Rel: November 25, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190468

Lewis A. Richardson and Ellen G. Richardson

v.

County of Mobile

1190469

Sherry E. Phelps

v.

County of Mobile

Appeals from Mobile Circuit Court
(CV-17-901056 and CV-16-902772)

SELLERS, Justice.

In these consolidated appeals, Lewis A. Richardson and Ellen G. Richardson (in case no. 1190468) and Sherry E. Phelps (in case no. 1190469) (hereinafter referred to collectively as "the landowners") contend that the Mobile Circuit Court erred in entering summary judgments in favor of Mobile County ("the County") in the landowners' respective actions against the County. The landowners assert that the County is responsible for flooding that has damaged the landowners' personal property, allegedly has decreased the value of their residential property, and has made travel over the roads in their neighborhood unsafe and inconvenient.

The trial court concluded that the County owes no duty to remediate the flooding. We agree with the County that the landowners have not demonstrated that the County owes them a duty to prevent the flooding of their property. However, we conclude that the County does owe a duty to keep its roads safe and convenient for travel and that the landowners

can seek to enforce that duty. Accordingly, we affirm the trial court's judgments in part and reverse them in part.

The landowners are neighbors in a subdivision called Cottage Park Estates in an unincorporated area of Mobile County ("Cottage Park"). Cottage Park was constructed in 1977 by a private developer. Phelps's house and the Richardsons' house are located across the street from one another in Cottage Park.

There is an open concrete drainage ditch in Cottage Park that is located east and southeast of the landowners' houses. When it rains, storm water enters the concrete ditch and travels to an underground concrete culvert. After reaching the underground culvert, storm water makes its way to a manhole under one of the streets in Cottage Park and exits into an open ditch or creek to the north of the neighborhood. If too much water enters the concrete ditch, water overflows at various points in the drainage system, flooding the roads in Cottage Park and the landowners' property.

The County had no input in designing, constructing, approving, or permitting any part of the drainage system in Cottage Park. In 1978,

however, pursuant to a County resolution, the County accepted dedication of the roads in Cottage Park, "together with the drainage system as it affects said roads."

Cottage Park has a history of flooding problems, which were exacerbated by the construction of four subdivisions on land situated uphill and to the east and southeast of Cottage Park. The first two subdivisions were constructed in 1989 and the third was constructed in 1992. In 2015, the fourth subdivision, called the O'Fallon subdivision, was constructed. The construction of the O'Fallon subdivision made the flooding problem worse and prompted the landowners to file their actions against the County. As it did with Cottage Park, the County accepted dedication of the roads in the four referenced subdivisions, as well as drainage systems to the extent they affect the roadways therein.[1]

The County approved the plans for the development of the four upland subdivisions, including the O'Fallon subdivision. The drainage

[1]It appears, however, that, of the four upland subdivisions, only the O'Fallon subdivision has improvements aimed at storm-water drainage. It appears that the other three developments do not have drainage systems.

system constructed in the O'Fallon subdivision was designed by a licensed engineer, and the plans for the subdivision were approved after review by the County's own engineer, Bryan Kegley. According to the landowners' brief,[2] the developer's engineer submitted "a certification regarding pre and post construction stormwater and surface water drainage." The record suggests that the developer's engineer certified that, after completion of the O'Fallon subdivision, the amount of storm-water runoff in the area would be the same or less than it was before construction.

The O'Fallon developer's engineer was incorrect. Shortly after construction began on the O'Fallon subdivision, the flooding problem in Cottage Park worsened significantly. The evidence indicates that the roads in Cottage Park frequently flood and become impassable. There is also evidence indicating that portions of the roads in the subdivision have caved in multiple times, necessitating repairs. Water also tends to escape from the roads, flooding the residential lots.

Expert reports submitted to the trial court suggest that the recent increase in the severity of flooding is largely the result of a decision by the

[2]The landowners filed the same joint brief in each appeal.

O'Fallon developer's engineer not to route certain portions of the O'Fallon subdivision's water runoff to the detention pond that is located in that subdivision. The water from the areas in question should have been routed to the pond or, if that was not possible, the discharge rate of the pond should have been set lower to account for the uncontrolled runoff coming from those areas. Design aspects of the Cottage Park drainage system, built in the late 1970s, render it unable to accommodate the increased storm water coming from the upland subdivisions.

The landowners sued the County and the developer of the O'Fallon subdivision. They eventually settled their claims against the developer and proceeded against only the County. Against the County, the landowners asserted negligence, nuisance, and trespass. They alleged that the flooding has made the roads in Cottage Park unsafe and that floodwater escapes from the roads and onto the landowners' property. They asserted that the County has a responsibility to ensure that the drainage system in Cottage Park is sufficient to control flooding in that subdivision. They also criticized the County for approving the plans for the upland subdivisions, primarily the plan proposed by the developer of

the O'Fallon subdivision. The landowners sought monetary awards and an injunction requiring the County to alleviate the flooding.

The trial court granted the County's summary-judgment motions, and the landowners filed two separate appeals. Those appeals were consolidated for the purpose of issuing one opinion.

> " 'A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present "substantial evidence" creating a genuine issue of material fact -- "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." Ala. Code 1975, § 12–21–12; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).'
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> "Capital Alliance Ins. Co. v. Thorough–Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994). Questions of law are reviewed de novo. Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004)."

Pritchett v. ICN Med. All., Inc., 938 So. 2d 933, 935 (Ala. 2006). As the appellants, the landowners bear the burden of demonstrating that the trial court erred in entering the summary judgments. Johnson v. Life Ins. Co. of Alabama, 581 So. 2d 438, 444 (Ala. 1991).

Flooding of Private Property

The landowners rely on Long v. Jefferson County, 623 So. 2d 1130 (Ala. 1993). In that case, Jefferson County constructed an underground sewer line within an easement it owned, which ran across a parcel of private property. A house was later constructed on top of the sewer line, and the plaintiffs purchased the property. Eventually, the sewer line collapsed, causing structural damage to the house. The plaintiffs sued Jefferson County, and the trial court entered a summary judgment in Jefferson County's favor.

On appeal, this Court pointed to analogous cases involving municipal drainage systems. Once a municipality chooses to provide such a system, " 'a duty of care arises and a municipality may be liable for damages proximately caused by its negligence [in designing or maintaining the drainage system].' " 623 So. 2d at 1136 (quoting City of

Mobile v. Jackson, 474 So. 2d 644, 649 (Ala. 1985)). According to Long, "[a] county, like a city, is under a duty to exercise due care when it constructs and operates a sewage or drainage system, and it may be liable for damages proximately caused by its negligence." 623 So. 2d at 1137. Jefferson County was aware when it installed the sewer line that a house likely would be built on top of the line, but the county failed to install a line that could withstand the weight of a house. It also failed to follow up after the house was constructed to determine whether the sewer line would hold up.

The landowners also point to Reichert v. City of Mobile, 776 So. 2d 761 (Ala. 2000). Reichert indicates that municipalities can be held liable if they are negligent in the design and construction of their drainage systems, if they negligently fail to correct design or construction problems in their drainage systems, or if they negligently fail to provide appropriate upkeep of their drainage systems.

As the County points out, it did not design or construct the drainage system in Cottage Park. But the County acknowledges that it did accept some responsibility over that system when it accepted dedication of the

roads in Cottage Park. The County's primary response to the landowners' reliance on Long and other authorities is that the County accepted dedication of the Cottage Park drainage system only "as it affects" the roads in Cottage Park. According to the County, unlike Jefferson County in Long, the County "has never operated any [drainage] system for the benefit of the surrounding landowners." The County suggests that it has responsibility for only those portions of the drainage system that are physically located in the County's rights-of-way and only to the extent those portions are aimed at preventing flooding of the roads. The evidence before the trial court indicates that the open concrete ditch and most of the underground culvert are located outside the County's rights-of-way.

The landowners, who have the burden on appeal, have not offered a convincing argument that the proviso in the resolution by which the roads in Cottage Park were dedicated to the County was not effective in limiting the County's responsibility over the drainage system in Cottage Park. They have not established that the County accepted responsibility over the entire drainage system when the roads were dedicated to the County. See Chalkley v. Tuscaloosa Cnty. Comm'n, 34 So. 3d 667, 675

(Ala. 2009) (indicating that a county can limit the portions of a drainage system for which it will be responsible when accepting dedication of roads). The landowners also have not established that the County's responsibility over the Cottage Park drainage system to the extent "it affects" the roads in Cottage Park exposes the County to liability for the flooding of private property.

Notwithstanding the limiting language the County used when it accepted dedication of the roads in Cottage Park, the landowners argue that the County has since voluntarily assumed responsibility over the entire drainage system. The landowners point to evidence indicating that the County has performed a significant amount of work in Cottage Park during the 40 years since it accepted dedication of the roads therein. It appears, however, that the overwhelming majority of that work was performed on portions of the drainage system located in the County's rights-of-way, not on portions located on private property.

The landowners can identify only 4 specific instances during that 40-year period when the County was involved in repairs or maintenance on portions of the drainage system that are outside the County's rights-of-

way. During a significant rainfall in 1980, the concrete ditch was destroyed. According to an affidavit submitted by County Engineer Kegley, "FEMA got involved with the repairs" and "provided all of the funding and asked the County to help administer and coordinate the project." According to Kegley, however, "the work itself was done by a private construction firm and not by the County." Nevertheless, it is clear that the County played a role in facilitating the rebuilding of the concrete ditch. In the mid 1980s, the County dug a swale on one of the lots in Cottage Park to divert water to the concrete ditch. In April 2009, the County removed portions of the concrete ditch to determine if water was flowing under the concrete and later replaced the concrete and filled the area with soil. Finally, in 2013, the County removed a fallen tree from the concrete ditch.

The landowners point to Lott v. City of Daphne, 539 So. 2d 241 (Ala. 1989). In that case, the plaintiff sued the City of Daphne after his property began eroding because of increased runoff caused by a new upland development. There was a gully running across the plaintiff's property, referred to as "Mazie's Gulch." Daphne's drainage system

consisted of underground pipes and junction boxes that discharged water from the area near Mazie's Gulch into the head of the gulch. When the new development was proposed, Daphne required the developer to build a drainage system that emptied into Daphne's existing system and required the developer to build an "energy suppressor" at the head of Mazie's Gulch. After the development was finished, Daphne maintained the drainage system and the energy suppressor. The additional runoff from the new development increased the water running through the gulch, which caused the plaintiff's property to erode. After a jury trial, the trial court in Lott directed a verdict[3] in favor of the City of Daphne.

On appeal, this Court held that there was sufficient evidence to support a conclusion that Daphne had undertaken responsibility to control the amount of storm water running into Mazie's Gulch. Specifically, the Court noted:

> "The mayor of Daphne, Victor Guarisco, and Daphne's former city engineer, Arthur Rigas, both testified that the City had constructed various pipes and junction boxes leading from the areas surrounding Mazie's Gulch to carry storm water that

[3]Effective October 1, 1995, a directed verdict is called a judgment as a matter of law. See Rule 50(b), Ala. R. Civ. P.

> eventually emptied into Mazie's Gulch. Prior to the construction of the [new] Subdivision, the City required the developers to construct a drainage system that fed into the City's system, and to construct an energy suppressor at the head of Mazie's Gulch where the City's system emptied. Moreover, both witnesses testified that the City had continually maintained the drainage system. These facts clearly show that the City had undertaken the responsibility for insuring the proper drainage of storm water from the areas surrounding Mazie's Gulch. However, the City contends that although it has maintained the drainage system surrounding Mazie's Gulch, it has never undertaken to maintain the gully itself and, therefore, is under no duty to maintain it. We cannot agree with such reasoning.
>
> "First, the facts show that the City has undertaken to maintain Mazie's Gulch itself. Arthur Rigas testified that the City repaired the energy suppressor, located at the head of Mazie's Gulch, at least once to protect the gully from erosion. More important, however, is the testimony of Mayor Guarisco that the City had been using Mazie's Gulch as an important part of the City's drainage system for the surrounding area. As noted above, once a municipality undertakes to maintain a 'drainage system,' a duty of care attaches in the maintenance thereof. Kennedy [v. City of Montgomery, 423 So. 2d 187 (Ala. 1982)]. Consequently, Mazie's Gulch being an integral part of the City's drainage system, it is subject to the same standards of due care to be exercised by the City in preventing harm to adjoining property owners. The fact that the City has failed or refused to maintain the gully is some evidence of the City's negligence. To hold otherwise would permit the City to channel any volume of water into Mazie's Gulch without taking any responsibility for its consequences to the landowners below."

539 So. 2d at 244.

For its part, the County relies on Royal Automotive, Inc. v. City of Vestavia Hills, 995 So. 2d 154 (Ala. 2008). In that case, four businesses sued Vestavia Hills and Hoover after the businesses incurred property damage when a creek flooded. According to the businesses, the cities had assumed a duty to maintain the creek and keep it from flooding. This Court disagreed:

> "Three dredgings of [the creek] by Vestavia over a 23–year period and the removal of debris in ditches and channels of the creek to prevent the flooding of public roads do not constitute undertaking maintenance of the creek. Such occasional activity constitutes the sporadic exercise of discretion to meet exigent circumstances. 'Sporadic' is defined as 'occurring occasionally, singly, or in irregular or random instances.' Merriam–Webster's Collegiate Dictionary 1207 (11th ed. 2003). The fact that Vestavia spent more than $100,000 per dredging on 3 occasions over a 23–year period does not serve to bring such intermittent activity above the level of sporadic activity. Further, we decline to hold that evidence indicating that Vestavia monitored the effects of storm-water runoff from some residential and commercial developments is sufficient evidence of the assumption of a duty to maintain the creek.
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> "Hoover's occasional cleaning of [the creek] in response to requests from residents of adjoining property and one public-works project to remove silt and debris from the creek is also insufficient to support a finding that Hoover undertook maintenance of [the creek]."

995 So. 2d at 160 (citations omitted). The Court in Royal Automotive distinguished Lott on the following grounds:

> "Surface water has flowed down adjoining mountainous terrain into and through [the creek] for hundreds of years. There is no evidence indicating that Vestavia or Hoover has constructed devices to direct water that would not otherwise naturally flow through or into [the creek]. In Lott, this Court held that 'in order for the City to be held liable for any damages caused by its failure to act, it must also be shown that the water from the City's drainage system, rather than the natural drainage of surface water, caused the damage complained of by the plaintiff.' 539 So. 2d at 244. Unlike Lott, in which Daphne purposefully constructed 'a series of underground pipes and junction boxes' to redirect surface water through one area of Mazie's Gulch, there is no evidence here indicating that Vestavia or Hoover constructed a drainage system that directed surface water, other than by natural drainage, into [the creek]. We conclude that neither Vestavia nor Hoover has undertaken a duty to maintain [the creek] because the cities have not purposefully directed into [the creek] water that would not otherwise naturally flow through the creek."

995 So. 2d at 159–60 (emphasis omitted). See also City of Dothan v. Sego, 646 So. 2d 1363, 1364 (Ala. 1994) (holding that a city's occasional clearing of a drainage ditch on private property did not amount to the assumption of a duty to maintain the ditch).

The present case is more like Royal Automotive and Sego than it is Lott. The County's acts of maintenance on the private portions of the drainage system in Cottage Park were "sporadic" and not sufficient to justify a conclusion that the County assumed responsibility over the entire drainage system. Moreover, like Vestavia Hills and Hoover in Royal Automotive, the County did not purposefully construct a drainage system in the O'Fallon subdivision to redirect water into the Cottage Park drainage system. Further, the landowners have not demonstrated that, like the City of Daphne in Lott, the County uses the Cottage Park drainage system as "an integral part" of its own drainage system.[4]

The landowners also criticize the County for approving the plans for the O'Fallon subdivision, which was constructed in 2015.[5] The landowners suggest that, by undertaking to review and approve development plans,

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[4]The landowners have not established that the County's acceptance of the drainage system in the O'Fallon subdivision to the extent that system "affects" the roads therein puts the County in the same position as the City of Daphne in Lott.

[5]Although the landowners make passing reference to the County's approval of the plans for the other three subdivisions that lie uphill from Cottage Park, they concentrate on the O'Fallon subdivision.

the County assumes a duty to the owners of downhill property to ensure that the plans include adequate drainage systems. According to the landowners, if the County approves a plan for an upland subdivision that lacks a sufficient drainage system, the County can be held liable for the flooding of downhill private property.

The landowners rely primarily on Havard v. Palmer & Baker Engineers, Inc., 293 Ala. 301, 302 So. 2d 228 (1974), overruled on other grounds in Ex parte Insurance Co. of North America, 523 So. 2d 1064 (Ala. 1988). In Havard, the plaintiff's decedent was killed in a fire in the Bankhead Tunnel in the City of Mobile. Thereafter, the plaintiff sued an engineering firm that had contracted with Mobile to inspect the tunnel, including the fire-suppression equipment kept in the tunnel. The plaintiff alleged that the engineering firm had failed to identify faulty fire-fighting equipment in the tunnel. In considering whether the engineering firm owed a duty to the decedent, with whom the firm was not in contractual privity, this Court stated:

> "[T]he test [for whether a duty existed] here is, would an ordinary man in defendant's position, knowing what they knew or should have known, anticipate that injury of the nature of

> that suffered was likely to result. Applying this test, the complaint ... alleges a duty. It could be foreseen or anticipated by [the engineering firm] that a fire could break out in the Tunnel and when it did break out, good and workable fire-fighting equipment would be needed to fight the fire."

293 Ala. at 307, 302 So. 2d at 232.

The landowners assert that the County should be held liable because, they say, it was foreseeable that flooding could occur as a result of the County's approval of the plans for the O'Fallon subdivision. They analogize the County's role in approving those plans to the role the engineering firm played in inspecting the Bankhead Tunnel in Havard.

Pursuant to its contract with the City of Mobile, the engineering firm in Havard specifically assumed a duty to ensure that the fire-suppression equipment in the tunnel worked properly, and it was clearly foreseeable to the firm that people could be injured or killed if the firm was negligent in doing so. In the present case, the County asserts that it simply undertakes to ensure that a licensed engineer has designed a drainage system for a private developer and that that engineer has concluded that the development will not increase the amount of storm-water runoff. According to the County, it does not make engineering

calculations itself or check the private engineer's work. As the County points out, the landowners "offer this Court no caselaw transforming the permitting process into an engineering study of drainage."

In Brickman v. Walter Schoel Engineering Co., 630 So. 2d 424 (Ala. 1993), the plaintiffs, who owned homes in a new subdivision in Vestavia Hills, sued the city's engineer after their homes were damaged by water runoff. They claimed that the drainage system built by the developer of the subdivision was insufficient and that the city's engineer should have discovered the problem. This Court held that the city engineer had no duty to inspect portions of the drainage system that were located on private property. In reaching that conclusion, the Court consulted the city's regulations setting forth the engineer's responsibilities and the engineer's own testimony as to what his duties were.

In the present case, the County points to § 11-24-2(b), Ala. Code 1975, which provides, in part:

> "No proposed plat shall be approved or disapproved by the county commission without first being reviewed by the county engineer or his or her designee. Following the review, the county engineer or his or her designee shall certify to the commission whether the proposed plat meets the county's

> regulations. If the proposed plat meets the regulations, it shall be approved by the commission. Should the proposed plat be determined by the county engineer to be deficient in any regard, the county engineer shall detail the deficiency to the county commission along with a recommendation that it be disapproved."

Although § 11-24-2(b) states that county engineers are to "certify to the [county] commission whether [a] proposed plat meets the county's regulations," as the County points out nothing in § 11-24-2(b) requires a county engineer to determine whether the calculations of a private developer's engineer regarding a proposed drainage system are correct.

Regarding the requirements of its regulations, the County points to an affidavit submitted by County Engineer Kegley. Kegley testified as follows:

> "The County process [for approving proposed subdivision plats] is governed by ... laws from the Alabama Code and County regulations adopted by the County Commission.
>
> "The County requires an owner and developer to submit the proposed plat to the county commission for approval and obtain a permit to develop. The County Engineer, or one of his/her delegates, checks to see if the plan meets County regulations to ensure it has been prepared by a licensed professional engineer, and that the plans show the proposed drainage route and drainage calculations, such that they are sufficient to show the subdivision's storm water runoff flows

meet a minimum of a 10-year storm level. The subdivisions are required to release storm water at a rate that is equal to or less than what would be released prior to development, and the engineer's calculations are meant to attest to that requirement being met by ensuring that the sizing of the improvements inside the roadways and the drainage easements can handle the anticipated flows. The specific numerical guidelines for detention and dispersal of storm water that the County distributes to developers are broadly accepted standards, and to my knowledge are in use all over the country.

"The rationale behind this County procedure is simple: by requiring developers to use licensed professional engineers, the County is able to feel certain that the design and construction of buildings, drains, streets, and other items are done competently while providing any aggrieved person with an avenue for redress against the designing entity.

"The O'Fallon subdivision plans were submitted by a licensed professional engineer. They show calculations that indicate that the project will actually release less water than what was being released by the natural slope of the land. These calculations appear mathematically correct, using the traditional method of engineering formulas, as is used by other counties throughout the United States. The County has not inspected or measured the outfall flow, and it is my understanding that the County is not obligated to do so by law."

The only specific portion of the County's regulations the landowners cite to this Court is a requirement that proposed subdivisions "shall have an adequate storm water collection system."[6]

The County construes its regulations as requiring only that the County engineer ensure that a developer's licensed engineer has concluded that a new development will not result in increased storm-

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[6]Another County regulation provides:

> "Street, utility, and other improvements shall be installed in each new subdivision in accordance with the standards and requirements of these Regulations and the detailed construction specifications and engineering requirements. Approval of the Final Plat shall be subject to the proper installation of such improvements, as determined by the County Engineer, or the posting of a surety or irrevocable letter of credit in such form and amount as approved by the County Engineer, such amount not to exceed 125% of the estimated cost of completion, to secure the actual construction of such improvements."

Although this regulation seems to require the County engineer to verify that a new subdivision has been constructed according to approved plans, there apparently was no final inspection performed with respect to the O'Fallon subdivision. Even though this regulation calls for the County engineer to perform an inspection prior to "approval of the Final Plat," the landowners do not link this regulatory process to the flooding in Cottage Park and fail to show how it imposes any duty on the County for their benefit.

water runoff. The County asserts that nothing in the regulations requires the County engineer to perform the same work of the developer's engineer to ensure that his or her conclusions are correct. In any event, to the extent the regulations can be construed to impose such a duty, the County suggests that that duty runs to the public in general, not to individual citizens, and therefore cannot support a cause of action against the County for the flooding of private property. In support, the County points to Rich v. City of Mobile, 410 So. 2d 385 (Ala. 1982).

In Rich, this Court held that a city could not be held liable for the negligent inspection of a faulty connection between the plaintiff's house and the city's sewer system. The city's plumbing inspectors were tasked, presumably pursuant to municipal ordinances, with ensuring that proper materials were used in residential plumbing lines and connections, that no leaks existed, and that lines and connections were installed in compliance with the city's plumbing code. This Court held that there is no "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." 410 So. 2d at 387. The Court suggested that the duty of the city plumbing inspectors in Rich was owed "to the public generally" and not "to individual homeowners." Id. at 385. In the present case, the County analogizes the inspection of sewer connections in Rich to the County's consideration of development plans. The County also cites Hilliard v. City of Huntsville, 585 So. 2d 889 (Ala. 1991), in which this Court held that municipal electrical inspections benefit the general public and that any benefit to an individual is merely incidental and not a guarantee of safety.

It is the landowners' burden to show that the trial court erred in entering the summary judgments in favor of the County. Considering the appellate record and the arguments before this Court, we simply cannot conclude that the landowners have met that burden with respect to their claims based on the County's approval of the O'Fallon subdivision.[7]

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[7]The landowners suggest that Reichert, supra, supports their claim that the County can be held liable for approving the plans for the O'Fallon subdivision. Although the Court in Reichert noted that the City of Mobile had "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 of the plaintiffs' property," 776 So. 2d at 766, the gist of the plaintiffs' claims was that the City of Mobile had

The landowners also appear to suggest that, simply because water enters the County's rights-of-way in Cottage Park, the County automatically becomes responsible to stop the water from entering surrounding private property. In support, they refer to testimony given by County Engineer Kegley indicating that, once water reaches the County's roadway, the county "maintains" the water:

> "Q. The stormwater system where the underground culvert ... that goes under your road, that's not the County's system?
>
> "A. Once it gets to our right-of-way, it becomes County maintained, yes, sir.
>
> "....
>
> "A. And that inlet pipe flows downstream a little bit further until it gets to the County right-of-way. And then just inside the County right-of-way there's a manhole. Once it reaches the County right-of-way, it becomes our maintenance.
>
> "Q. You're saying that the inlet pipe is not within the County's right-of-way?
>
> "A. That's correct."

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been negligent in designing, constructing, or maintaining its own drainage system. Reichert does not establish that the County is liable in the present case for approving upland-development plans.

As the County asserts, Kegley was simply testifying to "the boundaries or limits of what physical part of the [drainage] system was County-maintained and within the County right-of-way." He did not concede that the County owes a duty to "maintain" floodwater by keeping it off private property simply because it enters the County's rights-of-way.

The landowners also rely on the foreseeability test in support of their theory that the County has a duty to stop storm water once it enters the County's rights-of-way. See Smitherman v. McCafferty, 622 So. 2d 322, 324 (Ala. 1993) ("The key factor [in determining whether a duty exists] is whether the injury was foreseeable by the defendant."). They claim it is foreseeable to the County that, if it does not stop water once it enters the County's roads, the water will "escape" onto private property. But foreseeability is not the only factor courts consider in determining whether a duty exists. See DiBiasi v. Joe Wheeler Elec. Membership Corp., 988 So. 2d 454, 461 (Ala. 2008) (identifying foreseeability, public policy, social considerations, the nature of the defendant's activity, the relationship between the parties, and the type of injury or harm threatened as factors to be considered when determining whether a duty

exists). The landowners have not convincingly argued that foreseeability alone creates an affirmative duty to stop water from flowing onto adjacent property simply because it enters a roadway.

Finally, at various points in their brief, the landowners point to Mitchell v. Mackin, 376 So. 2d 684 (Ala. 1979), in which the Court discussed principles relating to a landowner's altering of property and interference with the natural flow of surface water to the detriment of downhill neighbors. The landowners, however, have not demonstrated that, for purposes of the rules discussed in Mitchell, the County is an owner of property lying uphill from the landowners' property and has interfered with the natural flow of surface water to the detriment of the landowners.

With respect to their claim that the County is liable for negligence in connection with the flooding of private property in Cottage Park, the landowners have not demonstrated that the trial court erred in entering summary judgments in favor of the County. Regarding the landowners' nuisance and trespass theories, the trial court concluded that those claims fail for the same reason their negligence claim fails. See generally Royal

Automotive, 995 So. 2d at 160 ("The trial court correctly found that because the [plaintiffs'] negligent-maintenance claims fail, their nuisance and trespass claims must also fail."). The landowners do not point to any authority supporting the proposition that, even if the County does not owe them a duty that would support a negligence claim in connection with the flooding of private property, the landowners can still succeed under a nuisance or trespass theory as to such flooding.

The County's Responsibility to Keep its Roads Safe and Convenient

The landowners argue that the County has a duty to alleviate the flooding on the roads in Cottage Park to make the roads safe and convenient to use. The landowners submitted evidence to the trial court indicating that the flooding of the roads makes them impassable at times and that residents have had to park their vehicles uphill and walk barefoot to their homes. There are photographs and videos in the record showing the roads in Cottage Park completely covered by swiftly flowing, muddy water.

In its brief to this Court, the County does not address the landowners' argument that the County has a duty to keep its roads safe

and convenient. During oral argument, counsel for the County suggested that the landowners had not argued to the trial court that the County has such a duty. Although the landowners' complaint concentrates primarily on the flooding of their private property, it does assert that the flooded roadways in Cottage Park create a dangerous condition and requests an injunction directing the County to alleviate the flooding in the neighborhood. Moreover, in response to the County's summary-judgment motions, the landowners pointed to statutory law and caselaw that, they asserted, made the County responsible for alleviating the flooding on the roads in Cottage Park to make them safe and convenient. We conclude that the landowners sufficiently raised this theory in the trial court.

The landowners cite § 23-1-80, Ala. Code 1975, which provides:

> "The county commissions of the several counties of this state have general superintendence of the public roads, bridges, and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end, they have legislative and executive powers, except as limited in this chapter. They may establish, promulgate, and enforce rules and regulations, make and enter into such contracts as may be necessary or as may be deemed necessary or advisable by such commissions to build, construct, make, improve and maintain a good system of public roads, bridges, and ferries in their respective counties, and regulate

> the use thereof; but no contract for the construction or repair of any public roads, bridge, or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than 20 years."

(Emphasis added.) In Macon County Commission v. Sanders, 555 So. 2d 1054 (Ala. 1990), upon which the landowners rely, the plaintiff sued Macon County and the Macon County Commission in tort after the plaintiff's decedent was killed in a car accident on a county road. The trial court entered a judgment on a jury verdict against the defendants. On appeal, this Court, citing § 23-1-80, noted that "[a] county has the duty to keep its roads in a reasonably safe condition for travel and to remedy defects in the roadway on receipt of notice of those defects." 555 So. 2d at 1057. See also Jefferson Cnty. v. Sulzby, 468 So. 2d 112, 114 (Ala. 1985) ("[G]overnmental entities, by virtue of their exclusive authority to maintain and control the roadways[,] are under a common law duty to keep the streets in repair and in a reasonably safe condition for their intended use."). The Court in Sanders affirmed the trial court's judgment, noting that the road on which the decedent was killed was overgrown with vegetation, had ruts and washouts, was too narrow, had insufficient sight

distances, and lacked warning signs. Although Sanders involved a monetary award based on a wrongful death and not a claim seeking an injunction, as noted the Court in Sanders did state that counties have a duty "to remedy defects in the roadway on receipt of notice of those defects." 555 So. 2d at 1057.

The landowners also rely on a nuisance theory not discussed in Sanders. According to the landowners, the frequent flooding of the roads in Cottage Park is a nuisance. The landowners acknowledge hurdles for individuals attempting to remedy a "public" nuisance as opposed to a "private" nuisance. Specifically, they note that § 6-5-121, Ala. Code 1975, provides:

> "Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. Generally, a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of the state. A private nuisance gives a right of action to the person injured."

But, as the landowners point out, "a public nuisance may ... give an individual a cause of action for abatement when he has suffered damages

different in degree and kind from those suffered by the general public." City of Birmingham v. City of Fairfield, 375 So. 2d 438, 441 (Ala. 1979). See also § 6-5-123, Ala. Code 1975 ("If a public nuisance causes a special damage to an individual in which the public does not participate, such special damage gives a right of action.").

Hall v. North Montgomery Materials, LLC, 39 So. 3d 159 (Ala. Civ. App. 2008), a per curiam opinion of the Court of Civil Appeals joined by two judges, with three judges concurring in the result, concluded that individuals could maintain an action to abate a public nuisance in the form of a proposed gravel quarry, which would have increased the use of heavy trucks in a residential area. The use of the trucks would have caused the roads to deteriorate, making it difficult and unsafe for the plaintiffs to use the roads to reach their houses. The opinion in Hall states:

> "An individual who cannot reach his home (or any other destination, such as a family cemetery, that holds a significance that society is prepared to recognize as compelling) without having to take a circuitous alternate route in order to avoid a public nuisance has established special injury different in kind as well as degree from the injury suffered by the public at large. A fortiori, an individual who

> cannot avoid a public nuisance by taking an alternate route to his home -- because there is no alternate route -- has established a special injury.
>
> "Applying those principles to the facts of the present case leads to the following conclusion: The local residents, who cannot travel to or from their homes without encountering the inherent danger of driving on [the roads in question] because those roads provide the only means of ingress and egress to their homes, established special injury different in kind as well as degree from the injury suffered by the public at large. Accordingly, they had a right of action, pursuant to § 6–5–123, to abate a public nuisance."

39 So. 3d at 178–79. The opinion in Hall references three decisions by this Court holding that individuals could seek to abate nuisances that blocked access to public roads. See Barnes v. Kent, 292 Ala. 508, 296 So. 2d 881 (1974) (noting that nuisance blocked plaintiff's access to public road leading to his property and required him to take circuitous route that added "two or three extra miles"); Scruggs v. Beason, 246 Ala. 405, 20 So. 2d 774 (1945) (noting that nuisance blocked access to public road leading to cemetery where plaintiffs' family members were buried); Sloss–Sheffield Steel & Iron Co. v. Johnson, 147 Ala. 384, 41 So. 907 (1906) (noting that nuisance blocked public road and required plaintiff to take a circuitous route to his property). See also McIntosh v. Moody, 228

Ala. 165, 167, 153 So. 182, 184 (1934) (holding that a nuisance in the form of a building that had been erected on a public road could be abated in an action brought by the owners of another building "at the point where the alleged obstruction [was] maintained").

In the present case, the County has taken the position that it does not cause the flooding of the roads in Cottage Park. But it has not been disputed that the County has responsibility over those roads and a duty to maintain their safety and convenience. A county can be held liable for injuries suffered by people using roads that are in an unsafe condition. Sanders. We have not been presented with a persuasive argument that a county cannot be enjoined from refusing to remediate the unsafe condition of a road.

We reverse the summary judgments to the extent they are based on the proposition that the County simply has no duty to maintain the roads in Cottage Park so that they are safe and convenient by taking steps to alleviate flooding on those roads and remand the cases for further proceedings. We express no opinion as to whether the landowners will ultimately succeed based on that theory.

1190468; 1190469

1190468 -- AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

1190469 -- AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Parker, C.J., and Bolin, Wise, Mendheim, Stewart, and Mitchell, JJ., concur.

Sellers, J., concurs specially.

Shaw and Bryan, JJ., concur in the result in part and dissent in part.

SELLERS, Justice (concurring specially).

I authored the main opinion. I write specially to address one aspect of Justice Shaw's opinion dissenting in part. That opinion appears to conclude that the County of Mobile does not have a responsibility to take reasonable steps to alleviate flooding on its roads, when those roads become dangerous or impassable, because the County itself did not cause the flooding by, for example, altering uphill land to the detriment of downhill land. But counties have a statutory and common-law duty to keep their roads as safe and convenient as practicable, and they must take reasonable steps to remedy unsafe or inconvenient conditions once notified of their existence. § 23-1-80, Ala. Code 1975; Macon Cnty. Comm'n v. Sanders, 555 So. 2d 1054 (Ala. 1990); Jefferson Cnty. v. Sulzby, 468 So. 2d 112 (Ala. 1985). I do not view the existence of that duty as contingent upon the counties themselves having affirmatively caused the unsafe or inconvenient condition.

SHAW, Justice (concurring in the result in part and dissenting in part).

I agree with the conclusion of the main opinion insofar as it affirms the summary judgments entered by the trial court on the basis that Mobile County ("the County") owes no duty to alleviate flooding on privately owned property; therefore, I concur in the result reached in that portion of the opinion. However, I am unable to agree with the opinion's second conclusion that the summary judgments for the County were inappropriate to the extent that they were allegedly based on the proposition that the County has no duty to maintain its roads so that they are safe and convenient.

In their original complaints, as to the County, in addition to damages for the alleged devaluation of and interference with privately owned real property, Lewis A. Richardson and Ellen G. Richardson and Sherry E. Phelps ("the landowners") sought "a permanent mandatory injunction ... against the ... County ... that the [County] be required to provide adequate stormwater and surface water drainage systems so as to alleviate the continued flooding or possibility of flooding on [the landowners'] property." I see nothing in those pleadings referencing

public roads or any duty of the County with respect to public roads. Thereafter, the landowners amended their complaints to add allegations connected to new flooding events. However, as reflected in the County's summarization of the landowners' claims in its brief in support of the summary judgments, at no time did their requests for injunctive relief against the County appear to change. During the proceedings on the County's summary-judgment motions, as observed in the main opinion, the landowners' evidentiary submissions did include reference to and evidence of corresponding flooding of the roads in the subdivision; however, it appears clear that the emphasis of the landowners' arguments was the effect of the alleged flooding on their privately owned real property.

Following the filing of the County's summary-judgment motions and after the trial court had taken the matter under advisement, the landowners filed amended complaints in each case, alleging for the first time that the County "allowed storm water and surface water from its right of way to flood private property and to damage private property." Nonetheless, the landowners' request for injunctive relief as to the County

was not amended and remained the same. In addition, the record indicates that the landowners expressly conceded that, "in the event the [trial] Court grants [the County's] summary judgment ..., [the landowners] agreed that the amended complaint would be moot and of no effect ."

The trial court's subsequent orders entering summary judgments for the County on the landowners' negligence claims reflects that it concluded as a matter of law "that the County had no duty to maintain the drainage ditch/system in question." In reaching that conclusion, the trial court specifically noted that the "primary criticism" of the landowners' expert "focuses on the initial design of the drainage system and the failure to upgrade that original design." As the trial court correctly pointed out, the landowners' complaint thus "points to an issue of design of the drainage system of the subdivision and not a lack of maintenance by the County." Similarly, as to its subsequent orders entering summary judgments for the County on the landowners' nuisance and trespass claims, the trial court found that "the nuisance, if any, arose out of a breach of a duty to provide " 'appropriate up-keep,' a duty which does not belong to the County" and that the landowners' trespass claims also failed because "[a]t

best [they] demonstrate a failure to act or take actions which the county had no legal duty to take, i.e., redesign or provide appropriate upkeep of the private drainage system. " Thus, I see nothing to suggest that the trial court's summary judgments were based, to any extent, on its rejection of the notion that the County has a legal duty to maintain its roads. To the contrary, the landowners specifically argued in postjudgment proceedings that the trial court's summary-judgment orders "do not address the flooding from the County's right-of-way."

In any event, and assuming that the landowners' road-based claims were properly presented below, I see nothing to suggest that ordering the County to perform its statutory responsibility to maintain its roads will afford the landowners relief: the landowners' evidence does not demonstrate that the rights-of-way -- or any other aspect of the roads under the County's responsibility -- were improperly designed, constructed, or maintained. Moreover, it appears that the primary source of the flooding is not runoff from the County's roads.

Like the trial court, the main opinion in its initial holding appears to accept the County's conclusion that it is responsible only for portions of

the drainage system located in the County's rights-of-way and only to the extent necessary to prevent flooding of the roads. However, not only are the portions of the affected drainage ditch, according to the main opinion, located "outside the County's rights-of-way," ___ So. 3d at ___, but the record suggests alternate sources of flooding and, as the main opinion also concludes, the recent increase in flooding within Cottage Park is largely attributable to the detention pond located in the O'Fallon subdivision. See ___ So. 3d at ___. That being the case, it appears to me that the second holding of the opinion not only places the trial court in error on grounds that the trial court did not consider, but also awards to the landowners relief that they never actually requested and, to the extent that it does so, relies on a conflicting analysis. If the flooding in Cottage Park -- both on private property and the roads -- is caused by the improperly designed drainage system in a neighboring subdivision over which the County has no duty or responsibility, then I see no causation demonstrated on the County's part in relation to the flooding on the roads. Thus, as to that portion of the main opinion, I respectfully dissent.

Bryan, J., concurs.