry* found a jury question existed as to the cause of the sewage overflows. *Id.* at 391-92. *See also id.* at 391 (if a city "negligently turned, or allowed, its storm waters to flow into the sanitary system with notice of the insufficiency of the county sanitary sewers to care both for the sanitary sewage and the storm waters ... we think it would be negligent maintenance of the sanitary sewage system") (citation omitted). Thus, the issue in *Terry* was whether the city acted negligently by allowing groundwater to infiltrate and overload its sanitary sewer lines, which were not intended to handle groundwater. *Terry* did not hold that a city's failure to enlarge stormwater pipes constitutes "negligent maintenance."

The Millers' reliance on *Reichert v. City of Mobile* is similarly misplaced. *Reichert* held that, to prove a negligent maintenance claim, a

plaintiff must show “the flooding of their property was proximately caused by the City’s failure to provide appropriate upkeep for the storm-drainage system **in its existing condition**, see *City of Birmingham v. Leberte*, *supra*, rather than by the City’s failure to correct any alleged design or construction problems with that system.” 776 So. 2d at 765-66 (emphasis added).

The Millers neither argued nor presented any evidence that the City failed to keep its stormwater system in its “existing condition.” *Cf. id.* Instead, they argued “the City’s drainage system is ‘no longer adequate’ and ‘too small for the services now required of it,’” Appellees’ Br. at 76, and that therefore the City negligently maintained that system. *Byrd* and *Long* make clear this is a design/construction theory of liability, not maintenance.⁵

The Millers also cite *Mayor of Huntsville v. Ewing*, 22 So. 984 (Ala. 1897), which they argue “recognize[d] that a claim for failure to keep a drain in a proper condition included the ‘failure to enlarge’ after the flow

⁵ Typical examples of negligent maintenance claims include situations when a city negligently allowed debris to clog pipes, or negligently allowed sections of pipe to collapse, thereby obstructing the flow of water through the pipe. *City of Birmingham v. Leberte*, 773 So. 2d 440, 446 (Ala. 2000). There is no such evidence in this case.

of water increased.” Appellees’ Br. at 71. That is inaccurate. *Ewing* declined to find “that it was the defendant’s duty to enlarge the ditch or dig it deeper. This alternative was bad. So, the demurrers to this count ought, also, to have been sustained.” 22 So. at 987.

Notably, the Millers do not address the City’s public policy arguments concerning the critical distinctions between maintenance and design/construction claims and why those distinctions matter. *See* Appellant’s Br. at 43-46. Nor do they address the evidence proving their property would have flooded on May 15, 2023 even if the City’s stormwater infrastructure had been upgraded and built to present-day standards, or the import of that fact as it relates to the trial court’s permanent injunction. *Id.* at 64-65. The Millers also do not address the important differences between abatable and unabatable nuisances (and the lack of injunctive relief available with respect to the latter). *See id.* at 33, 45-46; Amici Br. at 19-20.

Because the Millers did not respond to these arguments, the City will not belabor them. The Millers’ silence on these important considerations speaks volumes and reinforces the gravity of the trial

court's error in imposing strict liability and entering permanent injunctive relief.

IV. SUBSTANTIVE IMMUNITY PROTECTS THE CITY.

The Millers' argument against substantive immunity is, in essence, a repeat of the same refrain that runs through their entire brief – i.e., this is just a “simple case” which *only* deals with the “rights and duties” of an easement holder, is *only* governed by a few selective sentences in *Beatty*, and is unaffected by the decades of decisions since *Beatty* dealing with flooding related to sewer/stormwater drainage. It is the Millers' position that the presence of an easement trumps all other considerations and that when there is (1) a drainage easement on private property, and (2) flooding or overflow from the drainage easement, substantive immunity has no application, and *Beatty* is the only law which applies. See Appellees' Br. at 46 (“[T]he City's duty is not derived from a duty owed to the general public. It is derived from the fact the City is an easement holder and the duty is owed directly to the Millers as owners of the land on which the City holds an easement.”).

First, the Millers' insistence that this is a “simple case” which *only* deals with the law of easements (and has nothing to do with a city's duties

to the public as a whole) is *directly* contradicted by their Complaint. Their Complaint, as amended, is replete with assertions related to the alleged inadequacy of the City's stormwater drainage system *as a whole*, an alleged failure by the City to update the pipes and the capacity of the system *in its entirety* (not just in the Millers' property), and the City's alleged failure to properly provide for the "safety of its residents" (not just the Millers), in the broadest of terms:

- "The water that flooded Plaintiffs' property was the result of Defendant's failure to properly maintain its **stormwater drainage system**." C. 95, ¶ 8.
- "Defendant's **stormwater drainage system** is no longer adequate." C. 95, ¶ 12.
- "Defendant's conduct displaces a conscious **disregard for the safety of its residents** and surrounding wildlife." C. 97, ¶ 31.
- "Defendant is required to properly operate and maintain all systems of control to achieve compliance with its storm water pollution prevention plan...[and] to inspect and determine the adequacy of its stormwater drainage system." C. 98-99, ¶¶ 37, 43.
- "Defendant is responsible for replacing **any portion of its stormwater drainage system that is no longer adequate** for the services required of it." C. 99, ¶ 45.
- "Defendant's **drainage system** has become overloaded, which has **rendered its pipes too small for the services now required of them**." C. 102, ¶ 78.

Though the Millers now seek to convince this Court their claims have nothing to do with any other pipe beyond the pipe in the Millers' yard, one need only glance at their Complaint to see that is not what they pleaded. They went to great lengths, in over 100 paragraphs, to repeatedly assert alleged failures by the City to maintain a comprehensive "drainage system" and "pipes" (plural) which are adequate *as a whole* to provide for "the safety of *its residents* and wildlife." C. 94-108. This Court should reject the Millers' argument that the only duty their Complaint implicates is a duty owed "directly to the Millers as the landowners (not to the general public)." Appellees' Br. at 47.

Second, apparently recognizing that the City's decision not to construct Schoel's 3-Phase Project is protected by substantive immunity, the Millers assert that "[t]his case is not about the Schoel Project or a policy decision." Appellees' Br. at 50. That is irreconcilable with the Millers' pleadings, testimony, and arguments below, irreconcilable with the trial court's Order, and irreconcilable with the Millers' appellate arguments.

Their own Complaint directly links their allegations of flooding on their property with an alleged failure to replace “undersized pipes” (plural) system-wide and includes an entire section entitled “DEFENDANT HAS IGNORED THE RECOMMENDATIONS OF MULTIPLE ENGINEERS,” specifically outlining the history of Schoel’s involvement and assessment of drainage “between Montevallo Road and Surrey Road and onto Overhill Road and Canterbury Road to identify problems and submit plans of remediation options.” C. 99-100, ¶¶47-63. If the Millers’ claims “have nothing to do with any decision regarding any project” (Appellant’s Br. at 54), why did they devote an entire section of their Complaint to outlining Schoel’s involvement and findings related to “undersized pipes” in the City’s system beyond the Millers’ yard?

The Millers’ focus on Schoel’s 3-Phase Plan continued in their summary judgment briefing, in which they argued that “Schoel [] provided the City with ‘feasible’ design plans” and that, “[d]espite receiving Schoel’s report and remediation design plans, the City has chosen not to replace the undersized pipes identified by Schoel.” C. 367. In the section of their brief titled “The City’s Drainpipes Are No Longer Adequate,” the Millers argued the City’s failure to implement the

“remediation design plans from Schoel that called for the undersized pipes to be replaced with larger pipes ... amounts to negligent maintenance.” C. 384. They made the same argument in their reply brief. C. 903.⁶

Try as they may to now minimize the role the Schoel study played in their claims, even a cursory review of the trial court’s Order reveals the holding in this case is not limited to findings related only to the easement on the Millers’ property. Rather, it directly implicates the City’s decision regarding the Schoel project. C. 1157-1158. In fact, the trial court’s Order specifically links its finding of negligent maintenance

⁶ Schoel’s Preliminary Design of its 3-Phase Plan was one of the Millers’ summary judgment exhibits, C. 469-486, as was Schoel’s draft report, C. 510-513. In their sworn interrogatory responses, the Millers stated:

ANSWER: The City of Mountain Brook has breached its duty to maintain its drainage system so that it does not flood Plaintiffs’ property. Upon information and belief, the City of Mountain Brook:

- **failed to follow recommendations of engineers the City retained to provide solutions to the drainage problem in Plaintiffs’ area;**

C. 545. Schoel’s 3-Phase Plan has always been squarely at issue in this case. In fact, it is the only evidence in the record which reflects what could be done (albeit at extraordinary cost, in the face of citizen opposition, and in contravention of Schoel’s recommendation) to upgrade and enlarge the stormwater system in this area of the City.

with what it describes as the City's failure to increase the drainage capacity *system-wide* and a failure to implement the Schoel project, holding the City, "despite...receiving reasonable remediation design plans from the engineering firm it retained [Schoel], failed to provide appropriate upkeep of its drainage system." C. 1158.

The trial court's Order illustrates exactly what the City and the Amici have emphasized – *i.e.*, that the claims in this case cannot be viewed in a vacuum.⁷ They are inextricably intertwined with the system's capacity as a whole (which the Millers' claims call into question) and the City's duty to the public as a whole (in particular the property owners "downstream" from the Millers), all of which was part of the Schoel study and contributed to Schoel's recommendation *against* implementing its 3-Phase Plan. C. 787.

⁷ For example, the trial court's Order acknowledges the Millers are not the only property owners in this area with drainage easements running over their private property. C. 1153-1154 ("Defendant [City] possesses and easement over private property from Surrey Road that runs between Lots 255 and 256 along the rear lots lines of Plaintiffs' neighbors' properties (Lots 266, 267, 268, 269, 256, 258, 259 and 260) and along the rear and side of Plaintiffs' property (Lot 265) through which Defendant drains stormwater."). The City's duties to these other landowners are necessarily involved and affected by any changes to the section of pipe on the Millers' land.

The reality is the Millers' Complaint directly invokes the City's duty to consider all its citizens' interests, not just the Millers'. The trial court's Order likewise acknowledges the intertwined nature of the drainage issue in the Millers' yard to the system as a whole and specifically criticizes the City for not implementing a comprehensive plan for remediation as opposed to a "simple" fix on the Millers' property alone.⁸ It defies logic, then, that the Millers would argue to this Court that their claims against the City do not involve any duty owed to the general public (and therefore only *Beatty* applies, not any cases involving substantive immunity). This position is belied by their pleadings and by the Order entered by the trial court at their urging.

The Millers brush away any application of this Court's repeated and recent applications of substantive immunity based solely on *Beatty*. Their argument cannot be squared with the reasoning this Court has

⁸ Schoel's 3-Phase Plan and Walter Schoel's testimony show that there is no "simple fix" and make clear that enlarging sections of pipe near the Miller property would affect the entire drainage system and citizens located downstream. Appellant's Br. at 18; C. 787.

articulated several times just this year and for decades since *Beatty*.⁹ For example, in *Britt v. City of Hoover*, 2025 Ala. LEXIS 54, at *10, this Court affirmed a finding of immunity for the City of Hoover in a case “challenging a **city’s decision not to expand or replace drainage pipes**” – *exactly* what the City did here. In fact, Justice Mitchell described such claims as “**classic examples of duties owed to the public at large and not to individual plaintiffs.**” *Id.* (emphasis added). As this Court recently explained in *Smith v. City of Birmingham*, 2025 WL 2680098 (Ala. Sep. 19, 2025), the fact that an individual is injured does not create liability (or a “legal duty of care to an individual”) when, as here, the claimed injury is tied to a municipality’s choice to provide for the public health, safety, and general welfare of its citizenry by voluntarily assuming a responsibility.

Throughout this case, including on appeal, the Millers have criticized the City’s “drainage system” as a whole, linking their injury to a failure to expand and replace drainage pipes throughout the system. Appellees’ Br. at 76. They cannot be heard now to maintain that there

⁹ Notably, *Beatty* was decided approximately 8 years prior to this Court’s recognition of substantive immunity in *Rich v. City of Mobile*, 410 So. 2d 385 (Ala. 1982).

is no duty to the public at large implicated by their claims. *See also Fahrman v. City of Orange Beach*, 2025 WL 1007962 (Ala. April 4, 2025) (“But to stop here and impose liability is to overlook what we perceive as overriding public policy reasons to hold to the contrary...While, as here, the individual homeowner is affected..., the City’s larger obligation to the whole of its resident population is paramount.”); *Ex parte City of Muscle Shoals*, 2025 Ala. LEXIS 30, at *29 (holding “a city’s choice in how to plan” for large rain events is an issue which “touch[es] on broader questions involving a city’s stormwater-drainage system as a whole and questions involving other City residents, not just these plaintiffs.”).¹⁰

Fulfilling the duty it owes to *all* its citizens, the City considered a myriad of factors when deciding whether to upgrade and expand its drainage system. Appellant’s Br. at 17-20. The Millers say “none of

¹⁰ The Millers’ superficial reference to cases in which claims for negligent design or true negligent maintenance have been excluded from the application of substantive immunity have no bearing here (*e.g.*, *City of Mobile v. Jackson*, 474 So. 2d 644 (Ala. 1985)). The Millers disavowed any claim for negligent design, and there is no evidence of negligent maintenance. The cases allowing such claims have no relevance to the issue here, which is the City’s alleged failure to move forward with a plan affecting an entire drainage system.

them matter.” Appellees’ Br. at 53. Simply put, this Court’s substantive immunity decisions hold otherwise. *Ex parte City of Muscle Shoals*, 2025 Ala. LEXIS 30, at *29; *Britt*, 2025 Ala. LEXIS 54, at *10.

This Court should decline the Millers’ invitation to ignore all stormwater drainage cases except *Beatty*, to ignore *Rich v. City of Mobile* and its progeny (including multiple opinions applying substantive immunity this year), to ignore the claims set out in their Complaint, and to ignore the language used by the trial court in its Order (all of which implicate the City’s duty to the public as a whole). The existence of an easement may be the reason the Millers claim there is a duty owed to them by the City, *but the actual duty* the Millers have put at issue is the alleged duty of the City to implement a plan to expand the capacity of its drainage system as a whole. That issue unquestionably invokes substantive immunity, regardless of the limited holding in *Beatty* back in 1974.

V. THE MILLERS’ PARADE OF HORRIBLES IS INAPPOSITE.

The Millers claim that if the City’s arguments are credited, “there will be no limit as to what the City can do on the Millers’ property.” Appellees’ Br. at 57. *See also id.* at 54 (“the City could start holding City

Council meetings in the Millers’ living room”). These arguments are straw men. A dedicated drainage easement allows the City to construct and/or maintain drainage infrastructure. If the City exercises its authority to do so, it cannot act negligently. That obviously does not turn the City into a “joint owner with unlimited use of the entire property.”

The City and Amici’s point—which the Millers never address—is that extending *Beatty* to impose strict liability and enter a permanent injunction whenever stormwater pipes in an easement get overwhelmed would be a sea change in the law and impose an impossible fiscal burden on municipalities, turning them into “an insurer of last resort.” *Britt*, 2025 Ala. LEXIS 54, at *11 (Mitchell, J., concurring).

VI. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT AGAINST THE CITY.

The trial court’s judgment should be reversed, and this case should be remanded with instructions to enter summary judgment in the City’s favor for the reasons above. Additionally, at a bare minimum, the trial court’s Order entering offensive summary judgment against the City should be vacated for both the reasons above and the additional reasons below.

A. Prescription

The Millers contend the City “den[ied] it flooded the Millers’ property without consent and den[ied] it even had notice of the flooding issue.” C. 1161. That is inaccurate. The City did not deny that 2801 Montevallo Road has flooded for decades but rather denied that any wrongful act by the City caused that flooding. *See* C. 105-107 (Am. Compl.) ¶¶ 104, 106, 108, 110, & 111 (a “negligent maintenance” count against the City), ¶ 123 (a trespass count against the City alleging that Defendant flooded Plaintiffs’ property “without their consent on May 15, 2023”) *and compare with* C. 126-127 (City’s Answer).

The City expressly acknowledged “prior instances of flooding have occurred at Plaintiffs’ property.” C. 117. *See also* C. 441 (“admitted that prior to May 15, 2023 there were numerous flooding events near Plaintiffs’ property, and that in some of those prior extraordinary events the stormwater pipes near Plaintiffs’ property were overwhelmed by the volume of water.”). The above evidence, as well as other evidence¹¹,

¹¹ *See* C. 675 (flooding at 2801 Montevallo Road since the year 2000); C. 670-671, 673 (letters from the 1950s regarding flooding); C. 783 (“In the 1950’s, Walter Schoel, Sr., served as acting City Engineer for the City of Mountain Brook. Records indicate that Schoel investigated the

demonstrate the lack of support for the trial court’s finding that the City “den[ied] it had notice of the flooding.” C. 1161.

As the City explained in its principal brief, flooding does not have to occur every day for 20 years for prescription to bar the Millers’ claims. *Stewart v. Shook Hill Rd. Prop. Owners’ Ass’n*, 726 So. 2d 694 (Ala. Civ. App. 1998); APJI 18.30 (“The harm does not have to happen every day, but when it does happen it must be the same kind and degree over the [prescriptive] period.”). *City of Montgomery v. Couturier* does not support the Millers’ argument to the contrary. 373 So. 2d 625 (Ala. 1979). In *Couturier*, the flooding occurred “during heavy rains and for a short while thereafter.” *Id.* at 628. *Couturier* acknowledged, however, that evidence of “a visible condition which would reasonably put a landowner on notice” that the property flooded could support a prescription defense. *Id.* The evidence here (viewed in a light most favorable to the City) shows the Millers either knew or should have known that 2801 Montevallo Road had a history of flooding. C. 1041 (cataloguing that evidence, including

drainage issues at 2801 Montevallo Road, which were documented as problematic during that period.”).

the home inspection report which stated “[t]his house is [sic] had some serious drainage work done. I suspect maybe it flooded in the past.”).

Moreover, evidence dating back more than 70 years shows multiple prior owners of 2801 Montevallo Road had notice of, and repeatedly experienced firsthand, flooding. *See* footnote 11 *supra*. The City therefore presented substantial evidence that it met the elements of a prescription defense before the Millers even purchased the property in 2023. Those prescriptive rights “pass[] with the conveyance of the land, even when it is not specifically mentioned in the instrument of conveyance.” *Andrews v. Hatten*, 794 So. 2d 1184, 1188 (Ala. Civ. App. 2001) (citation omitted).

B. Act of God

The Millers claim that, because their property has flooded before, the City’s act of God defense fails as a matter of law. Appellees’ Br. at 63-64. They misunderstand the issue. The issue is whether the May 15, 2023 rain event qualifies as an act of God. It is undisputed the May 15, 2023 rain event approached a 50-year rain event—far more severe than what even new stormwater drainage systems built to present day standards are required to handle. C. 784-85. Whether that particular

rain event was “so unprecedented” that it constitutes an act of God is a jury question. *Bradford v. Stanley*, 355 So. 2d 328, 330 (Ala. 1978) (“It was a jury question to determine whether or not the rainfall was so unprecedented as to be deemed an act of God”); *Jackson*, 474 So. 2d at 650 (when “there is conflicting testimony in the record as to the classification of the April 1980 and May 1980 rains, ... it was for the jury to determine whether the rainfall was so unprecedented as to be deemed an act of God.”).

C. Coming to the Nuisance

The Millers offhandedly dismiss the cases cited by the City, which they say do not recognize the doctrine of coming to the nuisance. To the contrary, *Mountain Brook Estates, Inc. v. Solomon* recognized that when a purchaser buys property and the existence of a condition alleged to be a nuisance is “open to ordinary observation and inspection,” that condition “cannot be made the basis of equitable relief.” 23 So. 2d 1, 5 (Ala. 1945). Similarly, in *Martin Bldg. Co. v. Imperial Laundry Co.*, this Court held that whether alleged nuisance “was established and operated several years before the construction of the [plaintiff’s] office building”

was “a matter properly to be considered.” 124 So. 82, 84 (Ala. 1929) (collecting cases).

Notably, the Millers appear to acknowledge that the coming to the nuisance doctrine can apply where a purchaser knows of a pre-existing nuisance, as they argue that the doctrine does not apply where “there was no evidence the complainant knew of the nuisance.” Appellees’ Br. at 65 (citing *Crommelin v. Cox*, 30 Ala. 318, 327 (Ala. 1857)). Again, the evidence viewed in a light most favorable to the City reflects the Millers either knew, or should have known, about prior flooding at the property. The trial court erred in ignoring that evidence.

CONCLUSION

The City of Mountain Brook respectfully requests this Court reverse the Circuit Court’s judgment and remand this case with instructions to instead enter judgment in the City’s favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of ALA. R. APP. P. 28 because this brief contains 6,833 words, excluding the parts of the brief exempted by ALA. R. APP. P. 28 and 32(c), as counted by the word count function of Microsoft Word processing software.

2. This brief complies with the typeface and type style requirements of ALA. R. APP. P. 32(a)(7) because this brief has been prepared in a proportionately spaced typeface using the Microsoft Word processing software in 14-point Century Schoolbook font.

s/ Benjamin T. Presley
Benjamin T. Presley

CERTIFICATE OF SERVICE

I do hereby certify that on **October 22, 2025**, I electronically filed the foregoing with the Clerk of the Court using this Court's electronic filing system and it has been served upon the below counsel of record by e-mail and by placing same in the United States mail, postage pre-paid and properly addressed as follows:

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