

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-20240901073

APPELLEES' RESPONSE BRIEF

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Oral Argument Requested

STATEMENT REGARDING ORAL ARGUMENT

The Appellees, Rodney E. Miller and Mary Leah Miller, (the “Millers”) request oral argument. While this is a simple case involving the rights and duties of an easement holder and the remedies available to landowners when an easement holder goes beyond the scope and purpose of its easement and breaches its duties, the outcome sought by the City of Mountain Brook (the “City”) would upend decades of easement law and provide easement holders unlimited use of property subject to an easement. Accordingly, oral argument is warranted, and the Appellees welcome the opportunity to present oral argument.

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STATEMENT OF THE CASE

The City's Statement of the Case misrepresents that the trial court entered summary judgment on the Millers' negligent maintenance claim. See Appellant's Brief, p. 12. The Millers sought summary judgment on their nuisance and trespass claims, as well as an injunction prohibiting the City from flooding their property. C. 385. The primary basis for the injunction is the City's breach of its duty as an easement holder not to overflow and flood the Millers' property as articulated in *City of Mountain Brook v. Beatty*, 295 So. 2d 388 (Ala. 1974). C. 371-377. The Millers also presented a second basis for an injunction predicated on a negligence theory as articulated in *City of Birmingham v. City of Fairfield*, 375 So. 2d 438 (Ala. 1979). C. 380-385.

The trial court held that because the City's drainpipe is in an easement *Beatty* applies, and it granted the injunction. C. 1154. Additionally, the trial court held that "even if this matter did not involve the rights and duties of an easement holder resulting in the application of *Beatty*, [the Millers] are still entitled to an injunction abating the nuisance pursuant to *City of Birmingham*." C. 1158.

The City also failed to mention the allegation that the City “was under a duty to maintain its drainage system in such a condition that the stormwater cast into its drainage system did not cause it to overflow and flood [the Millers’] property and home”, C. 102, 104-05, 371, and that it breached its duty, C. 374.

STATEMENT OF THE ISSUES

- I. Whether the City, as an easement holder, must abide by the limited scope and purpose of its easement and drain without unduly burdening adjacent property.

STATEMENT OF THE FACTS

The City has a twelve-foot-wide “storm drain” easement that runs along the rear lot lines of the Millers’ neighbors’ properties and the rear lot line and side of the Millers’ property (Lot 265). C. 391, 604 (zoomed in on C. 364). The City maintains a 36-inch underground drainpipe in its easement and it has been that size since 1928. C. 420, 604. The City also has seven drain inlets in the easement that capture stormwater and direct it into the City’s drainpipe. C. 425-28.

On May 15, 2023, the Millers’ property and home flooded with several feet of water causing over \$80,000 in damages. C. 550-67. Mr. Miller witnessed stormwater coming out of the City’s drainpipe and drain inlets in the easement. C. 530-31. This is called surcharging, which occurs when the capacity of a drainpipe is overloaded and releases water from the drainpipe through the drain inlets. C. 430-31.

While this was the first time the home flooded for the Millers, it was the ***seventh time*** the home flooded in a ***two-year span*** totaling hundreds of thousands of dollars in damages. C. 727. Notably, the Millers’ property is ***not*** in a flood zone. C. 391.

The City admits “the stormwater pipes near [the Millers’] property [have been getting] overwhelmed by the volume of water” directed to them resulting in flooding C. 441. City employees have admitted that the Millers’ property floods because the drainpipe cannot handle the water directed to it and gets overwhelmed. C. 517, 524.

The City’s experts, Schoel Engineering Company, Inc. (“Schoel”), studied the issue and concluded the flooding at issue is “originating from” the drainpipe in the easement. C. 423-24, 511. Schoel attributed this to the City’s drainpipe not having the capacity to handle the amount of water being captured and directed to it. C. 511. Schoel designed plans for the City that call for increasing the capacity of the drainage system “such that the flooding originating from [the City’s] pipe network will be significantly reduced.” C. 423-24, 469-86, 511. The City never voted the project up or down. C. 943.

SUMMARY OF THE ARGUMENT

This is a simple case involving the rights and duties of an easement holder. The law in Alabama (which has been in place for *over half a century*) provides that when a municipality drains through an easement across private property, it “**does not** have the right to flood [adjacent] property” and “**should be enjoined** from causing a flood on [adjacent] property.” *Beatty*, 295 So. 2d at 391, 394-95 (emphasis added). Because the City’s drainpipe and drain inlets at issue are in a City easement over private property, the City is an easement holder and its right to drain is accompanied by a corresponding duty to maintain the drain easement “in such a condition that the **water cast in [it] by the city not cause it to overflow**” and flood adjacent property. *Id.* at 394 (emphasis added).

The duty articulated in *Beatty* is consistent with easement law in Alabama, which provides that an easement holder is not permitted to overburden the property subject to the easement, *see Perdido Place Condo. Owners Ass’n, Inc. v. Bella Luna Condo. Owners Ass’n, Inc.*, 43 So. 3d 1201, 1207 (Ala. 2009), and in the case of an easement to drain, the easement holder has a duty to use the drain easement “in such a

fashion that adjacent property would not be unduly burdened,” *City of Birmingham*, 375 So. 2d at 444.

On May 15, 2023, the City breached its duty when the City’s drainpipe in its easement backed up and overflowed **from out of** the City’s drain inlets in the easement and flooded the Millers’ property and home **well beyond** the twelve-foot width of the easement, causing over \$80,000 in damage. C. 550-67. Since the City’s drainpipe and drain inlets are contained in an easement, *Beatty* applies, is decisive, and compels a ruling affirming the trial court’s order.

ARGUMENT

I. THIS CASE IS ABOUT THE RIGHTS AND DUTIES OF AN EASEMENT HOLDER.

By focusing on negligence, the City has gone to great lengths to distort what this case is about. The City ignores its duty as an easement holder while, at the same time, misrepresenting this matter as a negligence case involving drainpipe design standards, a 3-phase project, and upgrading drainage infrastructure. Make no mistake: This is a simple nuisance and trespass case involving the rights and duties of the City **as an easement holder**.

II. *BEATTY* SQUARELY APPLIES TO THIS CASE.

The City's drainpipe and drain inlets at issue are in the City's easement over private property. C. 391, 604¹. Although the City has the right to drain within its easement, deep-rooted Alabama precedent provides that this right carries with it the corresponding duty to maintain the drain easement "in such a condition that the water cast in [it] by the city not cause it to overflow" and flood adjacent property. *Beatty*, 295 So. 2d at 394. When a municipality, in the exercise of its right to drain through an easement, breaches its duty and floods adjacent property outside of the easement, this Court has held that the municipality "should be enjoined from causing a flood on [adjacent] property." *Id.*

The plaintiffs in *Beatty*, like the Millers, asserted a nuisance claim and sought an injunction. *See id.* at 389. The "key issue" in *Beatty* was "whether the City of Mountain Brook ha[d] the right to drain water across the [complainants'] property, and, if so, **to what extent such**

¹ When Mountain Brook Estates became part of the City, the drains and public easements became the City's responsibility "to repair and maintain". *Mountain Brook Estates. v. Solomon*, 23 So. 2d 1, 5 (Ala. 1945).

right exists.” *Id.* at 391 (emphasis added). This Court found the City had an easement for drainage but that such right is **not without limits**. It held that possessing a drainage easement “does not imply that the city possesses the right to flood the complainants’ property.” *Id.* at 394. In reaching this conclusion, this Court relied on water rights principles: “diffuse surface water **may not** be collected in a channel and cast on complainants’ land” and one “**may not be permitted to overtax the capacity** of the water course or drainage channel.” *Id.* at 392-93 (emphasis added) (citation omitted).

This Court also relied on a Georgia case where water had been overflowing from a municipality’s drain easement and spilling out onto the complainants’ property. *See id.* at 394 (citing *City of Atlanta v. Williams*, 128 S.E. 2d 41 (Ga. 1962)). The Georgia Supreme Court held that “[i]f the city claims a right to use the drainage ditch then it is under a duty to maintain it **so that the content and flow of surface waters would not overflow to the damage of the adjacent property owners.**” *Williams*, 128 S.E. 2d at 42 (emphasis added).

Because the water complained of in *Beatty* was overflowing from the City’s easement, this Court held the City “should be enjoined from

causing a flood on complainants' property" and instructed the trial court to enter an order "prohibiting overflow." 295 So. 2d at 394.

a. IT IS *UNDISPUTED* THAT THE CITY'S DRAINPIPE AND DRAIN INLETS ARE IN AN EASEMENT.

The City acknowledges that the drainpipe is in an easement. *See* Appellant's Brief, p. 14. A City Council Member for the City also admitted that the drainpipe belongs to the City and is in the City's easement. C. 466. The 1928 plat map identifies a twelve-foot-wide easement for "storm drains" that runs along the rear lot lines of the Millers' neighbors' properties and along the side of the Millers' property (Lot 265). C. 604, 364. The easement is also identified on the Millers' property survey. C.391. The City's easement also contains seven drain inlets. C. 425-28. Accordingly, it is undisputed that the City's drainpipe and drain inlets are in the City's easement.

b. IT IS *UNDISPUTED* THAT THE CITY'S DRAINPIPE GETS OVERWHELMED AND RELEASES WATER ONTO THE MILLERS' PROPERTY.

To be clear as to what is happening and what happened on May 15, 2023, the City is capturing and directing so much water into its drainpipe in its easement that the drainpipe is backing up and releasing the water **out of** the City's drain inlets and onto the Millers' property outside of the

City's easement. C. 423-24, 430-31. This is called surcharging. C. 430-31. There is so much water surcharging out of the City's drainpipe in the easement that the water flooding the Millers' property and home has exceeded three feet (*i.e.*, as high as the door handles on the Millers' home). C. 569. The City attempts to paint the May 15, 2023 flood as an isolated incident resulting from an unusual rain event. *See* Appellant's Brief, p. 23. While the May 15 flood was the first time the home flooded for the Millers, it was the ***seventh time*** the home had flooded in a ***two-year span***. C. 727.

On May 15, 2023, Mr. Miller witnessed the water rushing **out of** the City's drainpipe and drain inlets and onto his property. C. 530-31. Importantly, the City **admits** "the stormwater pipes near [the Millers'] property [have been getting] overwhelmed by the volume of water" directed to them resulting in flooding C. 441. An employee in the City's Public Works Department admitted 2801 Montevallo Road (the Millers' property) "flooded **because** the storm system couldn't handle all of the water" being directed to it. C. 524 (emphasis added). When emailing the previous owners of the Millers' home about floods they experienced, the

City's Manager attributed the flooding to the City's drainpipe getting "overwhelmed." C. 517.

The City's experts studied the issue and prepared a report which referenced the Millers' property and discussed the City's pipe network at issue. C. 511. In this report, the City's experts **admit** that the flooding at issue is "**originating from** this pipe network." C. 511 (emphasis added). Mark Simpson, an engineer with Schoel who was designated as an expert by the City and the Millers, confirmed that Schoel's statement that the flooding is "originating from this pipe network" refers to the surcharging of the City's drainpipe in the easement. C. 423-24. Schoel attributed this to the City's drainpipe not having the capacity to handle the amount of water being captured and directed to it.² C. 511. Mr. Simpson explained that Schoel designed plans that call for increasing the capacity of the

² This does not mean the drain was negligently designed or constructed when installed in 1928. William Thomas, an expert from Schoel, testified that drainpipes are selected based on the level of development *at the time of installation* and explained that this means drainpipes that are sufficient when installed may no longer be adequate today because of increased development over time resulting in increased impervious surface space. C. 593-94, 598-99. Regardless, the City's duty under *Beatty* is that of an easement holder, and as discussed in Section (II)(c), an underlying negligence theory is not relevant or determinative for purposes of a nuisance claim when an easement is involved.

drainage system “such that the flooding originating from [the City’s] pipe network will be significantly reduced.” C. 423-24, 511, 515. Importantly, this Court specifically acknowledged in *Beatty* that the duty of an easement holder includes installing pipes to increase the capacity of the drainage system when stating, “[p]erhaps proper maintenance of the ditch will eliminate the flooding ***or perhaps another take-off pipe will have to be installed.***” 295 So. 2d. at 394. (emphasis added).

The City admits that development pressure has taxed its older drainage infrastructure, making it difficult for the infrastructure to effectively convey stormwater. C. 488. The City also admits that development has resulted in “natural permeable surface areas [being] covered by impermeable surfaces, such as rooftops, driveways, and parking lots, resulting in more of the rain becoming runoff” and needing to be collected by the City in its drainage system. C. 488. These admissions by the City specifically include the Millers’ property.³

The City attempts to undo the fatal impact of its admissions and the findings in the Schoel report by blaming the flood on topography and,

³ Schoel divided the City into Tribs. The Millers’ property is in the Heathermoor Trib. C. 408, 488 (adopting the Critical Basin designation that is part of C. 494-96).

specifically, the low elevation of the Millers' finished basement. *See* Appellant's Brief, p. 34. This argument fails for several reasons. First, the City relies on an affidavit from Walter Schoel who was not present at the Millers' property on May 15, 2023 and does not claim he was present. Therefore, he lacks personal knowledge as to where the water that flooded the Millers' property on May 15 came from. Furthermore, Mr. Schoel is the engineer who submitted the Schoel report concluding the flooding is "originating from" the City's drainpipe. C. 511. His position that the water originating from the City's drainpipe and overflowing onto the Millers' property eventually makes its way into the Millers' garage and home (the low point of the Millers' property) is consistent with what Mr. Miller saw on May 15 and constitutes a nuisance and trespass.

To better understand what is happening, this Court can turn to the survey of the Millers' property, C. 391, which shows the "12' easement" from which the water overflows when the City's drainpipe surcharges. The survey also shows 24.9' of space between the easement and structure of the home, which is the Millers' driveway. C. 391. The water comes out of the drainpipe in the easement and overflows onto the driveway, which

is outside of the easement. The water then enters the garage and home, which are the low points on the property.

The City's attempt to blame the elevation of the home ignores the fact that the trespass and nuisance occur when the water comes out of the City's drainpipe in the easement and overflows onto the Millers' property (driveway) outside of the easement. It is not relevant that **after** the water overflows onto the Millers' property (resulting in the nuisance and trespass) it eventually makes its way to the low point of the property.

Most importantly, it is not the existence of the garage and finished basement that cause the flooding; it is the City's overwhelmed drainpipe releasing water onto the Millers' property. This was confirmed by Mr. Simpson, an expert for the City and the Millers, who testified that there is nothing about the structure of the Millers' home that contributes to the water coming onto the Millers' property. C. 929. For example, even if the Millers bricked in their garage and basement, the water would still overflow onto the driveway and flood the Millers' property, which is a nuisance and trespass. Besides, the Millers are allowed to have a garage and basement on **their** property; the City is not allowed to flood outside of its easement.

The City's position also ignores the purpose of the drain inlets, which Mr. Simpson testified is to capture and direct stormwater into the City's drainpipe within the easement *before* the water gets to the Millers' property. C. 402-03, 428. In other words, it is not stormwater landing on the ground and flowing to the Millers' property as such water would be captured by the drain inlets before reaching the property. Rather, as the City and its experts have admitted and Mr. Miller witnessed, it is the water being captured and directed to the City's drainpipe that is coming out of the "overwhelmed" drainpipe that is flooding the Millers' property.

These undisputed facts and admissions amount to a breach of the City's duty as an easement holder to maintain the drain easement "in such a condition that the water cast in [it] by the city not cause it to overflow" and unduly burden adjacent property. *Beatty*, 295 So. 2d at 394.

c. CITY OF BIRMINGHAM V. CITY OF FAIRFIELD AFFIRMED THE DUTY ARTICULATED IN BEATTY.

Five years after *Beatty*, this Court issued another opinion involving municipal flooding and distinguished a situation where a municipality drains through an easement on private property (such as in *Beatty* and the case at hand) from a situation where a municipality drains through

municipal-owned property. *See City of Birmingham*, 375 So. 2d at 443-44.

In *City of Birmingham*, Fairfield sought an injunction to stop Birmingham from operating a drainage system that was diverting water onto property belonging to Fairfield. *See id.* at 439. The trial court found the condition to be a nuisance and enjoined Birmingham. *See id.* at 440. This Court reversed because “the case was not tried on any sort of negligence theory”, which this Court deemed was required to obtain injunctive relief for nuisance. *Id.* at 443.

Expecting that some might find its decision requiring an underlying negligence theory to be conflicting since an underlying negligence theory ***was not*** required in *Beatty*, this Court specifically noted that “the cases are distinguishable” and pointed out that in *Beatty* Mountain Brook had an easement to drain and in *City of Birmingham* “[i]t [was] clear that Birmingham ha[d] no easement over Fairfield’s property.” *Id.* at 443-44. Since *City of Birmingham* did not involve an easement to drain, this Court distinguished it from *Beatty* and noted that “the focus [in *City of Birmingham*] ***[was] not on the rights and duties which arise as a***

result of the creation of *an easement over private property.*” *Id.* at 444. (emphasis added).

This Court was clear that to obtain an injunction involving a drainage system on *municipal-owned* property as in *City of Birmingham*, a plaintiff must “prov[e] that the ‘nuisance’ was produced by the negligent acts or omissions of defendant” to obtain an injunction. *Id.* at 441, 443-44.⁴ However, when, as in *Beatty* and the case at hand, a municipality utilizes an easement over private property to drain, the matter involves “the rights and duties” of an easement holder, making it distinguishable from *City of Birmingham* and negating the requirement to prove an underlying negligence theory. *Id.* at 441, 443-44.

⁴ The City misrepresents that the trial court granted summary judgment on the Millers’ negligent maintenance claim. *See* Appellant’s Brief, pp. 12, 26, 60-61. The Millers sought summary judgment on their *nuisance* and *trespass* claims, as well as an injunction. C. 385. One theory was based on the duty of an easement holder in *Beatty* and the other on *City of Birmingham*, which held that when the rights and duties of an easement holder **are not** involved, nuisance claims must be supported by a negligence theory to obtain injunctive relief. *See* 375 So. 2d at 441, 443-44. It did not, however, require judgment on a cause of action for negligence. The plaintiffs in *City of Birmingham* did not assert a negligence claim and this Court noted it is not the “ceremonial averment of negligence” that counts, but whether the plaintiff can “prov[e] that the ‘nuisance’ was produced by the negligent acts or omissions of defendant.” *Id.* at 441.

The City, relying on *City of Birmingham*, contends “*Beatty* does not relieve the Millers of the burden of presenting substantial evidence of the City’s negligence in this case.” Appellant’s Brief, p. 31. Similarly, the City argues that “the Millers’ trespass and nuisance claims depend on the viability of their ‘negligent maintenance’ claim, and therefore those claims should have been dismissed, as well.” *Id.* at p. 42 n.8. The City’s position is contrary to the fact that the plaintiffs in *Beatty* asserted a nuisance claim without an underlying negligence theory (*Beatty* does not reference or include the words “negligence” or “negligent”), 295 So. 2d at 389, and in *City of Birmingham* this Court held that an underlying negligence theory is not required when, like here, the matter involves the rights and duties of an easement holder. *See* 375 So. 2d at 443-44.

d. THIS COURT’S DISTINCTION OF *BEATTY* FROM *CITY OF BIRMINGHAM* IS CONSISTENT WITH EASEMENT LAW.

This Court’s distinction between a municipality draining through an easement on private property and a municipality draining through municipal-owned property is consistent with easement law. An easement is “[a]n interest in land owned by another person, **consisting in the right to use or control the land**, or an area above or below it, **for a specific limited purpose.**” BLACK’S LAW DICTIONARY (12th ed. 2024)

(emphasis added). “[O]ne holding an easement cannot change the character of that easement, or ‘enlarge upon [that] easement for other purposes.’” *Chatham v. Blount Cnty.*, 789 So. 2d 235, 241 (Ala. 2001) (citations omitted).

When a municipality owns the property it is draining on, its right to drain is not limited in scope or purpose by an easement. Accordingly, to recover damages in such a situation, a plaintiff must prove the nuisance was produced by negligence. *See City of Birmingham*, 375 So. 2d at 441. However, when a municipality utilizes an easement to drain across private property its rights are as an easement holder and, therefore, limited in scope and purpose.

This Court’s finding in *Beatty* that the City possessed the “right to drain” but “[did] not have the right to flood [adjacent] property” is consistent with easement principles. 295 So. 2d at 391. Similarly, this Court’s holding in *City of Birmingham* that the holder of an easement to drain has a duty to use the easement “in such a fashion that adjacent property would not be unduly burdened”, 375 So. 2d at 444, is consistent with the general rule that an easement holder is not permitted to

overburden the property subject to the easement. *See Perdido Place*, 43 So. 3d at 1207.

The holding in *Beatty* is no different from a situation where an individual possesses a twelve-foot-wide right-of-way easement through a neighbor's property to use as driveway access to get to his property. If the easement holder drives his vehicle *outside* the width of his easement and all over his neighbor's property causing damage, that constitutes trespass and nuisance; the neighbor can recover against the easement holder **without proving negligence**.

In the case at hand, the City has the right to drain within its easement, but it does not have the right to flood an entire level of the Millers' home ***outside of*** the City's easement as it undisputedly did on May 15, 2023. Doing so is a breach of the City's duty and constitutes trespass and nuisance – the claims the trial court granted summary judgment on. C. 1155-57, 1159.

Interestingly, the City discusses drainpipe design standards at length. *See* Appellant's Brief, pp. 43-44. This case is not about design standards, but rather the duties of an easement holder. Consider a situation where an individual obtains an easement to install a drainpipe

through a neighbor's property to drain stormwater and years later the easement holder begins directing more water to the drainpipe such that it no longer has adequate capacity to handle the water. If this results in an overflow and flooding of the neighbor's property, the easement holder is liable. The easement holder cannot avoid liability by simply declaring that the drainpipe was the appropriate standard and sufficient years ago when installed.⁵

e. THE CITY'S DUTY IN *BEATTY* IS NOT LIMITED TO PRESCRIPTIVE EASEMENTS.

The City and Amicus Cities attempt to distinguish *Beatty* from the case at hand by pointing out that *Beatty* involved a *prescriptive* easement. See Appellant's Brief, p. 28; Amicus Brief, pp. 11-12. This is a distinction without a difference. Prescription is merely a method by which an easement can be acquired. See *Ammons Prop., LLC v. Spraggins*, 385 So. 3d 919, 924 (Ala. 2023).

This Court stated in *Beatty* that “[b]y finding that the city has **an easement for drainage**, however, the court does not imply that the city

⁵ The easement holder in this example also cannot avoid liability by claiming it will cost too much to stop flooding the neighbor's property, which is another argument the City makes. See Appellant's Brief, pp. 18, 54-55, 62.

possesses the right to flood the complainants' property.” 295 So. 2d at 394 (emphasis added). It was the fact that the municipality had an “easement for drainage” that served as the basis for the duty (not how the easement was acquired).

In support of their position, the City and Amicus Cities offer block quotes from *City of Birmingham*. See Appellant's Brief, p. 30; Amicus Brief, p. 12. The portion of the quote offered by the City does not even include the word “prescriptive” or refer to prescriptive easements, and has nothing to do with limiting the application of *Beatty* to *prescriptive* easements or distinguishing *Beatty* from *City of Birmingham* on the basis that *Beatty* involved a *prescriptive* easement rather than some other type of easement. See Appellant's Brief, p. 30. The Amicus Cities offer an expanded version of the same quote but add ellipses in place of the portion of the quote that is contrary to their position. See Amicus Brief, p. 12. The portion of the quote that the City and Amicus Cities omit explains that *Beatty* and *City of Birmingham* are distinguishable because “the focus [in *City of Birmingham*] is not on the rights and duties which arise as a result of the creation of **an easement over private property**” and that “Birmingham ha[d] no **easement** over Fairfield's property...”

375 So. 2d at 444 (emphasis added). Neither statement references *prescription* nor limits the duty in *Beatty* to *prescriptive* easements. This Court took special care to note that *Beatty* was distinguishable from *City of Birmingham* because it involved “an easement over private property” (without regard as to how it is acquired). 375 So. 2d at 444.

The 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. Such a position does not make sense and is contrary to the law.

Regardless of how an easement is obtained, it is limited in scope and purpose by nature. Here, the City has a twelve-foot-wide easement to drain – not a hundred-foot-wide easement to flood the Millers’ property.

f. THE CITY’S DUTY IN *BEATTY* IS NOT LIMITED TO REMOVING DEBRIS.

The City contends this matter is distinguishable from *Beatty* because the easement in *Beatty* contained debris. *See* Appellant’s Brief,

p. 33. However, the City fails to cite any statement in *Beatty* limiting the duty in such a manner.

Beatty held that the holder of a drain easement has a duty to maintain the drain easement “in such a condition that the water cast in [it] by the city not cause it to overflow”. 295 So. 2d at 394-95. In *City of Birmingham*, this Court held that the holder of a drain easement has a duty to use the easement “in such a fashion that adjacent property not be unduly burdened.” 375 So. 2d at 444. Neither case limits the duty to keeping the easement free of debris. In fact, this Court specifically acknowledged that debris removal alone may not be sufficient to satisfy the duty when stating, “[p]erhaps proper maintenance of the ditch [*debris removal*] will eliminate the flooding **or perhaps** another take-off pipe will have to be installed.” *Beatty*, 295 So. 2d. at 394. (emphasis added).

III. AN INJUNCTION IS AN APPROPRIATE REMEDY FOR NUISANCE AND TRESPASS.

A nuisance is “anything that works hurt, inconvenience, or damage to another.” ALA. CODE § 6-5-120. A trespass is “[a]ny entry on the land of another without express or implied authority.” *Cent. Parking Sys. of Ala., Inc. v. Steen*, 707 So. 2d 226, 228 (Ala. 1997) (quoting *Foust v. Kinney*, 80 So. 474, 475 (Ala. 1918)). An “injunction is a proper remedy to

restrain repeated or continuing trespasses where the remedy at law is inadequate because of the nature of the injury, or because of the necessity of multiplicity of actions to obtain redress.” *Town of York v. McAlpin*, 167 So. 539, 540 (Ala. 1936); *see also Hobbs v. Mobile Cnty.*, 72 So. 3d 12 (Ala. 2011).

As discussed, the City and its experts admit the City’s drainpipe gets overwhelmed and water surcharges from out of the drainpipe in the City’s easement and onto the Millers’ property. C. 423-24, 430-31, 441, 511, 517, 524. This is a nuisance and trespass. Mr. Simpson testified that under the current circumstances the City’s drainpipe will continue to surcharge and flood the Millers’ property unless its capacity is increased. C. 399-400. Absent intervention enjoining the City from flooding the Millers’ property, the condition which causes damage to the Millers’ property will continue to interfere with the Millers’ exclusive possessory interest and peaceful use and enjoyment of their property.

IV. THE MILLERS’ CLAIMS ARE NOT TIME-BARRED.

The statute of limitations for a nuisance claim is two years. *See Ex parte Abbott Lab’ys*, 342 So. 3d 186, 195 (Ala. 2021) (noting a repeated nuisance or trespass creates a continuous tort and results in successive

causes of action). The statute of limitations for a trespass claim is six years. *See* ALA. CODE § 6-2-34. For negligent maintenance claims, each flood event “gives rise to a separate cause of action.” *Reichert v. City of Mobile*, 776 So. 2d 761 (Ala. 2000). Since this matter was filed less than ten months after the May 15, 2023 flood, the Millers filed well before the statute of limitations for any of their claims expired.⁶

V. THE CITY HAS NOT OBTAINED A PRESCRIPTIVE EASEMENT TO FLOOD THE MILLERS’ DRIVEWAY, GARAGE, AND HOME.

The City contends the trial court erred when rejecting its prescription argument. To be clear, the City’s position is that it has a prescriptive easement to flood the driveway, garage, **and the entire first floor of the Millers’ home**. In such a preposterous situation, the City would be free to flood the home, including the children’s playroom, and there would be nothing the Millers could do to prevent or interfere with the City’s use of this area. Fortunately, the City’s position is contrary to the law.

To establish an easement by prescription, the City must prove it used the premises over which the easement is claimed for a period of

⁶ Because *Beatty* does not require an underlying negligence theory, only the statute of limitations for nuisance and trespass apply.

twenty years or more, and the use “must have been adverse, peaceable, uninterrupted, and under a claim of right ... The ditch or drain must have been an apparent, open, visible, or notorious encumbrance; and there must have been an actual occupation by the flow of water.” *Beatty*, 295 So. 2d at 391 (emphasis added) (quoting 93 C.J.S. Waters § 121, at 821-822).

The City did not seek a declaratory judgment for a prescriptive easement or in any way claim such a right until filing its summary judgment brief. C. 1161. Additionally, the City did not assert a counterclaim, plead prescription as a defense in its Answer, or in any way place its claim to a prescriptive easement at issue in the case.

a. THE CITY’S FLOODING OF THE MILLERS’ PROPERTY HAS NOT BEEN ADVERSE OR UNDER A CLAIM OF RIGHT.

The City denied it had notice of the flooding issue and denied it flooded the Millers’ property without consent. C. 126⁷, 127⁸. As the trial court noted, the City cannot meet its burden to prove its use was adverse

⁷ The City denied paragraph 110 of the Complaint that alleged the City “had notice of the flooding issue.” C. 105.

⁸ The City denied paragraph 123 of the Complaint that alleged the City “flooded Plaintiffs’ property without their consent on May 15, 2023.” C. 107.

and under a claim of right while also denying it flooded the Millers' property without consent and denying it even had notice of the flooding issue. C. 1161. For these reasons alone, the City's claim for a prescriptive easement fails.

b. THE CITY'S FLOODING OF THE MILLERS' PROPERTY HAS NOT BEEN EXCLUSIVE.

The City argues the trial court erred when finding the City "failed to present any evidence that the use was exclusive..." Appellant's Brief, p. 66. The City, however, fails to identify any evidence its use was exclusive. Contrary to what it is required to prove, the City submitted photos of the area over which it claims a prescriptive easement being used by the homeowners: as a bedroom in 2021, C. 696; to store a vehicle in 2021, C. 698; and to store toys in 2004, C. 685. Each of these photos prove that any use over the area by the City was not exclusive. The City cannot obtain a prescriptive easement over an area the homeowners have been using.

c. THE CITY'S FLOODING OF THE MILLER'S PROPERTY HAS NOT BEEN CONTINUOUS.

The City argues the trial court erred in "fail[ing] to recognize that the flooding does not have to be literally continuous for 20 years."

Appellant's Brief, p. 66. The City relies on *Beatty* in support of its argument that continuous possession does not mean constant possession. *See id.* The easement in *Beatty*, however, was an easement to drain through **an open and obvious ditch** – **not** to flood where there is no ditch like in in this case where the City seeks a prescriptive easement over the Millers' driveway, garage, and home. 295 So. 2d at 392. This distinction is fatal to the City's argument.

In *City of Montgomery v. Couturier*, a municipality sought a declaratory judgment that it had a prescriptive easement for spillage and the plaintiffs sought an injunction to restrain the municipality from dumping water on their property. *See* 373 So. 2d 625, 626 (Ala. 1979). The trial court concluded the municipality failed to establish the existence of a prescriptive easement. *See id.* at 627. On appeal, this Court affirmed the trial court's ruling that:

[t]here must have been either an open and obvious ditch, **or if the easement is claimed *where there is no ditch*, there *must* have been a continuous occupation of the land by a *flow of water*.** In other words, **in order to acquire an easement by prescription, the evidence must show a visible condition which would reasonably put a landowner on notice that the land is adversely occupied.**

Id. at 627-28 (emphasis added).

In *Couturier*, the water complained of **did not** flow through an established ditch and “made a visible flow only during heavy rains and for a short while thereafter.” *Id.* at 628. As a result, this Court upheld the trial court’s decision that the city did not obtain a prescriptive easement for spillage. *See id.* Like in *Couturier*, in the instant case the City is claiming a prescriptive easement to flood where there is **no** ditch (the flood water at issue flows onto the Millers’ driveway and into their garage and home) and the water complained of flows only during heavy rains and for a short while thereafter. It is undisputed that there is not a “continuous occupation of [the Millers’ driveway, garage, and home] by a flow of water” as required by this Court. *Id.* at 627-28. Moreover, the City did not present any evidence of a visible condition “which would reasonably put a landowner on notice that the [driveway, garage, and first floor of the Millers’ home] is adversely occupied” by the City as required by this Court. *Id.*

d. THE CITY’S FLOODING OF THE MILLERS’ PROPERTY HAS NOT BEEN PEACEABLE AND UNINTERRUPTED FOR TWENTY YEARS.

The City must prove it used *the premises over which the easement is claimed* for a period of twenty years. In support of its argument, the

City relies on letters from 1957 which discuss flooding between 2801 Montevallo Road (the Millers' home) and 2801 Overhill Road and, more specifically, "at the corner of Montevallo Road and Overhill Road." C. 670, 673. That puts the flooding in these letters on the right side of the property. C. 391 (showing "Overhill Road" on the right side of the property). The area where the City now claims a prescriptive easement to flood is on the **left side** of the property. C. 391 (showing "12' Easement" on the left side of the property).

Additionally, the flooding in these letters involved a **24-inch pipe** between Montevallo Road and *Overhill Road*. C. 670, 673. The drainpipe that is surcharging in this case is a **36-inch pipe** (and has been since 1928) between Montevallo Road and *Surrey Road*. C. 604, 364. The City cannot rely on flooding from a different pipe on the opposite side of the property from where it is now claiming a prescription to flood. It must prove it has been flooding the Millers' driveway, garage, and home for twenty years.⁹

⁹ The City has not even proven the house had a garage or finished basement in 1957, let alone that it was flooding that area.

Removing the letters from consideration, the earliest the City can point to flooding is an affidavit from a City Council Member who claimed she “became aware of flooding” at 2801 Montevallo Road “[w]ithin a year of being elected to the City Council” in 2000. C. 675. Importantly, the City Council Member does not claim any personal knowledge regarding the flooding nor identify where on the property the flooding she became aware of occurred. Reliance on this affidavit would require the Court to speculate that the flooding she “became aware of” occurred in the same area the City now claims a prescriptive right to flood.

Those deficiencies notwithstanding, the City still fails to meet its burden. When discussing the concept of prescription in *Beatty*, this Court noted that the landowner would have to take ***no steps*** “to prevent the casting of collected water by the city on their property” for a twenty-year period. 295 So. 2d at 393. Here, the evidence includes photographs showing that previous homeowners put up barricades in 2004 to fend off the water the City collected and casted onto the property. C. 627-28, 685-88. Previous homeowners also constructed a wall along the side and back of the property where the City’s easement and drain inlets are located, C. 827, 873, repeatedly complained to the City about the flooding, C. 692-

700, 956-59, and filed a Notice of Claim with the City seeking damages related to the flooding. C. 727-80. Even if this Court were to assume the flooding the City Council Member “became aware of” at some point in 2000 or 2001 was flooding the Millers’ driveway, garage, and home, the use was not peaceable (as evidenced by the complaints and Notice of Claim) and it was not uninterrupted (as evidenced by the barricades and wall). The flood at issue was on May 15, 2023, and this evidence from 2004, 2021, and 2022 disrupts the running of the twenty-year period that, at best, began in 2000.

The City fails to present evidence identifying any twenty-year period where it was continuously using the driveway, garage, and home and that such use was adverse, under a claim of right, exclusive, peaceable, and uninterrupted.

VI. THE MILLERS’ CLAIMS ARE NOT BARRED BY SUBSTANTIVE IMMUNITY.

The City and Amicus Cities urge this Court to provide the City immunity and allow it unlimited use of the entirety of the Millers’ property, including flooding their children’s playroom. Fortunately, substantive immunity does not permit the City to exceed the scope and purpose of its easement.

a. THE NARROW EXCEPTION OF SUBSTANTIVE IMMUNITY DOES NOT APPLY BECAUSE THIS CASE INVOLVES THE RIGHTS AND DUTIES OF AN EASEMENT HOLDER.

i. THE CITY’S DUTY CORRESPONDS TO THE CITY’S RIGHT AS AN EASEMENT HOLDER.

Substantive immunity is a “narrow exception to the general rule of municipal liability.” *Long v. Jefferson Cnty.*, 623 So. 2d 1130, 1135 (Ala. 1993). The substantive-immunity rule is “given operative effect **only** in the context of those public service activities of governmental entities...so laden with the public interest as to outweigh the **incidental duty** to individual citizens.” *Rich v. City of Mobile*, 410 So. 2d 385, 387 (Ala. 1982) (emphasis added).

The City’s duty in this case is not “incidental”, let alone incidental to a public service activity. This Court held that the City’s right to drain carries with it the “**corresponding** duty” to maintain the easement “in such a condition that the water cast in [it] by the city not cause it to overflow” and flood adjacent property. *Beatty*, 295 So. 2d at 394 (emphasis added). This is a “legal correlative”, which is “[a] legal status that has a corresponding or reciprocal status, *such as a right that corresponds to a duty.*” BLACK’S LAW DICTIONARY (12th ed. 2024) (emphasis added). The “reciprocal” status between the City’s right and

the City's duty means they are "directed by each toward the other." *Id.* Because of their reciprocal status, the right is no greater than the duty and the duty is no less significant than the right. Without the easement providing the City the right, there would be no corresponding duty owed to the Millers. But a right in a nonpossessory interest over a portion of the Millers' property does exist; therefore, a reciprocal, corresponding duty owed to the Millers as the landowners also exists.

When the City acquires the right to drain, it also acquires the corresponding, equivalent, reciprocal duty not to unduly burden. **The City cannot obtain the right without also obtaining the duty.** Accordingly, the City's duty is not incidental to a public service activity and for this reason alone substantive immunity does not apply.

ii. THE CITY'S DUTY DERIVES FROM THE CITY'S STATUS AS AN EASEMENT HOLDER.

"[T]he lack of anything other than an incidental duty to a particular individual prevents the municipality from being liable for damages, because a breach of a duty owed to the general public will not form the basis for a negligence claim by an individual citizen." *Bill Salter Adver., Inc. v. City of Atmore*, 79 So. 3d 646, 652 (Ala. Civ. App. 2010). As discussed herein, the City's duty to the Millers by virtue of its status as

an easement holder is not “incidental”. Moreover, the City’s duty is not derived from “a duty owed to the general public.” *Id.* 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. “***If*** the city claims a right to use the drainage ditch ***then*** it is under a duty to maintain it so that the content and flow of surface waters would not overflow to the damage of the adjacent property owners.” *Beatty*, 295 So. 2d. at 394 (quoting *Williams*, 128 S.E. 2d 41 (emphasis added)).

In *Britt v. City of Hoover*, Justice Mitchell issued a concurring opinion discussing the significance of “duty” and to whom the duty is owed when determining the applicability of substantive immunity:

Part of the courts’ traditional role when hearing a tort claim **is to determine the scope of the defendant’s duties and to whom those duties are owed.** [...] After all, for a plaintiff to successfully bring a claim in tort, **there must first be an underlying duty owed to the plaintiff.** *Macrum v. Security Tr. & Sav. Co.*, 221 Ala. 419, 421, 129 So. 74, 76 (1930) (noting that it is “axiomatic that there can be no tort action maintained **except against one who owned a duty fixed by law to the plaintiff**”). Consequently, for a plaintiff to succeed in suing a municipality either for equitable relief or when one of the immunity statute’s exceptions apply, a court must first determine **if the municipality owed that plaintiff a duty.**

SC-2024-0530, 2025 WL 1416936, at *3 (Ala. May 16, 2025) (internal citations omitted).

The City's duty in this case is derived from the City's status as an easement holder, correlates to the City's easement rights, is fixed by law, and is owed **directly to the Millers as the landowners** (not to the general public). Despite applying substantive immunity in *Britt*, Justice Mitchell stated, "I do not believe, however, that we need to disturb any precedent **that imposes a duty to individuals when a municipality either causes flooding** or negligently designs and constructs a drainage system." *Id.* at *5 (emphasis added). *Beatty*, which imposes on the City a duty owed to the Millers to maintain the drain easement "in such a condition that the water cast in [it] by the city not cause it to overflow", is such precedent. *Beatty*, 295 So. 2d at 394.

Recently in *Smith v. City of Birmingham*, this Court discussed the role of duty as it relates to substantive immunity and held that Birmingham did not owe a duty to any individual based on its voluntary choice to maintain streetlights. *See* SC-2024-07000, at **19, 23, Alabama Appellate Courts Public Portal (Ala. Sept. 19, 2025). In doing so, this Court noted "[a] plaintiff must demonstrate the existence of a duty owed

by the defendant to him” and found that “in the absence of a legal duty to that individual, the municipality cannot be held liable for his or her injuries.” *Id.* at **20, 25. Unlike *Smith*, the Millers have shown that the City owes them a corresponding legal duty by virtue of the City’s status as an easement holder on the Millers’ property. Substantive immunity does not relieve the City of this duty.

b. THE CITY’S RELIANCE ON *CROSS V. CITY OF MUSCLE SHOALS* IS MISPLACED.

The City relies heavily on *Cross v. City of Muscle Shoals*, 384 So. 3d 37 (Ala. 2023). In *Muscle Shoals*, however, the municipality’s retention pond that was alleged to have overflowed was on municipal-owned property. *See id.* at 38. Therefore, *Muscle Shoals* did not involve the rights and corresponding duties of an easement holder and any duty on the part of the municipality was not derived from the municipality’s status as an easement holder.

Additionally, the plaintiffs in *Muscle Shoals* sought “an injunction requiring the City to enact particular policies or to enforce existing policies to benefit the residents.” *Id.* at 43. This Court held that “[t]he City’s decisions about its enactment of a plan or its enforcement of existing ordinances concerning its drainage systems are public-policy

decisions... and fall into the category of actions excepted from the general rule of liability.” *Id.* at 44. The Millers, however, are not asking the City to enforce its policies or enact new policies but are pursuing an injunction consistent with *Beatty* to prohibit the City, as an easement holder, from flooding their property.

In response to the municipality’s argument for substantive immunity, the plaintiffs in *Muscle Shoals* relied on *Kennedy v. City of Montgomery*, 423 So. 2d 187 (Ala. 1982). This Court noted that the plaintiffs’ reliance on *Kennedy* was misplaced because “the claims in *Kennedy* are different from those made [in *Muscle Shoals*].” 384 So. 3d at 44. This Court acknowledged a distinction between a municipality engaging in culpable conduct and a municipality making a policy decision. *Id.* It noted that in *Kennedy* “the homeowners alleged that the conditions created by the City of Montgomery caused the flooding and constituted a nuisance. The homeowners sought monetary damages and an injunction prohibiting the city from causing further flooding.” *Id.* The Millers, like the plaintiffs in *Kennedy*, presented undisputed evidence that water overflowed from out of the City’s drainpipe in its easement and onto the Millers’ property on May 15, 2023, resulting in a nuisance

and trespass, and entitling the Millers to an injunction prohibiting the City from further flooding.

c. THIS CASE IS NOT ABOUT THE SCHOEL PROJECT OR A POLICY DECISION.

The City and Amicus Cities contend this case involves the City's decision not to proceed with a stormwater project. *See* Appellant's Brief, p. 56; Amicus Brief, p. 15. Specifically, the City argues the Millers' claim "that the City's decision not to proceed with the 3-phase plan designed by Schoel in 2022 'amounts to negligent maintenance.'" Appellant's Brief, p. 54. However, the Millers never made such a claim and that is not what this case is about.

The injunctive relief sought by the Millers is the same as in *Beatty* – to enjoin the City "from causing a flood on [the Millers'] property." C. 385. This Court noted in *Beatty* that "[w]hile the city should be enjoined from causing a flood on complainants' property, it would seem inappropriate for this or any other court to prescribe exactly how the city should solve this problem." 295 So. 2d at 394. The Millers stated in their summary judgment brief that "the court cannot dictate the means of preventing the overflow" and cited to *Beatty*. C. 385 n.4.

Following instruction from *Beatty*, the trial court also “acknowledge[d] that it cannot dictate the means of preventing the overflow and, therefore, cannot be accused of interfering with the operation and functioning of the municipal authority in trying to solve the City’s overall drainages situation.” C. 1159. The City tries to use the trial court’s refusal to dictate the means of preventing overflow to argue the trial court’s injunction is “broad and vague.” Appellant’s Brief, p. 64. Yet, the trial court’s order follows the instructions of this Court in *Beatty* where it ordered that the City should be enjoined from causing a flood on adjacent property and instructed the trial court to enter an order “prohibiting overflow.” 295 So. 2d at 394.

The City also argues that the injunction requires “that the City rip out the existing stormwater infrastructure and install new infrastructure.” Appellant’s Brief, p. 64. The trial court’s order *does not* instruct the City to do the Schoel project or dictate the means in which the City prevents overflow.¹⁰ Following this Court’s instruction from

¹⁰ The City misrepresents that “[t]he trial court further held the City should have implemented Schoel’s ‘remediation design plans,’ which the trial court deemed to be reasonable.” Appellant’s Brief, pp. 37, 61, 63. Nothing in the trial court’s order dictates the means of preventing overflow. Moreover, the trial court did not make a determination on the

Beatty, the trial court entered an order enjoining the City from flooding 2801 Montevallo Road. C. 1159. The manner in which the City prevents the flooding is up to the City. Accordingly, the City’s argument that the Millers and the trial court are interfering with its decision-making authority on how to handle drainage or whether to move forward with a particular project is unfounded.

The City retained Schoel in 2021 to “identify problems,” provide “solutions,” and develop “feasible” design plans to remediate the drainage problem. C. 498, 503. Schoel concluded that the flooding is “originating from” the City’s drain network. C. 511. Mr. Simpson confirmed that Schoel’s statement that the flooding is “originating from this pipe network” refers to the surcharging of the City’s drainpipe and drain inlets in the City’s easement. C. 423-24. Schoel provided the City design plans that call for increasing the capacity of the drainage system. *See id.* Mr. Simpson testified that under the current circumstances the water that

reasonableness of any project as the City contends. Rather, the trial court referred to evidence in the record that the City received remediation plans that *Schoel* deemed reasonable. C. 503 (Schoel agreed to design “feasible” remediation plans for the City), 1158.

surcharges from the City's drainpipe will continue to flood the Millers' property unless its capacity is increased. C. 399-400.

The City claims it made a policy decision not to move forward with the project. However, there is no evidence in the record reflecting such a decision being made. In fact, a City Council Member testified that they did **not** "vote it up **or down**." C. 943 (emphasis added).

The City is trying to use the fact that it retained Schoel to design a project and any decision it may have made regarding the project to falsely claim this case is about such a decision.¹¹ Even if the City made a decision

¹¹ The City discussed items it considered related to the Schoel project. *See* Appellant's Brief, pp. 54-55. However, none of them matter. The City's duty is not to unduly burden adjacent property. The duty is not, for example, not to unduly burden unless it costs a certain amount of money to stop flooding adjacent property. Moreover, the considerations are not as the City represents. Regarding the potential downstream effects of the project, Schoel deemed the impact to be minimal and not a problem that precluded moving forward with the project. C. 987-88 (Walter Schoel stated the downstream channel is so "capacious" that it will not be materially altered by the project); C. 991 (Mr. Schoel stated the downstream channel has "ample freeboard and additional capacity for extremely severe storms"); C. 978 (William Thomas of Schoel reported, Schoel is able to demonstrate the downstream channel has capacity to accept water for 100 year storms); C. 984 (Mr. Thomas said the study was complete and it was time to put the project out for bid). Regarding opposition to the project, the downstream residents sent the City a letter stating, "We are not interested in stopping the City's efforts to address our neighborhood's water issues", "we respectfully request...that the plan

on the project, the Millers' claims for nuisance, trespass, and injunctive relief involve the City breaching its duty as an easement holder and have nothing to do with any decision regarding any project. To further illustrate this, consider a situation where the City never retained Schoel to design plans, and therefore never made a decision regarding the project. The Millers' claims for nuisance, trespass, and injunctive relief remain unchanged.

If the Millers' nuisance, trespass, and injunctive relief claims are based on any decision by the City, it is the City's decision not to abide by its duty as an easement holder. The City's decision to ignore the scope and purpose of its easement is not a *policy* decision. If it were a policy decision, there would be no limit as to what the City could do on the Millers' property. Claiming substantive immunity protection, the City could commit any nuisance or trespass and simply insist it made a policy decision not to abide by the easement. For example, the City could start holding City Council meetings in the Millers' living room and claim they

be modified and expanded to address the entire neighborhood's water issues." C. 807-09.

made a policy decision not to abide by the scope and purpose of the easement.

The City's substantive immunity claim also fails because the City's right to drain in the easement is not derived from any legislative authority. It is derived from the terms of the easement – an agreement between the City as the easement holder and the Millers as the landowners, giving the City a nonpossessory interest in a specific portion of the property for a limited purpose.

In *Muscle Shoals*, this Court discussed a situation where a governmental agency's decision is derived from legislative authority making it a legislative matter protected by substantive immunity. *See* 384 So. 3d at 42 (citing *Payne v. Shelby Cnty. Comm'n*, 12 So. 3d 71 (Ala. Civ. App 2008)). In *Payne*, the court noted that ALA. CODE § 11-52-76 gave the county the authority to enforce zoning ordinances and, therefore, the county's decision on how to enforce a zoning ordinance was a legislative matter protected by substantive immunity because it derived from a statute. *See* 12 So. 3d at 80. This matter is different as the City's decision not to abide by the scope and purpose of its easement is not derived from any legislative authority. If anything, ALA. CODE § 11-50-50 provides that

when a municipality maintains a drain on private property it “must” provide “just compensation” for any private property “injured or destroyed”. Not only has the legislature not given municipalities the authority to breach their duties arising out of easements, but, contrary to the concept of immunity, the legislature specifically requires municipalities to compensate private landowners for injured or destroyed property.

d. THE CITY’S RELIANCE ON *BRITT V. CITY OF HOOVER* IS MISPLACED.

The City relies on *Britt v. City of Hoover*, 2025 WL 1416936, in support of its substantive immunity argument. While *Britt* involves stormwater, it is not an “analogous case.” Appellant’s Brief, p. 51. The drains in *Britt* were not Hoover’s and, therefore, not Hoover’s responsibility. *See* 2025 WL 1416936, at *6 n.2. In fact, the plaintiffs sought an injunction directing Hoover to take responsibility for the drains. *Id.* at *2. Justice Mitchell found that substantive immunity precluded imposing a duty on Hoover to Britt individually. *See id.* at *4. Unlike the Millers’ case, *Britt* did not involve an easement and, therefore, did not involve a legal duty derived from an easement and owed directly to Britt as the landowner. If it had, Justice Mitchell was clear that he did

not believe “any precedent that imposes a duty **to individuals** when a municipality [...] **causes** flooding” should be disturbed. *Id.* at *5 (emphasis added).

VII. PUBLIC POLICY DICTATES THE CITY IS BOUND BY ITS DUTY.

The City’s easement gives the City limited rights to use a specific portion of the Millers’ property. The City **does not** have any rights over the portion of the Millers’ property that it is flooding. If the City is not required to abide by the scope and purpose of its twelve-foot-wide easement to drain and, instead, can flood outside of its easement, there will be no limit as to what the City can do on the Millers’ property. **If the City is provided immunity, it could block the drainpipe just downstream from the Millers’ property forcing all the stormwater it collects on a go forward basis to back up and come out of the drainpipe and onto the Millers’ property.**

An outcome which frees municipalities from the scope and purpose limitations of their easements would convert every property on which a municipality holds an easement into a property wherein the municipality would be no different than a joint owner with unlimited use of the entire property. Properties with municipal easements would become

unmarketable as they would be burdened by a municipality unbound by the scope and purpose of an easement and unlimited in its use of the property. Landowners would be disincentivized to give municipalities an easement if municipalities do not have to abide by the scope and purpose of the easement. The duty of an easement holder to use the easement consistent with the limited scope and purpose is a guardrail that protects landowners. Without this guardrail, easement holders would be free to do whatever they desire on the entirety of a landowner's property.

It is imperative that municipalities know that they must abide by the limited scope and purpose of their easement. The duty is clear and consistent with easement law: "If the city claims a right to use the drainage ditch then it is under a duty to maintain it so that the content and flow of surface waters would not overflow to the damage of the adjacent property owners." *Beatty*, 295 So. 2d. at 394 (quoting *Williams*, 128 S.E. 2d 41).

The City and Amicus Cities incorrectly claim that if municipalities are required to abide by the limited scope and purpose of their easements, they will be strictly liable and must prevent all future flooding and "pay for damages from all flooding which occurs on private property on which

there exists a city-owned easement.” Appellant’s Brief, p. 65; Amicus Brief, pp. 9-13. This is not true. For example, if a pipe bursts in the Millers’ home causing a flood or if a neighbor diverts water onto the Millers’ property causing a flood, the City would not be liable for those floods. The City is only liable if it does not abide by the scope and purpose of its easement and unduly burdens the Millers’ property outside of its easement. This is consistent with the water rights principles this Court discussed in *Beatty*: “diffuse surface water may not be collected in a channel and cast on complainants’ land” and one “may not be permitted to overtax the capacity of the water course or drainage channel.” 295 So. 2d at 392-93. This is also consistent with easement law, which provides that an easement holder is not permitted to overburden the property subject to the easement. *See Perdido Place*, 43 So. 3d 1201, 1207.

The Amicus Cities claim that “[t]he financial burden of such a holding would be unprecedented and unsustainable” and that upholding the duty “would amount to a complete sea change in this area of the law.” Amicus Brief, p. 10. If requiring municipalities to abide by the scope and purpose of their easement is unsustainable then the Amicus Cities would be able to point to at least one instance in the past fifty years where the

Beatty holding (or general easement law) created the havoc they warn of, but they cannot. Requiring easement holders to abide by the limited scope and purpose of their easements is not “unprecedented”, but not holding easement holders liable when going beyond the scope and purpose of their easements would cause “a complete sea change in this area of the law.” *Id.*

If municipalities cannot abide by the scope and purpose of their easements and drain without unduly burdening adjacent property, they should be held liable or simply not take the easement.

VIII. THE CITY FALSELY CLAIMS THE FLOODING CANNOT BE PREVENTED.

Contrary to its experts’ opinions, the City claims that nothing can be done to prevent the flooding. However, one of the City’s experts stated he is “confident” the 3-phase plan will mitigate flooding, C. 940; the report from the City’s experts concludes that increasing the capacity of that drainage system will “significantly reduce” the flooding “originating from” the drainpipe, C. 511; and the City’s expert testified that the City’s drainpipe will continue to flood the Millers’ property until its capacity is increased, C. 399-400.

IX. THE CITY HAS NOT ASKED THIS COURT TO OVERTURN *BEATTY*.

Importantly, the City has not asked this Court to overturn *Beatty*, which is controlling precedent in the case at hand. Consistent with principles of easement law, *Beatty* has imposed a corresponding duty on municipalities to drain without unduly burdening adjacent property for **over fifty years**. See 295 So. 2d. at 394-95. “Stare decisis commands, at a minimum, a degree of respect from this Court that makes it disinclined to overrule controlling precedent when it is not invited to do so.” *Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C.*, 949 So. 2d 893, 898 (Ala. 2006).

Since (1) it is undisputed the City’s drainpipe and drain inlets are in the City’s easement over private property, C. 466, 604; (2) the City admits the City’s drainpipe in its easement becomes overwhelmed resulting in flooding of the Millers’ property *well outside* of the City’s twelve-foot-wide easement, C. 441, 517, 524; (3) the City’s expert admits that the flooding is “originating from” the drainpipe and drain inlets in the easement, C. 423-24, 430-31, 511; and (4) Mr. Miller witnessed the water rushing out of the City’s drainpipe resulting in the flooding of the Millers’ property on May 15, 2023, C. 530-31, it is undisputed that the

City breached its duty as an easement holder and should be enjoined from flooding the Millers' property.

Respectfully, this should end this Court's analysis as it relates to the trial court granting the injunction and awarding damages. The City admits its drainpipe gets overwhelmed and floods the Millers' property, and it seeks permission to continue flooding. This Court should not allow it. Decades of easement law protects the Millers from such a dangerous attitude towards the rights of landowners.

X. THE CITY'S ACT-OF-GOD DEFENSE FAILS BY ITS OWN ADMISSIONS.

The City contends the trial court erred in denying summary judgment on its act-of-God defense. *See* Appellant's Brief, p. 67. ALA. R. CIV. P. 56(e) requires the City to "affirmatively set forth specific facts showing a genuine issue for trial", which it fails to do. The trial court noted "[m]ere conclusory allegations or speculation that fact issues exist will not defeat a properly supported motion for summary judgment, and bare argument or conjecture does not satisfy a nonmoving party's burden to offer substantial evidence to defeat the motion." C. 1151-52.

The only cited authority the City offers to support its act-of-God defense discusses rainfall being so "unprecedented" as to constitute an

act-of-God and clarifies that “the act-of-God defense applies only to events in nature so extraordinary that the history of climatic variations and other conditions, in particular localities, affords no reasonable warning of them.” *City of Mobile v. Jackson*, 474 So. 2d 644, 650 (Ala. 1985) (citations omitted); *see also Bradford v. Universal Constr. Co., Inc.*, 644 So. 2d 864, 866 (Ala. 1994) (reversing summary judgment where defendants “offer[ed] no evidence that the wind that caused [the plaintiff]’s injury was unprecedented for that area and time, and, therefore, unforeseeable”). In support, the City offered the conclusory statement that “the May 15, 2023, rain event was extraordinary”. C. 656. The trial court found the City’s statement insufficient to overcome summary judgment, especially when the City admitted that the May 15, 2023 rain event was the **seventh time** the home flooded in a **two-year span**, making it the opposite of extraordinary because it was not “unprecedented for that area and time, and, therefore, unforeseeable.” C. 1159. Even if it was an unusual rainfall, which it was not, this Court has held that “[a]n ‘unusual and excessive’ rainfall is not a correct definition of an act of God.” *Law v. Gulf States Steel Co.*, 156 So. 835, 838 (Ala. 1934).

Moreover, the rain event at issue (50-year rain event, C. 785) cannot be “unprecedented” for purposes of an act-of-God defense when the City’s expert concluded the rain event two years earlier was a more severe rain event (100-year rain event, C. 510, 639).¹² The City’s expert also testified that under the current circumstances the City’s drainpipe will continue to surcharge and flood the Millers’ property unless its capacity is increased. C. 399-400. Contrary to the definition of “unprecedented rainfall”, this indicates that the flooding at issue is foreseeable and expected to continue.¹³

Since the undisputed evidence establishes that the May 15, 2023 flood event was not new, had happened seven times in two years, and is expected by the City’s expert to happen again, the trial court correctly determined that the rain event cannot be an unprecedented act-of-God

¹² “Unprecedented” is defined as “[h]aving no precedent or example, novel, new, unexampled”; “[n]ever before known; without any earlier example.” BLACK’S LAW DICTIONARY 1538 (6th ed. 1990) and 1537 (7th ed. 1999).

¹³ “Unprecedented rainfall” is defined as “an unusual or extraordinary rainfall as has no example or parallel in the history of rainfall in the vicinity affected, or as affords no reasonable warning or expectation that it will likely occur again.” BLACK’S LAW DICTIONARY 1538 (6th ed. 1990).

and the City's conclusory statement was not enough to defeat the Millers' properly supported motion for summary judgment. C. 1159.

XI. THE CITY'S COMING TO THE NUISANCE DEFENSE IS CONTRARY TO THE EVIDENCE AND THE LAW.

The City contends the trial court erred in denying summary judgment on its "coming to the nuisance" defense. The City fails to explain the trial court's error other than to say the trial court erred when finding "[n]o Alabama case law has been cited that recognizes the doctrine of coming to the nuisance." Appellant's Brief, p. 69. However, the City cites only to *Mountain Brook Estates, Inc. v. Solomon*, 23 So. 2d 1, 5 (Ala. 1945) and *Martin Bldg. Co. v. Imperial Laundry Co.*, 124 So. 82 (Ala. 1929), neither of which recognize the doctrine of coming to the nuisance.

The coming to the nuisance doctrine's principle was rejected by this Court in a case where the nuisance which caused the injury was present before the plaintiff became the property owner. See *Crommelin v. Cox*, 30 Ala. 318, 327 (Ala. 1857) (stating a party could not "defend on the ground that the nuisance was there when the plaintiff bought and that he therefore bought cum onere" when the nuisance continued and there was no evidence the complainant knew of the nuisance).

Even if Alabama recognized “coming to the nuisance” as a defense, the Millers did not know of the flooding when they purchased the home and there is no evidence to the contrary. The City acknowledged the Millers did not know of the flooding problem prior to purchasing 2801 Montevallo Road. C. 646 n.6.

For these reasons, the City’s claim that the trial court committed reversible error is without merit.

XII. EVEN IF AN EASEMENT WAS NOT INVOLVED, THE MILLERS WOULD STILL BE ENTITLED TO AN INJUNCTION.

The City refuses to acknowledge its duty as an easement holder and, instead, attempts to make this case about negligence. In doing so, the City recasts the Millers’ negligent maintenance claim as a negligent design or construction claim to avoid liability.¹⁴ Because the City is an easement holder and the duty in *Beatty* applies, the City’s arguments regarding negligence are immaterial. Nonetheless, the Millers respond to the City’s arguments as follows:

¹⁴ The Millers’ Complaint does not contain the words “construction” or “design”; nor does it contain a cause of action for negligent design or construction. C. 94-108.

In *City of Birmingham*, this Court addressed a situation where the flooding at issue originates from municipal-owned property and how such a situation requires proof of an underlying negligence theory to obtain injunctive relief for a nuisance claim. *See* 375 So. 2d at 443. As shown below, even if this Court did not clearly articulate the rights and duties of a municipality when draining through an easement over private property – *which it did* – and the City’s drainpipe and drain inlets were not in an easement over private property – *which they are* – and the City did not have a duty to abide by the scope and purpose of its easement and drain without unduly burdening the Millers’ property – *which it does* – the Millers would still be entitled to an injunction pursuant to *City of Birmingham*.

a. THE MILLERS PROVIDED UNDISPUTED EVIDENCE OF NEGLIGENT MAINTENANCE.

i. THE DUTY IN *BEATTY* AMOUNTS TO NEGLIGENT MAINTENANCE.

The duty *Beatty* imposed on the City as an easement holder is a duty to *maintain*: the “**duty to *maintain*** the ditch in such a condition that the water cast in the ditch by the city not cause it to overflow”; and “the corresponding **duty of the city to *maintain*** its drainage easement

so as not to cause an overflow on complainants' property". 295 So. 2d at 394-95 (emphasis added). The elements of negligence are (1) duty; (2) breach of that duty; (3) causation; and (4) damages. *See Hilyer v. Fortier*, 227 So. 3d 13, 22 (Ala. 2017). Here, the City has a duty as an easement holder not to unduly burden adjacent property. The City breached its duty, which was the proximate cause of the Millers' damages. Therefore, a breach of the duty in *Beatty* constitutes negligent *maintenance* and serves as the underlying negligence theory for an injunction pursuant to *City of Birmingham*.

This is consistent with *Terry v. City of Sheffield*, 484 So. 2d 389 (Ala. 1986), where this Court held that even in the absence of an easement a municipality overflowing onto someone's property constitutes negligent maintenance. In *Terry*, the municipality's sewer in front of the plaintiffs' house got overloaded with rain, causing sewage to overflow onto their property. *See id.* at 389-90. The plaintiffs alleged that the municipality made no modifications to the sewer despite knowing it overflowed. *See id.* at 390. This Court held:

[I]f the city negligently provided or maintained an insufficient outlet for its sewage system and caused water and sewage to accumulate on property resulting in damage, it is liable.

[...]

If the city sanitary sewers, during the management of the city and by its authority or with knowledge of the conditions, ***had become overloaded, and thereby rendered too small for the service required of them, and the city allowed this condition to exist or continue after notice***, when with reasonable diligence it could have remedied the condition, that would be a ***negligent maintenance***.

Id. at 391 (quoting *City of Birmingham v. Greer*, 126 So. 859 (Ala. 1930) (emphasis added)). This Court found 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. *Id.*

**ii. EVIDENCE OF DEVELOPMENT PRESSURE
OVERBURDENING THE CITY’S DRAINAGE SYSTEM
CONSTITUTES NEGLIGENT MAINTENANCE.**

In *Reichert v. City of Mobile*, several homeowners asserted claims for negligent design and construction, negligent maintenance, trespass, and nuisance after their properties flooded. *See* 776 So. 2d at 763. This Court found that the negligent design and construction claims were time-barred “because all of the plaintiffs sued more than two years after they had experienced their first floods after the construction.” *Id.* at 765.

However, this Court held that because each flood event gave rise to a separate cause of action and the floods at issue “came within the two years preceding the date they filed their complaint”, the plaintiffs’ negligent maintenance claims were not time-barred. *Id.* This Court explained that:

...each flooding event resulted in a different injury because the plaintiffs suffered, at a minimum, the additional financial burden of having the water removed from their homes and having personal property repaired or replaced each time flooding occurred. To uphold the judgment in favor of the City would be unfair to the plaintiffs...

Id. This Court then considered whether the plaintiffs presented evidence of negligent maintenance and, finding the expert’s testimony regarding the impact of development persuasive, held that a jury could conclude that the municipality’s failure to provide “appropriate upkeep for the storm-drainage system” in light of the development the municipality allowed constitutes *negligent maintenance*. *Id.* at 765-66.

The City misunderstands the basis of the negligent maintenance claim in *Reichert*. The expert in *Reichert* testified that the municipality caused the increase in water to be collected, which overburdened the existing drainage system, by allowing so much development without providing appropriate upkeep. *See* 776 So. 2d at 764, 766. It was not the

failure to provide upkeep itself that constituted negligent maintenance, but the failure to provide **appropriate** upkeep **in light of** the development the municipality had allowed which overburdened the drainage system.

This Court's holding in *Reichert* is consistent with *Mayor of Huntsville v. Ewing*, 22 So. 984 (Ala. 1987) where the plaintiff brought claims against a municipality for cutting a ditch and failing to keep the ditch in a proper condition. *See id.* at 986. This Court found that the cutting of the ditch constituted negligent design or construction and was time-barred. *See id.* However, this Court held that the plaintiff's claim for failure to keep the ditch in a proper condition, which included the "failure to enlarge the ditch, or dig the same deeper, ***after the increase of said flow of surface water***", was not time-barred. *Id.* at 987 (emphasis added). Importantly, this Court recognized that a claim for failure to keep a drain in a proper condition included the "failure to enlarge" after the flow of water increased. *Id.* at 986-87.

1. THE MILLERS PRESENTED THE SAME EXPERT TESTIMONY FOUND IN *REICHERT*.

Almost a century ago, a 36-inch storm drainpipe was maintained in the easement along the rear lot lines of the Millers' and their neighbors'

properties. C. 364, 604. Today, the City still has a 36-inch drainpipe in the easement along with seven drain inlets to capture and direct stormwater into the drainpipe. C. 420, 422, 425-28.

Comparing the case at hand to *Reichert*, the Millers presented undisputed evidence of negligent maintenance. Like the expert in *Reichert*, Mr. Simpson, an expert for the City and the Millers, testified that the City has experienced quite a bit of development since the 36-inch drainpipe was installed in the form of commercial property, new homes, home additions, and homes that have been torn down and rebuilt larger.¹⁵ C. 405-06, 609. The Millers also presented a report from Schoel concluding that the City's drainage infrastructure is "struggl[ing] to safely convey stormwater" and that development is adding "pressure" to the "stormwater drainage systems and exacerbat[ing] the drainage problems." C. 494-96. Additionally, the Millers presented evidence that

¹⁵ The City argued that the Millers asserted that "unspecified development" led to the problems. Appellant's Brief, p. 42 n.7. However, the Millers presented expert testimony that development in the form of commercial property, new homes, home additions, and homes that have been torn down and rebuilt larger has added pressure and overburdened the drainage system specifically around the Millers' home. C. 394-96, 404-06, 408-10, 494-96, 609.

Schoel rated the area of the Millers' home to be "High" for "Development Pressure", "High" for "Infrastructure Problems", "High" in "Severity", and deemed it to be a "Critical" basin. C. 408-10, 494-96.

Mr. Simpson, like the expert in *Reichert*, also testified that development in the City, which has resulted in increased impervious surfaces (driveways, roads, parking lots), has increased the amount of stormwater to be collected in the City's drainage system.¹⁶ C. 404-06.

This is the same expert testimony this Court found persuasive in *Reichert* and from which it held a jury could find a municipality liable for negligent maintenance based on its failure to provide "appropriate upkeep for the storm-drainage system" *in light of* the development the municipality allowed. 776 So. 2d at 765-66.

2. THE MILLERS PRESENTED ADMISSIONS FROM THE CITY.

In addition to presenting expert testimony consistent with *Reichert*, the Millers presented admissions from the City. As discussed in Section

¹⁶ William Thomas of Schoel (designated as an expert by the Millers) testified that when the original pipes were put in one of the factors that would have been considered for selection is the "level of development" *at that time*. C. 593.

(II)(b), the City admits its drainpipe is getting “overwhelmed” by the amount of water being directed to it – much like the “overburdened” drainage system in *Reichert*. The City also admits that development pressure is taxing the City’s drainage system, which is what the expert testified to in support of the negligent maintenance claims in *Reichert*. Specifically, in an ordinance it passed, the City admits the following regarding the area of the Millers’ property: (1) it is considered a “Critical [drainage] Basin” that has “elevated re-development pressure”; (2) it is a drainage basin “where continued re-development pressure and additions to existing structures further tax [the] already strained stormwater drainage system[] and exacerbate the infrastructure problems”; and (3) as a result of the development in the area, “the City has seen natural permeable areas covered by impermeable surfaces, such as rooftops, driveways, and parking lots resulting in more of the rain becoming runoff” and needing to be collected by the City in its drainage system.¹⁷

C. 488-91, 495-96 (Heathermoor Trib).

¹⁷ The Amicus Cities argue that the drain is functioning as it was designed. See Amicus Brief, pp. 13, 17. This conclusory statement is contrary to admissions from the City and its experts that the drain is getting overwhelmed and surcharging. That is not how the drain is supposed to function. The expert admitted that if the drain and drain

According to this Court in *Reichert*, these admissions by the City and its experts' opinion that development the City has allowed without providing appropriate upkeep of its drainage system has increased the amount of water to be collected and overburdened the City's drainage system in the area of the Millers' home amounts to negligent maintenance. This serves as a negligence theory under *City of Birmingham* that supports the Millers' request for an injunction. See *Reichert*, 776 So. 2d at 765-66. For these reasons, the trial court's finding that "even if this matter did not involve the rights and duties of an easement holder resulting in the application of *Beatty*, [the Millers] are still entitled to an injunction abating the nuisance pursuant to *City of Birmingham*" is due to be affirmed. C. 1158.

iii. THE CITY MISCONSTRUES THE MILLERS' NEGLIGENCE CLAIM.

The City misrepresents that "the Millers never claimed that the City failed to 'provide appropriate upkeep for the storm-drainage system in its existing condition'" and mischaracterizes the Millers' claim as being

inlets were functioning properly, then they would collect water before it gets to the Millers' property (not release water onto the Millers' property). C. 402-03.

that the “stormwater infrastructure is ‘inadequate’” as if it has always been inadequate due to negligent design or construction. Appellant’s Brief, p. 42. The Millers’ 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]” – meaning it was once adequate but is no longer because the City failed to provide appropriate upkeep in light of the development it has allowed, which has resulted in an increase in water collected by the City and directed to its drainage system in the area of the Millers’ property. C. 95, 102.

The City argues the Millers claim the drainage infrastructure “is ‘inadequate’ and must be redesigned and enlarged.” Appellant’s Brief, p. 42. The Millers never make such an argument about what “must” be done or seek relief dictating the means of preventing overflow. Knowing *Beatty* held that “the injunction should be limited to prohibiting the flooding of complainants’ property – with the means of preventing the overflow being left to the sound discretion of the city planners”, 295 So. 2d at 395, the Millers only sought, and the trial court only issued, an order enjoining the City from causing a flood on the Millers’ property. C. 385, 1159.

CONCLUSION

The City undisputedly breached its duty as an easement holder to maintain its drain easement “in such a condition that the water cast in [it] by the city not cause it to overflow” and flood adjacent property. *Beatty*, 295 So. 2d at 394. As such, the Millers respectfully request that this Honorable Court affirm the trial court’s order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of ALA. R. APP. P. 28(j)(1) because this brief contains 13,981 words, excluding parts of the brief exempted by ALA. R. APP. P. 28(j)(1) and 32(c), as counted by the word count function of Microsoft Word.

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 Microsoft Word in 14-point Century Schoolbook font.

s/ Rodney E. Miller
Rodney E. Miller

CERTIFICATE OF SERVICE

I do hereby certify that on **October 8, 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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