

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 BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant, City of Mountain Brook, Alabama (the “City”) requests oral argument. Oral argument is warranted because this appeal has profound ramifications as it relates to municipal liability for flooding, municipal public policy decisions, and the proper scope of relief available against municipalities under Alabama law. The City would welcome the opportunity to present oral argument on these important issues.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to ALA. CODE § 12-2-7 because it involves an appeal from a final judgment which disposed of all claims and controversies between the parties.

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STATEMENT OF THE CASE

The Millers filed their lawsuit against the City on March 8, 2024, seeking damages and injunctive relief relating to a May 15, 2023, flooding event. C. 17. The Complaint contained three counts: “Injunction,” “Negligent Maintenance,” and “Wanton Maintenance.” C. 27-31. After the City filed a partial motion to dismiss the wantonness count and demand for punitive damages, C. 63, the Millers filed an Amended Complaint with four counts: “Injunction”, “Negligent Maintenance”, “Trespass”, and “Nuisance”. C. 94-108. In their operative Amended Complaint, the Millers alleged that “Defendant’s drainage system in the Plaintiffs’ area is no longer adequate,” and that the pipes are “too small for the services now required of them.” C. 102.

On November 20, 2024, the Millers filed an offensive “Motion for Partial Summary Judgment and for Permanent Injunction”, C. 361, arguing that “[t]he City’s Drainpipes Are No Longer Adequate.” C. 380. The Millers sought summary judgment on their nuisance and trespass claims, \$80,441.15 in damages, and a permanent injunction against the City. C. 385. In their motion, the Millers argued that “granting the injunction and awarding the \$80,441.15 in damages as requested would

nullify the need for a jury trial on Plaintiffs’ remaining claim, negligent maintenance[.]” *Id.*

On December 16, 2024, the City responded to the Millers’ motion for partial summary judgment and filed its own motion for summary judgment. C. 623. In its motion, the City argued that the Millers’ claims were based on a design/construction theory of liability, not maintenance, and were also time-barred. C. 642-650. The City further argued that the Millers’ claims were barred by substantive immunity and the doctrine of prescription. C. 650-655. Additionally, the City argued that genuine issues of material fact precluded the Millers’ request for offensive summary judgment. C. 655-660. The parties briefed both motions, C. 889-1120, and on February 5, 2025, the trial court held oral argument. R. 1.¹

On April 4, 2025, the trial court granted the Millers’ partial summary judgment motion and denied the City’s motion for summary

¹ Former Jefferson County Circuit Court Judge Jim Hughey, III, presided over this case until January 2025. Judge Hughey retired shortly after summary judgment briefing concluded but before the summary judgment hearing. Jefferson County Circuit Court Judge Shera Grant presided over the summary judgment hearing and subsequently issued the order that forms the basis of this appeal.

judgment. C. 1151. Relying on *City of Mountain Brook v. Beatty*, 295 So. 2d 388 (Ala. 1974), the trial court awarded \$80,441.15 in damages and entered a permanent injunction which provides that “Defendant City of Mountain Brook is hereby enjoined from flooding 2801 Montevallo Road, Mountain Brook, Alabama 35223.” C. 1159. Although the Millers did not move for summary judgment on their “negligent maintenance” claim, the trial court nonetheless entered judgment on this claim and held that, because the City did not implement a project to upgrade and enlarge its stormwater drainage infrastructure, the City “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.

On April 9, 2025, the trial court clarified that its summary judgment order was a final judgment. C. 307. On May 2, 2025, the City filed a notice of appeal. C. 1171. On May 5, 2025, the trial court suspended its injunction pending the outcome of this appeal. C. 1181.

STATEMENT OF THE ISSUES

- I. Whether the trial court erred by relying on *Beatty v. City of Mountain Brook*, which involved a prescriptive easement natural drainage ditch located on private property, to hold the City strictly liable for the flooding event that forms the basis of this case and permanently enjoin the City from ever allowing the Millers' property to flood again, regardless of the size of the rain event, the condition of the City's stormwater pipes, or the standards to which they were built.

- II. Whether the trial court erred in expanding a cause of action for "negligent maintenance" to include a theory that the City should have upgraded and enlarged stormwater infrastructure that is not alleged to have been improperly designed or constructed.

- III. Whether substantive immunity protects the City from liability for its decision not to proceed with a multi-million dollar project to upgrade and enlarge existing stormwater infrastructure where the evidence shows that the City considered a myriad of factors, including the substantial financial burden of the project, citizen opposition, the effects of the proposed project on all citizens, and the engineer's recommendation that the project not be performed because it would not meaningfully improve flooding on the Plaintiffs' property and any benefit of the project was outweighed by its cost.

- IV. Whether the trial court erred in rejecting the City's other defenses, which presented issues of fact for a jury.

STATEMENT OF THE FACTS

This case arises out of the flooding of the Millers' property, located at 2801 Montevallo Road in the City of Mountain Brook, Alabama (hereinafter the "Property"), which occurred on May 15, 2023. C. 18.

The Documented Historical Flooding of 2801 Montevallo Road

The drainpipes in the dedicated easement adjacent to the Millers' property are 36-inch pipes and have been that size since at least 1928. C. 365 & 604. Those pipes are part of a larger network of the City's stormwater drainage infrastructure in the area of Canterbury Road, Montevallo Road, Surrey Road, and Overhill Road located near Mountain Brook Village. C. 469-486; 502.

The Property has flooded on occasion since at least the mid-1950s. In August 1957, the Mountain Brook City Manager received a letter from Schoel Engineering Company (hereinafter "Schoel") which discussed the "drainage problem" at the Property and an adjacent property at 2801 Overhill Road. C. 670. In December 1957, a prior owner of the Property and the owner of 2801 Overhill Road wrote the City regarding the "[d]rainage problem at the corner of Montevallo Road and Overhill Road."

C. 673. *See also* C. 675 (current city officials have been aware of flooding at the Property since at least 2000).

In 2004, a prior owner of the Property named Steve Griffin engaged former Schoel chief hydrologist David Hains to study flooding issues at the Property. C. 678. Mr. Hains determined there were not any improvements that the City could make to its stormwater infrastructure that would stop flooding at the Property. C. 679. Mr. Hains personally observed one such flooding event at the Property on September 16, 2004, documenting it with photographs. *Id.*

Archie and Paige Andrews purchased the Property in December 2020. C. 727. Between December 2020 and when they sold the Property to the Millers on May 5, 2023, it flooded on numerous occasions. *Id.* In May 2021, water flooded the garage and basement during a heavy rain event. C. 692-701; C. 725. Following the May 2021 flooding event, the Andrews' neighbor stated that "this has been a known issue with the city for decades," and "those of us that live here will need to do what we can to help prevent our homes from flooding." C. 662. On July 25, 2022, the Andrews filed a sworn notice of claim with the City relating to additional

flooding events, stating that the Property had flooded “six (6) times” since they bought the property “on December 1, 2020.” C. 727.²

The Engineering Studies of the Canterbury/Surrey/Overhill Area

The area around the Millers’ property has been studied by engineers and hydrologists on multiple occasions over the last 70+ years. Walter Schoel, III, is the current senior principal of Schoel, and his grandfather (Walter Schoel, Sr.) studied this area in the 1950s. C. 783. Schoel’s “[r]ecords indicate that Schoel investigated drainage issues at 2801 Montevallo Road, which were documented as problematic during that period.” *Id.*

In the early 2000s, the City retained Hill Engineering to again study this area. C. 792-795. Hill Engineering’s study led to a proposal to widen certain channels in the area and replace some pipes with culverts. C. 792. The Hill Engineering study was met with resistance by City residents located downstream from the Property, including one resident who objected to the impact the proposed project would have on his property and threatened to take legal action against the City. C. 795-

² Neither the Griffins nor the Andrews filed a lawsuit against the City.

796. *See also* C. 518. Additionally, the City did not have the necessary easements to perform the work contemplated by the Hill Engineering study, and the citizens whose private property would have been subject to those easements refused to grant them. C. 792-793. After consideration, the City did not implement the proposal from Hill Engineering.

As referenced above, in 2004, prior owner Steve Griffin engaged former Schoel chief hydrologist David Hains to study flooding issues at the Property. C. 678. Mr. Hains determined there were not any improvements the City could make to its stormwater infrastructure that would stop flooding at the Property. C. 679.

In 2021 and 2022, the City retained Schoel to perform another hydrological study of this area, where “[c]ertain properties along Canterbury Road, Montevallo, Surrey and Overhill Road have historically flooded.” C. 501-508. In April 2022, Schoel presented its findings to the City in a preliminary report outlining a 3-phase project to upgrade and enlarge stormwater infrastructure in this area. Schoel’s “summary of the benefits and impacts” included the following findings:

- The estimated cost of the project was \$3,944,000. C. 511.³
- All three phases of the project had to be performed to mitigate (but not fix) flooding issues in this area. C. 412; C. 511-513 (“the improvements identified in the preliminary design will need to be implemented concurrent with the Upper Canterbury and Overhill/Surry Rd phases. Also the Upper Canterbury phase should be constructed before the Overhill/Surrey Rd phase, otherwise all benefits from the Lower Canterbury Rd improvements are negated. This is necessary because the Overhill/Surrey Rd improvements will increase flows to the Lower Canterbury area.”). C. 1105-1106.
- The second and third phases of the 3-phase project were projected to reduce flooding, but they would increase flow rates and surface elevations downstream from the Property. C. 511. Thus, if the City decided to move forward with the 3-phase project, there had to be additional studies and work performed even further downstream, *id.*, which would “significantly” increase the estimated \$4 million cost of the project. C. 707.
- With respect to 2801 Montevallo Road specifically, “[b]ased 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.” C. 786. To the

³ To put this \$3,944,000 estimated figure in perspective, in fiscal year 2022 the City had a capital outlay of \$1,086,711 on *all* drainage projects throughout the City. C. 1116-1120. Thus, the estimated capital cost of this project would have been roughly four times what the City spent on *all* capital drainage projects throughout the entire City in 2022. In fiscal year 2023, the City significantly increased its capital outlay to \$5,616,044 on all drainage projects throughout the City. *Id.* Even with this substantial increase, the estimated capital cost of this project (without any increase for further downstream work) would still have been more than 70% of what the City spent on *all* drainage projects throughout the entire City in 2023. As these figures reflect, the cost of this project was substantial.

contrary, Schoel determined “that **the project would not meaningfully improve conditions at 2801 Montevallo Road,**” and this assessment “was communicated by Schoel to Ms. Andrews, the property owner at the time.” C. 787 (emphasis added).

- Schoel’s recommendation, which it conveyed to the City, was that the City should not undertake the drainage improvement project because the cost of the project outweighed its benefit. “In addition, it was determined that implementation of the drainage improvement project would likely cause downstream impacts” on other citizens. *Id.*

Like the prior Hill Engineering study, the 2021-2022 Schoel study was met with resistance from citizens who were concerned about the project. C. 795-797; C. 802 (“There are residents with extraordinary downstream concerns.”). One of the residents who opposed the earlier Hill Engineering study again voiced concern about downstream effects of the 3-phase project, noting that “these problems have been going on for years” and that he had taken measures to prevent flooding on his property which were effective. C. 804-805. Numerous citizens objected to the 3-phase project, stating that if additional water were added to stormwater infrastructure located near their downstream properties, as Schoel’s study projected, then “the damage will be extraordinary.” C. 807. Those citizens protested that the project would “harm many more residents than it will help,” and that “[i]f the plan goes forward and we

are faced with the prospect of dealing with the inevitable damage that 14 additional inches of water will cause, we will have no choice but to utilize all available legal remedies.” C. 808. *See also* C. 811-812 (resident email to City Manager stating that “several of the residents downstream are very concerned about the downstream impact of the project” and are “100% opposed” to it).

In addition, and like the prior Hill Engineering study, Schoel’s 3-phase project would have required the City to obtain additional easements to perform/construct the project, and at least one citizen made clear that he would not grant the necessary easement to the City. C. 795-797; C. 1112.

After considering all these factors, the City decided not to move forward with the 3-phase project.

The Millers’ Purchase of the Property

The Millers purchased 2801 Montevallo Road on May 5, 2023. The home inspection report obtained by the Millers prior to buying the Property noted the substantial drainage work on the Property: “The driveway is equipped with several catch basins with underground drains that eventually drain into a sump pump ... Looks like this house has had

plenty of drainage work. Check the operations of the drains and pump during a good soaking rain to make sure all works well. You don't want water to back up in the garage areas." C. 1068-1069. Elsewhere in the report, the inspector noted that "This house is [sic] had some **serious drainage work done. I suspect maybe it flooded in the past. Consult the current owner for more information.** You may need flood insurance just for good measure." C. 1073 (emphasis added). See also C. 1079 ("given all the drainage work done around the house, this house may have flooded in the past.").

Before buying the Property, the Millers and their real estate agent also personally inspected the Property. C. 708-709. During their inspection, they noticed a drain and a sump pump in the driveway. C. 710; C. 825-827. This prompted the Millers to ask direct questions regarding whether the Property had previously flooded. According to the Millers, the history of significant flooding was not disclosed in response to those questions:

Q Okay. So just to kind of sum up what we just heard: At the closing, y'all directly asked, Has the property had flooding issues? We've noticed this sump pump. Has the property had flooding issues? And you were told that there has been minor water, or however you want to describe it, in the basement but

that the sump pump had fixed the problem. No disclosure of four feet of water in the basement; correct?

A I think that is an appropriate summary.

Q Okay.

A Yes. And – and we did that knowing that even if at the closing before we – we finalized this deal, we had this contingency in place in the contract that, you know, if – if we were to have learned – had we been told the truth about what happened, we could have walked away; and it wouldn't have been a problem.

[...]

Q Okay. And you feel like the questions you asked should have elicited that information?

A Yes. Well, it's my understanding health and safety concerns have to be disclosed. And on top of that; when you ask questions, you have to be told the truth. And we asked questions that, obviously, based on Archie's email and what we see here in Yorke's; we did not receive the truth.

C. 713-714; 720. *See also* C. 848 (Ms. Miller testifying that “the whole truth was not disclosed to us”); C. 851 (testifying that the Andrews had an obligation to disclose the prior flooding to the Millers).⁴

⁴ Mr. Miller believed the Andrews “staged” the basement to actively conceal the fact that it had previously flooded. C. 724.

The May 15, 2023 Flooding Event

Ten days after the Millers purchased the Property, it flooded again. The May 15, 2023, rain event was “exceptionally severe” and approached a 50-year event, C. 785, which is beyond the designed capacity of the stormwater system near the Millers’ property. In fact, the May 15, 2023, rain event was more severe than the designed capacity for stormwater systems built to present-day standards. C. 785; C. 784-785. Accordingly, even if the stormwater infrastructure near the Property had been built to present-day standards, it still would have flooded on May 15, 2023. C. 785. Flooding occurred not just at 2801 Montevallo Road but in numerous other areas of the City. C. 861-867; C. 715.

Following the May 15, 2023, flooding event, the Andrews assigned to the Millers a flood insurance policy for the Property, which was referenced at the May 5, 2023 closing. C. 857-859. The Millers subsequently made a claim under that policy and received payment for their losses from the May 15, 2023 flooding event. C. 541.

There is no evidence that the May 15, 2023, flooding event was caused by any blockage, clog, obstruction, or collapsed pipe. C. 852; C. 716-717; C. 721-723. This was confirmed by a video inspection of the

pipes following the May 15, 2023, flooding event. C. 785 (there were no “collapses, or otherwise damaged pipes, or any obstruction that would have affected the capacity of the pipes during the May 15, 2023 event”). Mr. Miller described the basis of the Plaintiffs’ claims in this action as follows:

Q. All right. But are – are you alleging that the – that there are – there was blockages or a collapsed pipe that should have been repaired that led to your flooding, or is your claim based on the current capacity of the system as it’s built right now not being sufficient?

A. We did not have any knowledge of a collapsed pipe or anything. Our – our claim is based off the fact that while the pipe may have – the drainage system may have been sufficient to handle the capacity at one point in time; over time, there has been development, and there is a larger amount of water being directed to it. And because of that, the pipes are over – are undersized.

C. 721-722.

In their summary judgment briefing, the Millers similarly argued that they “do not allege that the drainpipes at issue were improperly designed or constructed, nor do Plaintiffs allege that the drainpipes were collapsed, obstructed, or clogged. Rather, Plaintiffs allege that the drainpipes at issue are no longer adequate.” C. 906.

STATEMENT OF THE STANDARD OF REVIEW

The appellate standard of review applicable to summary judgment rulings is well settled:

This Court's review of a summary judgment is *de novo*. *Williams v. State Farm Mut. Auto. Ins. Co.*, 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a *prima facie* showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; *Blue Cross & Blue Shield of Alabama v. Hodurski*, 899 So. 2d 949, 952, 2004 Ala. LEXIS 182, *4 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. *Wilson v. Brown*, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a *prima facie* showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce "substantial evidence" as to the existence of a genuine issue of material fact. *Bass v. SouthTrust Bank of Baldwin County*, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. "Substantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assur. Co. of Fla.*, 547 So. 2d 870, 871 (Ala. 1989).

Dow v. Ala. Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

The trial court's permanent injunction against the City is also reviewed *de novo*. *CraneWorks, Inc. v. RPM Cranes, LLC*, 239 So. 3d 561, 568 (Ala. 2017) (citing *Weeks v. Wolf Creek Indus., Inc.*, 941 So. 2d 263, 271 (Ala. 2006)).

SUMMARY OF THE ARGUMENT

The Millers’ arguments and the trial court’s order rely heavily on *City of Mountain Brook v. Beatty*, 295 So. 2d 388 (Ala. 1974). That reliance is misplaced. *Beatty* involved a prescriptive easement, and therefore a fundamentally different legal duty applied in *Beatty* than in this case. The trial court erred in relying on *Beatty* to impose what amounts to a strict liability standard on the City.

The trial court compounded its error by entering offensive summary judgment on the Millers’ “negligent maintenance” claim. Recognizing that any design/construction claim would be time-barred because the Property has flooded for more than 70 years, the Millers argued that their claims—all of which were based on the allegation that the City’s stormwater pipes are “no longer adequate” and must be “upgraded”—were for “negligent maintenance.” The holdings of this Court and of the Court of Civil Appeals foreclose this argument and make clear that the Millers’ allegations are a design/construction theory of liability, not maintenance. Under this settled law, the City’s motion for summary judgment should have been granted.

The trial court also erred in rejecting the City’s substantive immunity argument. As this Court’s decisions make clear, “[m]unicipal decisions regarding drainage systems and stormwater management are classic examples of duties owed to the public at large and not to individual plaintiffs.” Accordingly, those decisions are protected by substantive immunity. This is exactly such a case.

The trial court should be reversed, and summary judgment entered in the City’s favor. At a bare minimum, however, the trial court’s order should be vacated because there are issues of genuine material fact that preclude summary judgment in the Millers’ favor.

ARGUMENT

I. *CITY OF MOUNTAIN BROOK V. BEATTY* IS INAPPLICABLE TO THIS CASE.

The trial court relied on *City of Mountain Brook v. Beatty*, 295 So. 2d 388 (Ala. 1974), to enter offensive summary judgment against the City, holding as follows:

Defendant’s drainpipes at issue in the case at hand are in an easement on private property. Therefore, *Beatty* imposes a duty on Defendant “to maintain its drainage easement so as not to cause an overflow” on Plaintiffs’ property. *Id.* at 395. Because it is undisputed that the water complained of originated from Defendant’s overwhelmed drainpipes in its easement, Defendant breached its duty and, according to

Beatty, Defendant should be enjoined from causing a flood on Plaintiffs' property.

C. 1154. The trial court further held that, under *Beatty*, the Millers were not required to present evidence of negligence. C. 1155. The trial court's reliance on *Beatty* was misplaced, as it failed to recognize that the legal duty at issue in *Beatty* is materially different than the legal duty at issue in this case.

The issue in *Beatty* was whether the City had a **prescriptive easement** over an unimproved, natural ditch. 295 So. 2d 388, 390 (Ala. 1974). *Beatty* framed the issue as follows:

The key issue in this case - the one issue upon which practically all claims of both parties stand or fall - is whether the City of Mountain Brook has the right to drain water across the Beattys' property, and, if so, to what extent such right exists.

Id. at 391. *Beatty* recognized that "[t]he issue whether a party can obtain an easement for drainage by continuous use for the prescriptive period has been rarely litigated in this state." *Id.* at 391.

Beatty held that "[f]or more than 20 years there had been a city drainage pipe emptying into this" ditch, and therefore the City "had acquired a drainage easement across the complainants' property by prescription." *Id.* at 392. *Beatty* also found, however, that flooding had

only occurred for “seven or eight years prior to the start of the litigation ... during periods of heavy rain causing flooding,” and therefore the City had not yet acquired the right to flood the property because the flooding had not occurred for the requisite prescriptive period. *Id.* at 389.

Importantly, *Beatty* recognized that **“the very essence of the concept of prescription is the creation of rights in one party where none existed before”** and that the **“prescriptive right of drainage can only be exercised in manner and to extent used during [the] prescriptive period.”** *Id.* at 394 (citing *Peacock v. Stinchcomb*, 189 Mich. 301, 155 N.W. 349 (1915)) (emphasis added).

Applying those principles, *Beatty* held as follows:

It would seem from the evidence in the case at hand that indeed the City of Mountain Brook had acquired rights to drain through the ditch by prescription, but the evidence is also undisputed that the flooding has occurred for less than the prescriptive period. Therefore the decree of the trial court should be modified to the extent that the city is found to have a prescriptive easement of drainage, but the respondent should be enjoined from casting water into the ditch in such a manner as to cause the ditch to overflow.

295 So. 2d at 394. In other words, the City (like any holder of a prescriptive easement) could only use the ditch consistent with the limits of its prescriptive rights.

The case at hand does not involve the channeling of stormwater into a privately owned, natural drainage ditch. Rather, it involves stormwater pipes in a dedicated, recorded easement which the Millers do not contend were improperly designed or constructed. C. 906. Accordingly, a fundamentally different legal duty applies in this case than in *Beatty*.

Indeed, this Court has specifically recognized the difference between cases involving municipal-owned stormwater drainage improvements—like this case—and those involving prescriptive easements over a natural ditch on private property. In *Birmingham v. Fairfield*, this Court took special care to explain that *Beatty* involved a “*prescriptive easement*” and was therefore “distinguishable” from cases which involve municipal drainage improvements:

[*Beatty*] did not turn upon the liability of a municipality when it acts under statutory authority to create municipal drainage improvements. Indeed, the precedents on which this Court relied for that decision were not those relevant under the issues here. Thus the [*Beatty*] decision is not apropos in this instance.

375 So. 2d 438, 443-44 (Ala. 1979).

This case *does* involve “municipal drainage improvements.” *Id.* Alabama law is clear that municipalities can only be held liable for their

negligence in designing, constructing, or maintaining stormwater pipes. As this Court explained, “[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) (citing *Lee v. City of Anniston*, 722 So. 2d 755, 757 (Ala. 1998), quoting in turn *City of Mobile v. Jackson*, 474 So. 2d 644, 649 (Ala. 1985)).⁵ Accordingly, *Beatty* does not relieve the Millers of the burden of presenting substantial evidence of the City’s negligence in this case. As explained *infra* in Section II, the Millers disavowed any claim for negligent design or construction, and their argument that the City failed to update and enlarge its stormwater pipes is not substantial evidence of negligent maintenance under settled Alabama law.

For the same reason, *Beatty* does not support the trial court’s permanent injunction. “[T]he drastic remedy of abatement by injunction

⁵ ALA. CODE § 11-50-50 applies to municipal drainage systems on both “private” and “public property.” Thus, it applies to stormwater drainage pipes located on public property (such as a city-owned right-of-way) and on private property (such as a dedicated easement on the Millers’ property).

is not available to an injured party unless the authorized instrumentality was negligently constructed or maintained: The construction and operation of a governmental agency by authority of law, constructed and operated exactly as authorized by law and strictly in accordance with good practice, cannot be a nuisance in law, though it may work damage to others.” *Birmingham v. Fairfield*, 375 So. 2d at 442. *Birmingham v. Fairfield* cited multiple cases standing for this principle, *id.* at 442-443, explaining that “[t]hese and a host of other cases make it clear that injunctive relief is not properly granted to prohibit as a nuisance, the results of statutorily authorized municipal improvements unless the improvements were negligently constructed or maintained.” *Id.* at 443. *See also Bessemer v. Chambers*, 8 So. 2d 163, 164 (Ala. 1942) (an act authorized by law “prevents it from being an actionable nuisance unless negligently maintained”).

Again, the Millers do not allege the stormwater infrastructure at issue was improperly designed and constructed, and there is no evidence the City negligently failed to maintain that infrastructure in its “existing condition.” *Reichert v. City of Mobile*, 776 So. 2d 761, 765-66 (Ala. 2000). Because there is no evidence that the City negligently maintained the

stormwater pipes at issue in this case, “the drastic remedy of abatement by injunction is not available.” *Birmingham*, 375 So. 2d at 442.

Beatty is distinguishable in other respects as well. For example, the evidence in *Beatty* showed that the natural ditch over which the City had acquired a prescriptive easement was obstructed with debris. 295 So. 2d at 390. This case, in contrast, undisputedly does not involve any “obstruction” of stormwater infrastructure. *See* C. 906. Rather, the Millers claim that the City’s stormwater drainage pipes are undersized and should be upgraded. Under Alabama law, allegations that stormwater pipes are undersized have been deemed matters of “design and construction,” *Byrd v. City of Citronelle*, 937 So. 2d 515, 522 (Ala. 2006), and it is “well-settled law that negligent design or construction of a drainage ditch is considered to be a permanent condition that is not abatable.” *Id.* at 519.

Additionally, the flooding in *Beatty* had only occurred for “seven or eight years ... during periods of heavy rain causing flooding,” whereas the undisputed evidence in this case shows that 2801 Montevallo Road has flooded on numerous occasions since at least the 1950’s.

Beatty also recognized that flooding caused by the natural topography of the land was not the City's responsibility. *Beatty*, 295 So. 2d at 394. Expert testimony in this case shows that 2801 Montevallo Road floods due to the natural topography of the area. C. 786 ("The primary issue is the low elevation of the finished basement relative to storm drainage infrastructure. Specifically, the basement floor is approximately one foot below the inside top of the storm pipes adjacent to the residence. Additionally, the residence is situated in a bowl-shaped depression created by the higher surrounding topography of Overhill Road.").

Beatty was also decided in 1974, approximately eight years before the recognition of substantive immunity in *Rich v. City of Mobile*, 410 So. 2d 385 (Ala. 1982). Accordingly, *Beatty* did not address substantive immunity or analyze whether it barred the plaintiff's claims.

Beatty is distinguishable for all the above reasons, but the trial court's primary error was its failure to recognize that *Beatty* involved a fundamentally different legal duty applicable to prescriptive easements. *Beatty* did not abrogate the settled law that plaintiffs must present

substantial evidence that a city's negligence in designing, constructing, or maintaining its stormwater pipes proximately caused their damages.

II. THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT IN THE CITY'S FAVOR ON THE MILLERS' TRESPASS, NUISANCE, AND "NEGLIGENT MAINTENANCE" CLAIMS.

As this Court recently observed, the "distinction" between negligent maintenance and negligent design/construction claims "can be critical in cases involving statute-of-limitations problems." *Ex parte City of Muscle Shoals*, 2025 Ala. LEXIS 30, at *24 (citing *Reichert*, 776 So. 2d 761 and *Long*, 24 So. 3d 1110). That distinction is indeed critical in this case, because it is undisputed that the Property has flooded for more than 70 years.

Apparently recognizing the statute of limitations problems, the Millers disavowed any design/construction claim: "Plaintiffs do not allege that the drainpipes at issue were improperly designed or constructed, nor do Plaintiffs allege that the drainpipes were collapsed, obstructed, or clogged. Rather, **Plaintiffs allege that the drainpipes at issue are no longer adequate.**" C. 906 (emphasis added). Specifically, the Millers claimed that the City's stormwater drainage pipes near their property are "overburden[ed]," "undersized," and that

the City has “fail[ed] to enlarge” its pipes. C. 909-910. In its summary judgment briefing, the City explained why the Millers’ characterization of their claims as ones for “negligent maintenance” is wrong under settled Alabama law. C. 642-650; C. 1027-1034.⁶

The trial court denied the City’s summary judgment motion and granted the Millers’ offensive summary judgment motion, finding that “[i]t is undisputed that development permitted by Defendant has

⁶ In denying the City’s summary judgment motion, the trial court stated, “Plaintiffs did not assert a claim for negligent design or construction. Rather, Plaintiffs asserted the following claims: negligent maintenance, nuisance, and trespass. This Court will not consider a claim that was not asserted.” C. 1160. This holding reflects a misunderstanding of the City’s summary judgment arguments, *i.e.*, that despite Plaintiffs calling their claim “negligent maintenance”, the “Plaintiffs’ claims [] are premised on a negligent design/construction theory of liability.” C. 644 (citing *Reichert v. City of Mobile*, 776 So. 2d 761, 765-66 (Ala. 2000) and *Long v. City of Athens*, 24 So. 3d 1110, 1116 (Ala. Civ. App. 2009)). The City explained how “[p]ublished decisions by the Alabama Supreme Court and the Alabama Court of Civil Appeals conclusively establish that the Plaintiffs’ claims sound in negligent construction/design, not negligent maintenance.” C. 1028. The City extensively discussed *Byrd*, *Long*, and *Reichert*, explaining why those cases “make clear that [the Millers’ theory of liability] is a design/construction claim, not a maintenance claim.” C. 1028-1030. And the City reiterated these arguments at the summary judgment hearing. R. 55:4-17 (“Again, there’s no evidence of negligence maintenance in this case. ... The theory is, well, you should upgrade these pipes. *Byrd* and the *Long* cases make specifically clear that theory of liability is a design and construction theory of liability. A failure to upgrade pipes is not substantial evidence of negligent maintenance[.]”).

adversely impacted Defendant’s drainage system in the area of Plaintiffs’ property and that Defendant’s drainpipes at issue are no longer adequate.” C. 1158. The trial court further held the City should have implemented Schoel’s “remediation design plans,” which the trial court deemed to be “reasonable,” finding that, “[a]ccording to *Reichert*, such a failure constitutes negligent maintenance.” *Id.* This holding was error. As explained below, the trial court should have granted summary judgment in the City’s favor on the Millers’ trespass, nuisance, and “negligent maintenance” claims.

A. The Millers’ claim that the City failed to upgrade and enlarge stormwater infrastructure sounds in construction/design, not maintenance.

In *Byrd v. City of Citronelle*, the plaintiff asserted both a negligent design/construction claim and a negligent maintenance claim in a municipal flooding case. 937 So. 2d 515 (Ala. 2006). Like the Millers, the *Byrd* plaintiff argued that the City of Citronelle failed to upgrade stormwater infrastructure, thereby causing his property to flood. Specifically, the *Byrd* plaintiff argued that the City of Citronelle received a “proposal regarding replacement of pipe ‘for any drives needing replacement,’” and “that ‘in fact, the concrete culverts were not replaced.’”

The *Byrd* plaintiff further asserted “that the flooding problem is attributable in part to ‘the lack of removal of the restrictive [*i.e.*, undersized] driveway pipes.” *Id.* at 521. *Byrd* held the plaintiff’s negligent design/construction claim was barred by the two-year statute of limitations, because the first flooding event caused by the allegedly undersized pipes occurred more than two years prior to when *Byrd* filed suit. *Id.* at 520.

With respect to the plaintiff’s negligent maintenance claim, *Byrd* affirmed summary judgment for lack of any substantial evidence of negligent maintenance, explaining:

Underwood’s affidavit merely stands for the proposition that, for reasons that remain unexplained, he believes that there is inadequate drainage of the ditch on *Byrd*’s property “due to the lack of maintenance of the ditch and the lack of proper slope of the ditch along with the restrictive driveway culverts installed on the City of Citronelle right-of-way.” **The latter two conditions are clearly matters of design or construction.** All of this evidence indicates the existence of conditions having the potential to cause flooding, but, without more, **it is not substantial evidence indicating any negligence by the City in maintaining the ditch.**

Id. at 522 (emphasis added). Thus, *Byrd* makes clear that evidence of allegedly undersized pipes will not sustain a negligent “maintenance” claim.

In *Long v. City of Athens*, the plaintiffs alleged—again, like the Millers in this case—that the City of Athens failed to upgrade and improve stormwater infrastructure. 24 So. 3d 1110 (Ala. Civ. App. 2009). Citing this Court’s decision in *Byrd*, the Alabama Court of Civil Appeals held that this allegation sounded in negligent construction/design, not negligent maintenance, and affirmed summary judgment in favor of the City of Athens:

The Longs’ theory of recovery for their claim of negligent maintenance is that, by failing to update the drainage systems to accommodate the increased discharge of surface water from the developments surrounding the Long property, the City failed to maintain those systems. ...

In the present case, the recommendations of the various studies conducted on the City’s drainage systems included enlarging the culverts under Brown’s Ferry Road and requiring detention and retention ponds for developments upstream of the Long property. Those recommendations speak to matters of design, as did the conditions cited in *Byrd*, i.e., obstruction of driveway pipes and improper sloping of the ditch. Because the Longs have failed to present substantial evidence indicating that the City did not adequately maintain the drainage systems, we conclude that the trial court did not err in entering the summary judgment in favor of the City on the Longs’ negligent-maintenance claim.

Id. at 1115-1116 (emphasis added). Notably, this Court recently cited *Long* when emphasizing the “critical” distinctions between negligent

design/construction and negligent maintenance claims. *Ex parte City of Muscle Shoals*, 2025 Ala. LEXIS 30, at *24.

The holdings of *Byrd* and *Long* are clear: an alleged failure to upgrade or enlarge pipes is a design/construction issue, not a maintenance issue. Other jurisdictions are in accord. For example, in *Lorman v. City of Rutland*, the Vermont Supreme Court held as follows:

Plaintiffs believe that the pipes should be of a greater diameter and that there should not be a bend of a certain degree in a particular pipe. “When remedying a problem would require a city to, in essence, redesign or reconstruct the sewer system, then the complaint presents a design or construction issue.” *Essman v. City of Portsmouth*, 2010-Ohio-4837, ¶ 32, 2010 WL 3852247 (Ct. App. 2010). As in one of the cases discussed in *Essman*, plaintiffs’ true complaint here is “that the city failed to update the sewer system” as opposed to a “negligent maintenance” theory. *Id.* ¶ 36. There is no suggestion that any particular “maintenance” would have prevented the damages here. The issue is redesigning the system.

207 Vt. 598, 613, 193 A.3d 1174, 1183-84 (Vt. 2018) (collecting cases).

Although both *Byrd* and *Long* were cited in summary judgment briefing and discussed at oral argument, C. 644, 1028-1032, R. 48-52, the trial court’s Order does not mention either case or explain how its holding could be squared with those cases. Instead, the trial court relied on *Reichert v. City of Mobile* to hold that the Millers’ claims sound in

negligent maintenance. Simply put, *Reichert* does not stand for that proposition. *Reichert* held that, to survive summary judgment on a negligent maintenance claim, a plaintiff must present substantial evidence that “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).

With respect to the negligent maintenance claim, the *Reichert* court specifically noted testimony that the City of Mobile’s stormwater drains near one of the plaintiffs’ properties was “stopped up big time.” 776 So. 2d at 766. Again, the Millers did not claim (and the record here contains no evidence) that the City’s stormwater pipes were clogged or that any pipes had collapsed, thereby causing the flooding on May 15, 2023. C. 906.⁷

⁷ In reversing summary judgment for the City on the plaintiffs’ negligent maintenance claim, *Reichert* also referenced the plaintiffs’ expert’s testimony that “the City has issued additional permits for development to the north and to the west of the plaintiffs’ subdivision, causing an increased discharge of surface water to be directed to the area

Here, the Millers never claimed that the City failed to “provide appropriate upkeep for the storm-drainage system in its existing condition.” *Cf. Reichert*, 776 So. 2d at 765-66. In fact, the Millers argued directly the opposite, *i.e.*, that the “existing condition” of the stormwater infrastructure is “inadequate” and must be redesigned and enlarged. As *Reichert*, *Long*, and *Byrd* make clear, that is a negligent design/construction theory of liability, not a negligent maintenance theory of liability, and it does not save the Millers’ claims from summary judgment. *Byrd*, 937 So. 2d at 522; *Long*, 24 So. 3d at 1116. Accordingly, the trial court erred in denying the City’s motion for summary judgment.⁸

of the plaintiffs’ property.” 776 So. 2d at 766. In this case, the Millers asserted that unspecified development over the last century rendered stormwater pipes “undersized,” not that upstream development “caus[ed] an increased discharge of surface water to be directed to” their property. *Compare id. with* C. 908. Moreover, cases decided after *Reichert* make clear that this allegation cannot form the basis of a “negligent maintenance” claim. *Long*, 24 So. 3d 1115-1116 (citing *Byrd* and rejecting a negligent maintenance claim based on a failure to “enlarge” culverts and detention ponds to account for “increased discharge of surface water from the developments surrounding the Long property”).

⁸ The viability of the Millers’ trespass and nuisance claims depends on the viability of their “negligent maintenance” claim, and therefore those claims should have been dismissed, as well. *Long*, 24 So. 3d at 1116 (“[B]ecause the trial court properly entered the summary judgment on the Longs’ negligent-maintenance claim, the trial court’s disposal of the Longs’ nuisance and trespass claims was also proper.”). *See also Royal Auto., Inc. v. City of Vestavia Hills*, 995 So. 2d 154, 160 (Ala. 2008) (“The

B. Public policy considerations reinforce the conclusion that the Millers’ claims sound in design/construction.

Alabama law is clear: allegations that a municipal stormwater system needs to be updated or enlarged are “clearly matters of design or construction.” *Byrd*, 937 So. 2d at 522. There are sound public policy reasons why this is the law and why this Court should reject the unprecedented expansion of a “negligent maintenance” cause of action in the trial court’s Order.

If an Alabama municipality could be sued for “negligent maintenance” arising out of an alleged failure to *upgrade* stormwater infrastructure that was properly designed and constructed (as the Millers do not dispute here), it would force every Alabama city to continually re-design and re-build every component of their stormwater infrastructure that did not meet design standards put into effect decades later. It would also subject cities to an endless number of “negligent maintenance” lawsuits because it would allow plaintiffs to repeatedly sue after every

trial court correctly found that because the businesses’ negligent-maintenance claims fail, their nuisance and trespass claims must also fail.”) (citing *Hilliard*, 585 So. 2d at 893; *City of Prattville v. Corley*, 892 So. 2d 845, 848 (Ala. 2003)); *Richardson v. Cty. of Mobile*, 327 So. 3d 1130, 1142 (Ala. 2020) (same).

event in which stormwater pipes are overwhelmed, without regard to when those pipes were built, what standards applied at the time, or how many times flooding had occurred in the past. Importantly, this would remain true even if, as here, a city undisputedly maintained its stormwater infrastructure *in its existing condition* by keeping it free of clogs, obstructions, and collapsed pipes.

Requiring every piece of stormwater infrastructure throughout every Alabama municipality to be constantly upgraded to ensure that property never floods—regardless of the size of a rain event or the standards to which the infrastructure was built—is not feasible from a financial or practical perspective. The financial burden imposed on Alabama cities would be enormous, and the disruption to other property owners, streets, sidewalks, businesses, homes, and property under and through which the infrastructure is built would be unfathomable.⁹ And

⁹ Many Alabama cities, including the City of Mountain Brook, have taken significant measures to ensure that older stormwater infrastructure performs as well as it reasonably can. For example, the City’s stormwater management ordinance requires, *inter alia*, that property owners constructing either new structures or renovating existing structures to take steps to ensure that the stormwater runoff from their property is not increased by the construction. C. 1060 (City Code § 113-293).

every time a flooding event occurred, the entire process would have to be repeated again. As Justice Mitchell recently recognized, this would effectively transform every city into a flood “insurer of last resort.” *Britt v. City of Hoover*, SC-2024-0530, 2025 Ala. LEXIS 54, at *11 (Ala. May 16, 2025) (Mitchell, J., concurring).

Those practical realities are why Alabama courts have steadfastly held that claims against municipalities which are based on an alleged failure to enlarge or upgrade stormwater infrastructure are design/construction claims. It is why design/construction claims may only be brought once and must be asserted within two years following the first post-construction flooding event caused by the negligent design or construction. *Byrd*, 937 So. 2d at 520. It is why damages in such a lawsuit are “are estimated on the hypothesis of an indefinite continuance of the nuisance, and thus affecting the permanent value of the property [such that]... one may not recover in successive suits, but his damages are awarded in solido in one action.” *City of Birmingham v. Leberte*, 773 So. 2d 440, 445 (Ala. 2000). And it is why Alabama courts uniformly hold that injunctive relief is not available for flooding allegedly caused by the

negligent design/construction of stormwater infrastructure because it is an “unabatable nuisance” based on a permanent condition. *Id.* at 446.

This does not leave property owners without a remedy. The first property owner injured by flooding caused by the negligent design or construction of stormwater infrastructure can recover “damages [which] are estimated on the hypothesis of an indefinite continuance of the nuisance, and thus affecting the permanent value of the property.” *Id.* at 445. Then, it is “presumed” as a matter of law that future sales of the property take into account damage that has been, and in the future may be, caused by design or construction issues associated with stormwater infrastructure. *Id.* And in this case, the Millers had an additional remedy they chose not to pursue. Indeed, if their testimony is credited, then the Millers were misled into buying the Property because, they say, the sellers did not truthfully answer questions regarding the flooding history of the property.

III. THE CITY IS PROTECTED BY SUBSTANTIVE IMMUNITY.

Substantive immunity provides an additional, independent basis for reversing the trial court and entering summary judgment in the City’s favor on all claims. The trial court rejected the City’s substantive

immunity argument, reasoning that the Millers “are not seeking relief directing Defendant to enforce or enact a specific ordinance.” C. 1162. Substantive immunity, however, applies in contexts other than the “enforcement” or “enactment” of ordinances. *See Cross v. City of Muscle Shoals*, 384 So. 3d 37, 41-42 (Ala. 2023) (“*Muscle Shoals (I)*”) (collecting cases); *Britt*, 2025 Ala. LEXIS 54, at *10 (Mitchell, J., concurring) (collecting cases and holding that “our Court has held that substantive immunity applies to a municipality’s policy decisions concerning public services”).

The facts in *Muscle Shoals (I)* are analogous to the facts presented here. In 2005, the City of Muscle Shoals purchased a retention pond located in a subdivision which would overflow and damage nearby property during heavy rain events. 384 So. 2d at 38. Shortly after purchasing the pond, Muscle Shoals solicited bids to repair it and subsequently hired a contractor to make the improvements. *Id.* In 2011, Muscle Shoals also enacted a stormwater ordinance, the purpose of which was to prevent flooding and erosion from stormwater runoff and redevelopment projects, and to protect existing natural stormwater resources. *Id.* at 39.

In 2019, Muscle Shoals experienced heavy rainfall, and the retention pond overflowed once again, damaging nearby property owned by citizens of Muscle Shoals. *Id.* Citizens filed suit in March 2020, alleging claims of negligence, trespass, and that Muscle Shoals failed to “properly construct, improve, and maintain” the retention pond. *Id.* The citizens sought monetary damages and an injunction requiring Muscle Shoals to “enact[] a comprehensive stormwater management plan, as required by the Drainage Manual, and/or to compel the compliance with the Drainage Manual in such a way as to prevent future flooding and subsequent damage.” *Id.* In other words, the plaintiffs sought injunctive relief that would require the city to enlarge or build new infrastructure to prevent flooding of the plaintiffs’ property. The City filed a motion to dismiss the injunctive relief claim based on substantive immunity, which the trial court denied. *Id.*

This Court reversed. Consistent with its prior decisions, the Court quoted *Rich v. City of Mobile* and explained that substantive immunity

“[P]revent[s] the imposition of a legal duty, the breach of which imposes liability, in those narrow areas of governmental activities essential to the well-being of the governed, where the imposition of liability can be reasonably calculated to materially thwart the City’s legitimate efforts to provide such public services.’ ... [S]ubstantive immunity []

must be given operative effect only in the context of those public service activities of governmental entities ... so laden with public interest as to outweigh the incidental duty to individual citizens.”

Id. at 41 (quoting *Rich*, 410 So. 2d at 387).

After discussing Alabama cases applying substantive immunity, the Court held that substantive immunity barred the citizens’ claim for injunctive relief:

The City’s decisions about its enactment of a plan or its enforcement of existing ordinances concerning its drainage systems are public-policy decisions made in connection with the City’s responsibility to provide for the public’s safety, health, and general welfare and fall into the category of actions excepted from the general rule of liability. That exception -- the substantive-immunity rule -- is applied in “those narrow areas of governmental activities essential to the well-being of the governed, where the imposition of liability can be reasonably calculated to materially thwart the City’s legitimate efforts to provide such public services.” *Rich*, 410 So. 2d at 387. Thus, *Rich* and its progeny control in this case, and substantive immunity applies to bar the residents’ claim for injunctive relief against the City.

Id. at 44 (emphasis added).

Muscle Shoals (I) remanded the case for further proceedings on the plaintiffs’ negligence and trespass claims seeking damages. Less than a week before the trial court in this case issued its summary judgment opinion, this Court granted a petition for a writ of mandamus filed by the

City of Muscle Shoals on the plaintiffs’ negligence and trespass claims. *Ex parte City of Muscle Shoals*, SC-2024-0524, 2025 Ala. LEXIS 30 (Ala. Mar. 28, 2025) (*Muscle Shoals II*). *Muscle Shoals II* explained that “the determinative question in this specific case seems not to involve a fault in the design itself, but the City’s choice in how to plan.” *Id.* at *29. This Court recognized that “[t]his question involves broader issues regarding the City’s policy choices about whether to plan for smaller probability floods, the effect on adjacent landowners, and annexation problems. These issues touch on broader questions involving the City’s stormwater-drainage system as a whole and questions involving other City residents, not just these plaintiffs. These questions touch on issues of substantive immunity, as the City suggests.” *Id.* *29.¹⁰

The recent case of *Britt v. City of Hoover*—which was decided after the trial court issued its summary judgment opinion in this case—

¹⁰ *Muscle Shoals (II)* did not decide whether substantive immunity barred the plaintiffs’ negligence and trespass claims because the plaintiffs failed to present substantial evidence that the city negligently designed or constructed the retention pond at issue. Specifically, *Muscle Shoals (II)* held “[t]he evidence produced did not show that the City breached any duty it might have by failing to plan for larger, less probable rainfall events.” *Id.* at *30.

affirmed that the City of Hoover was entitled to substantive immunity on residents' claims arising out of flooding in a closely analogous case. SC-2024-0530, 2025 Ala. LEXIS 54 (Ala. May 16, 2025).¹¹

Sylvia Britt, a Hoover resident, sued the City of Hoover after her property flooded during a heavy rainfall event, seeking damages and injunctive relief. 2025 Ala. LEXIS 54, at *1. Prior to the flooding event, the City of Hoover hired Schoel Engineering to assess the city's drainage system. *Id.* at *2. One of Schoel's reports focused on Britt's neighborhood, and that report "suggested a number of improvements that could be made, ranging from the minor removal of sediment in drainage channels to the permanent installation of a new pipe." *Id.* at *3.

A few months after Schoel's reports were provided to the City of Hoover, Britt's home flooded during a heavy rain event. *Id.* at *4. Britt and others sued the City of Hoover, Jefferson County, and ALDOT, alleging that nearby developments had "replaced existing soil and vegetation with nonabsorbent pavement and sidewalks. This, in turn,

¹¹ Although not binding, Justice Mitchell's concurring opinion is persuasive authority. *Casey v. Beeker*, 321 So. 3d 662, 670 n.6 (Ala. 2020).

allegedly caused excess stormwater runoff to drain into Green Valley, flooding the plaintiffs' homes." *Id.* at *4. Like the Millers, the *Britt* plaintiffs "alleged that the City had negligently maintained the drainage system and that, because the system was insufficient for the excess runoff, it had contributed to the flooding." *Id.* The *Britt* plaintiffs sought damages and injunctive relief.

The trial court in *Britt* granted the City of Hoover's summary judgment motion, finding that the plaintiffs' claims were barred by substantive immunity, and this Court affirmed. 2025 Ala. LEXIS 54. In his concurring opinion, Justice Mitchell explained the purpose of substantive immunity and why it barred the plaintiffs' claim for injunctive relief:

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. *See DiBiasi v. Joe Wheeler Elec. Membership Corp.*, 988 So. 2d 454, 460 (Ala. 2008) (stressing that "the existence of a duty is a strictly legal question to be determined by the court" (citations omitted)). 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.

And that is the role our Court played when it announced the substantive-immunity doctrine in *Rich*. In that case, the plaintiffs asked this Court to hold that “the duty imposed upon the City ... inspectors is one which is owed, not to the public generally ..., but to individual homeowners.” 410 So. 2d at 385. In response, this Court determined that public-policy considerations “prevent the imposition of a legal duty, the breach of which imposes liability, in those narrow areas of governmental activities essential to the well-being of the governed.” *Id.* at 387 (emphasis added). This rule, the Court stressed, was “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.” *Id.* at 387-88. Thus, *Rich* simply defined the scope of a municipality’s duties. In particular, our Court determined that, when serving the general public, a municipality owes a duty to the public as a whole and not to individuals.

[...]

In this appeal, Britt challenges the City’s decision not to expand and replace the pipes under Green Valley. Municipal decisions regarding drainage systems and stormwater management are classic examples of duties owed to the public at large and not to individual plaintiffs. *City of Muscle Shoals*, 384 So. 3d at 41-44. Indeed, they are policy decisions regarding the provision of a public service. *See Hilliard*, 585 So. 2d at 891-92. As a result, the doctrine of substantive immunity prevents the imposition of a duty on the City that is owed to Britt individually. Her claims for injunctive and declaratory relief are therefore barred as a matter of law. As a result, the trial court correctly granted the City’s summary-judgment motion on these claims, and I agree that we should affirm this aspect of its ruling.

In my view, this application of the substantive-immunity doctrine to bar Britt’s claims is limited. I believe that, **in keeping with recent precedent, there is no duty – owed to individual plaintiffs – to either affirmatively expand a drainage system or to prevent flooding.** See *City of Muscle Shoals*, 384 So. 3d at 41-44. To hold otherwise would impermissibly transform the City’s duty to the general public, which is enforced through democratic politics, into a legal duty owed to individuals, which is enforced by courts. It would also excessively burden the City’s “broa[d] requirement ... to provide for the public health, safety, and general welfare of its citizenry,” thereby limiting its practical ability to do so. *Rich*, 410 So. 2d at 387. And imposing such a duty here would, in effect, turn the City into an insurer of last resort for flood damage on private property.

Id. at *6-8, 10-11 (emphasis added).¹²

Like the *Britt* plaintiffs, the Millers argued (and the trial court found) that the City’s decision not to proceed with the 3-phase plan designed by Schoel in 2022 “amounts to negligent maintenance.” C. 384. In deciding not to proceed with the 3-phase project proposed by Schoel, the City considered a myriad of factors, including: (i) the estimated

¹² Justice Mitchell noted, “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 *11. Here, the Millers disavowed any claim that the stormwater drainage pipes at issue were negligently designed or constructed. C. 906.

initial cost of \$3,944,000; (ii) the potential increase in flow rates and surface elevations downstream that could affect other citizens; (iii) the opposition from numerous downstream residents who were threatening to sue the City if the work was performed; (iv) the additional studies and additional work that would have to be performed further downstream which would further increase the estimated cost of the project; and (v) the fact that expert engineers informed the City that the 3-phase project, even if completed, would not “meaningfully improve”—much less solve—the historical flooding at 2801 Montevallo Road. C. 787; C. 630-632; C. 1104-1112. Notably, Schoel’s 3-phase plan contemplated the construction of stormwater infrastructure *beyond* what is required by current standards. C. 822-823 (the 3-phase plan was designed under the assumption of a 100-year, 6-hour event); C. 784 (current subdivision standards are a 25-year event).

Schoel recommended that the City **not** move forward with the 3-phase project “because the cost of the project outweighed the marginal benefit it provided. In addition, it was determined that the implementation of the drainage improvement project would likely cause downstream impacts. Due to this, the project would have to be extended

downstream to mitigate the expected impacts, which would have significantly increased the overall cost of the project.” C. 787.

When weighing these considerations, the City was necessarily making a “public-policy decision” protected by substantive immunity. *Muscle Shoals (I)*, 384 So. 3d at 44. Indeed, municipal “decisions not to expand and replace [] pipes ... are classic examples of duties owed to the public at large and not to individual plaintiffs.” *Britt*, 2025 Ala. LEXIS 54, at *10 (Mitchell, J., concurring). This is particularly true because “stormwater management is a public-service activity exercised for the collective benefit of all residents of the City, not just certain residents[.]” *Muscle Shoals (I)*, 384 So. 3d at 43.

The trial court did not acknowledge, much less analyze, the factors the City weighed when deciding whether to proceed with Schoel’s 3-phase plan. Instead, it summarily rejected the City’s substantive immunity argument, citing *Kennedy v. City of Montgomery*, 423 So. 2d 187 (Ala. 1982) for the proposition that substantive immunity was inapplicable because “the plaintiffs in *Kennedy*, much like Plaintiffs in the case at hand, were not asking the city to enforce or enact a specific ordinance.” C. 1162. The trial court further reasoned that “in *Kennedy*, the Alabama

Supreme Court ‘recognized a distinction between a policy decision made by a city and culpable conduct engaged in by a city.’” *Id.*

Kennedy, however, did not decide whether the City of Montgomery made a nonreviewable policy decision. To the contrary, *Kennedy* specifically noted that “[e]vidence was presented that the problem could be remedied only by spending \$500,000 to \$1,000,000 to install larger drainage pipes in the area,” and found that “[f]urther exploration of the factual matters discussed above is necessary to determine if the city engaged in a nonreviewable policy decision or in culpable conduct, either negligent or wanton.” 423 So. 2d at 189-90. *Kennedy* therefore recognized that a municipality’s decision regarding whether to update and enlarge stormwater drainage infrastructure may indeed be “a nonreviewable policy decision” as opposed to “culpable conduct.” *Id.*

Muscle Shoals (I), *Muscle Shoals (II)*, and *Britt* remove any doubt on this issue, and clearly hold that the City here made a policy decision that triggers substantive immunity, just as *Kennedy* contemplated. *See Britt*, 2025 Ala. LEXIS, at *10 (“*Britt* challenges the City’s decision not to expand and replace the pipes under Green Valley. Municipal decisions regarding drainage systems and stormwater management are classic

examples of duties owed to the public at large and not to individual plaintiffs.”); *Ex parte City of Muscle Shoals*, 2025 Ala. LEXIS, at *29 (whether city should have constructed larger infrastructure capable of handling more severe rain events implicates “broader issues regarding the City’s policy choices about whether to plan for smaller probability floods, the effect on adjacent landowners, and annexation problems. These issues touch on broader questions involving the City’s stormwater-drainage system as a whole and questions involving other City residents, not just these plaintiffs. These questions touch on issues of substantive immunity, as the City suggests.”); *Muscle Shoals (I)*, 384 So. 2d at 44 (specifically discussing *Kennedy* and explaining that the City of Muscle Shoals’ “decisions about its enactment of a plan or its enforcement of existing ordinances concerning its drainage systems are public-policy decisions made in connection with the City’s responsibility to provide for the public’s safety, health, and general welfare and fall into the category of actions excepted from the general rule of liability” by substantive immunity).

Alabama is not alone in following this rule. For example, in *Lorman v. City of Rutland*, the Supreme Court of Vermont affirmed summary

judgment in the city's favor on the plaintiff's claims for negligence, trespass, and nuisance, explaining that the city was immune from those claims:

There is no suggestion that any particular "maintenance" would have prevented the damages here. The issue is redesigning the system. Indeed, as part of their requested relief, plaintiffs seek a permanent injunction ordering the City to "design, construct, and maintain a reasonable and adequate remedy to the storm/wastewater system in the vicinity of [their] property so that they are not put in peril of future losses and damages from storm water and/or wastewater." **The proper design of the City's sewer system must be left to the City. ... Thus, for the reasons set forth above, we conclude as a matter of law that the City is immune from plaintiffs' negligence claim here.**

207 Vt. at 613, 193 A.3d at 1183-84 (collecting cases) (emphasis added).

The United States Supreme Court has similarly recognized that "[t]he duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory[.]" *Johnston v. District of Columbia*, 118 U.S. 19, 20-21 (1886). Thus, a city's "exercise of such judgment and discretion, in the selection and adoption of the general plan or system of

drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.” *Id.*

For all these reasons, the trial court erred in rejecting the City’s substantive immunity argument.

IV. AT A MINIMUM, THE TRIAL COURT ERRED IN ENTERING OFFENSIVE 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 all of the reasons set forth 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. The trial court erred in concluding, as a matter of law, that the City was “negligent” because Schoel’s 3-phase project was “reasonable.”

Although the Millers’ partial summary judgment motion did not ask for summary judgment on their negligent “maintenance” claim, the trial court addressed the claim anyway. In entering offensive summary judgment in favor of the Millers on this claim, the trial court found that it was purportedly “undisputed that development permitted by Defendant has adversely impacted Defendant’s drainage system in the

area of Plaintiffs' property and that Defendant's drainpipes at issue are no longer adequate." C. 1158. Further, the trial court found that Schoel's 3-phase plan constituted "reasonable remediation design plans" that the City should have paid implemented, using this finding as a springboard to enter offensive summary judgment on the Millers' "negligent maintenance" claim. Stated another way, the trial court found that the City's decision not to implement Schoel's 3-phase plan constituted negligence *as a matter of law*.

No Alabama case supports the proposition that a city's decision regarding whether to implement a multi-million-dollar project to upgrade and enlarge stormwater infrastructure can form the basis of a "negligent maintenance" claim. And there is certainly no case which holds that a city's decision not to implement a multi-million-dollar drainage project can be "negligent" where the city considered numerous factors in arriving in decision, including the engineer's recommendation not to go forward with the project.¹³

¹³ The trial court cited *Reichert* for the proposition that offensive summary judgment was appropriate on the Millers' claims. C. 1158. *Reichert* did not enter offensive summary judgment against the City of Mobile but rather reversed summary judgment granted in the City's favor on the plaintiff's negligent maintenance claim and remanded the

Trial courts typically do not make such “reasonableness” determinations at summary judgment. *See Fuller v. Tractor & Equip. Co.*, 545 So. 2d 757, 759 (Ala. 1989) (“Because of the nature of negligence actions, with their questions of reasonableness, ... summary judgment will not ordinarily be granted.”). Here, the record reflects that the City considered numerous factors in deciding not to move forward with the 3-phase project. *See pp. 54-56 supra*. All those factors bear on whether the City’s decision was “reasonable.” Moreover, Schoel—who is the only expert in this case—recommended that the City **not** proceed with the 3-phase project because its cost outweighed its benefit and because it would not “meaningfully improve conditions at 2801 Montevallo Road.” C. 787.

Even assuming *arguendo* that substantive immunity does not bar the Millers’ claims (it does), there is substantial evidence in the record that the City’s decision not to proceed with the 3-phase project was “reasonable.” The trial court erred in holding to the contrary. *Shaffer v. Regions Fin. Corp.*, 29 So. 3d 872, 883 (Ala. 2009) (reversing summary judgment because “the reasonableness of Shaffer’s judgment is a

case for further proceedings. 776 So. 2d at 766. The City’s research has not located any Alabama case where offensive summary judgment was entered against a city under any similar fact pattern.

question of fact”); *Hankins v. Crane*, 979 So. 2d 801, 808-09 (Ala. Civ. App. 2007) (noting that “[o]n an offensive motion for summary judgment ... the plaintiff[s] must conclusively prove every element of [their] claim”) (citation omitted).

B. The trial court’s permanent injunction violates settled law.

The trial court’s permanent injunction is legal error for all the reasons set forth above in Argument §§ I, II and III. But even if those dispositive shortcomings are ignored, the trial court’s injunction still cannot stand. In its entirety, the trial court’s permanent injunction states:

Defendant City of Mountain Brook is hereby enjoined from flooding 2801 Montevallo Road, Mountain Brook, Alabama 35223. This Court acknowledges 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. There are numerous fatal deficiencies in this injunction.

First, the trial court’s permanent injunction irreconcilably conflicts with its finding that Schoel’s 3-phase project was “reasonable” and that, by failing to implement that project, the City is liable for negligent “maintenance.” C. 1158. That finding directly conflicts with the trial

court's statement it purportedly "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. That is exactly what the trial court's injunction does.

Second, Rule 65(d)(2) is clear: "Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." ALA. R. CIV. P. 65(d)(2). The trial court's injunction is impermissibly broad and vague. On its face, the injunction appears to require that the City rip out the existing stormwater infrastructure and install new stormwater infrastructure sufficient to handle every rain event from now until the end of time, regardless of the severity of the rain event. That is obviously untenable. *See CraneWorks*, 239 So. 3d at 569 (reversing injunction which was "broad and vague rather than 'specific in [its] terms'").

Indeed, the problem with this Court's injunction is illustrated by the Millers' own arguments. Specifically, and in response to the undisputed evidence which shows that the Property would have flooded on May 15, 2023 even if surrounding infrastructure were built to present

day standards, C. 785, the Millers argued that “whether today’s standards would prevent the May 15, 2023 flood is not a relevant fact to be determined in this case.” C. 920. This begs the questions: What would be deemed compliance with the trial court’s injunction, and what would happen if the City built new infrastructure to present day standards (or even beyond present day standards), but the Property flooded again because a subsequent rain event was more severe than the pipes could handle? These issues lay bare the fundamental flaw in the Millers’ arguments and the trial court’s Order, which effectively imposes strict liability on the City and requires it to forever prevent flooding that engineers have repeatedly concluded cannot be prevented.

C. The trial court erred with respect to prescription.

The trial court also erred in rejecting the City’s prescription argument.

First, the trial court held that the City “did not seek a declaratory judgment that it possessed a prescriptive easement or in any other way claim such a right until the filings of its response brief.” C. 1161. There is nothing improper about the City raising a prescription argument in response to the Millers’ offensive summary judgment motion, and the

City was not required to assert a counterclaim to preserve its prescription argument. Nor did the Millers make any such assertion in responding to the City's prescription argument. C. 894-95.

Second, and with respect to the merits, the trial court found that “Defendant failed to present any evidence that the use was exclusive and uninterrupted for twenty years.” C. 1161. This holding ignored the undisputed evidence showing that the Property has flooded for more than 70 years during heavy rains. C. 1041-42. The trial court also failed to recognize that the flooding does not have to be literally continuous for 20 years for the doctrine of prescription to bar the Millers' claims. *See Beatty*, 295 So. 2d at 389 (recognizing that prescription may have been a viable defense, but that the ditch had only be overflowing for “seven or eight years”); *Stewart v. Shook Hill Rd. Prop. Owners' Ass'n*, 726 So. 2d 694 (Ala. Civ. App. 1998) (finding that prescription barred plaintiffs' claims, notwithstanding their alleged lack of knowledge of the drainage pipe, because “the drainage pipe had been in existence, and used to channel water onto the Stewarts' property, for approximately 50 years”). Indeed, the Alabama Pattern Jury Instruction for a prescription defense to a nuisance claim make this clear: “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.” Alabama Pattern Jury Instructions - Civil APJI 18.30.

D. The trial court erred in rejecting on the City’s “Act of God” and “Coming to the Nuisance” defenses, which necessarily entail factual determinations for a finder of fact.

Finally, the trial court rejected both the City’s “Act of God” and “Coming to the Nuisance” defenses, deciding both as a matter of law. This, too, was reversible error.

With respect to the City’s “Act of God” defense, the trial court held that the “flooding of Plaintiffs’ property is foreseeable and expected” because it had flooded before, and therefore the May 15, 2023 flooding event was not “an unprecedented act-of-God.” C. 1159. Foreseeability is “commonly a question for the trier of fact.” *Peters v. Calhoun County Comm’n*, 669 So. 2d 847, 850 (Ala. 1995). Moreover, whether a particular rain event should be deemed “so unprecedented” that it constitutes an act of God is a jury question. *See 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”).

With respect to the City’s “coming to the nuisance” defense, the trial court found that “[n]o Alabama case law has been cited that recognizes the doctrine of coming to the nuisance.” C. 1158. That is incorrect. The City cited cases in support of its argument with respect to this defense. C. 658 (citing *Mountain Brook Estates, Inc. v. Solomon*, 23 So. 2d 1, 5 (Ala. 1945) and *Martin Bldg. Co. v. Imperial Laundry Co.*, 124 So. 82, 84 (Ala. 1929)).

CONCLUSION

The Appellant 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(j)(1) because this brief contains 12,751 words, excluding the 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 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 **September 18, 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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