Rel: June 16, 2023
Corr: August 3, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

1210055

City of Orange Beach

v.

Ian Boles

Appeal from Baldwin Circuit Court
(CV-16-900955)

1210056

City of Orange Beach

v.

Ian Boles

Appeal from Baldwin Circuit Court
(CV-17-900361)

SHAW, Justice.

In these consolidated appeals, the City of Orange Beach ("the City") appeals from a judgment entered on a jury verdict in two consolidated actions below in favor of Ian Boles in regard to a dispute over the City's inspection of Boles's property. We reverse and remand.

Facts and Procedural History

Between 2013 and 2015 Boles constructed, without any apparent issues, two eight-bedroom duplexes on property he owned that is located within the City limits ("the beachfront property"). In September 2015, Boles filed with the City a building-permit application seeking a permit to construct two additional multiple-level duplexes on the beachfront property. Additionally, in October 2015, Boles filed with the City a separate building-permit application for the construction of a single-

family dwelling on another parcel of property that Boles owned within the City limits ("the Burkhart Drive property"). At the time of each permit request, Boles completed a "Home Builders Affidavit" attesting that he was the owner of the property; that he would be acting as his own contractor on the proposed project, which would not be offered for sale; and that he was, thus, exempt from the requirement that he be licensed under Alabama's Home Builders Licensure Law. See, generally, § 34-14A-1 et seq., Ala. Code 1975.

As to each of Boles's requests, both the building-permit application itself and an accompanying stormwater-permit application specifically provided that the applicant agreed, among other things, that the proposed construction would comply with the provisions of the 2012 International Residential Code, which the City had adopted, as well as with the City's ordinances. See, generally, § 11-45-8, Ala. Code 1975. The City approved both building-permit applications. In accordance with the City's standard operating procedure at the time, the building-permit packages issued to Boles provided that a "subcontractor list must be submitted to [the] City … finance department prior to [an electrical and/or gas] meter[-]release inspection." (Capitalization and emphasis

omitted.)[1] Elsewhere, the building-permit packages provided to Boles explained that a certificate of occupancy for the proposed structure would not be issued until, among other things, "a subcontractor list has been submitted to the [City's] Finance Department." Boles also received with each package a blank subcontractor list ("the subcontractor form") for identifying all subcontractors for the proposed project, which specified that it was due within 10 days of the issuance of the building permits.

As explained by the City, the subcontractor form was used by its

---

[1]Section 34-14A-13, Ala. Code 1975, provides:

> "It is the duty of the building official, or other authority charged with the duty, of issuing building or similar permits, of any incorporated municipality or subdivision of the municipality or county, to refuse to issue a permit for any undertaking which would require a license hereunder unless the applicant has furnished evidence that he or she is either licensed as required by this chapter or is exempt from the requirements of this chapter [i.e., § 34-14A-1 et seq., Ala. Code 1975]. … The builder shall submit to the issuing municipality if requested a list of the subcontractors with correct physical address and phone numbers involved in the construction project within 15 days of the issuance of the building permit. Should the builder add any other subcontractor to the project, the builder will submit the subcontractor's name, address, and phone number to the municipality within three working days of hiring. An updated list of subcontractors shall be furnished by the builder before the issuance of a certificate of occupancy by the municipality."

Finance Department to verify that contractors or subcontractors were properly licensed. The subcontractor form included, as to each subcontractor performing work on a project, a space for recording the subcontractor's license number, the type of work performed, the subcontractor's contact information, and the amount the subcontractor received for performance of the specified work. The record suggests that the verification process included not only verifying that a particular contractor had "applied for a City license, but also [to] check if there was any other State licenses that might be applicable" or concurrently required. See, e.g., § 34-14A-2(12), Ala. Code 1975 (defining a "residential home builder" as including those who assist undertaking construction "to be used by another as a residence when the cost of the undertaking exceeds ten thousand dollars ($10,000)"); § 34-14A-5, Ala. Code 1975 (requiring "residential home builders" to be licensed).

Landon Smith, the City's "chief building official" at all pertinent times, described the required subcontractor form as serving the following purposes:

> "First, it is meant to ensure that all subcontractors working within the City are properly licensed. Second, the form provides assurance that the City is abiding by regulations pertaining to certain state-regulated trades, including

> homebuilding, general contracting, roofing, gas, plumbing, mechanical and electrical. The form is also used to obtain contact information for subcontractors. From time to time the City may need to contact subcontractors to have them answer questions about work being performed or to secure or remove equipment in certain circumstances such as potential storm events."

Evidence in the record also indicated that the City was aware that all potential subcontractors might not be known in the early stages of a project and that, as construction on permitted projects proceeded, the City would, even in the absence of a completed subcontractor form, conduct any and all inspections up to the meter-release inspection, but that a completed subcontractor form was a prerequisite for a meter-release inspection because, by that point in construction, the information necessary to complete the subcontractor form should be readily available.

Following issuance of both permits, Boles apparently proceeded as planned with construction at the beachfront property and at the Burkhart Drive property, including subcontracting out certain work and undergoing various periodic inspections by the City as construction progressed. It is undisputed that, after obtaining those permits and undertaking construction, Boles did not complete and timely return to the City a completed subcontractor form for either project.

In June 2016, as construction at the beachfront property was nearing completion, Boles's electrical subcontractor apparently contacted the City to request an electrical meter-release inspection upon completion of the electrical portion of that project, i.e., the subcontractor sought the required City approval before permanent electrical power service could be supplied to the beachfront property. Citing Boles's failure to complete and return the required subcontractor form, the City, through Smith, refused to conduct the meter-release inspection.

In response, Boles offered to provide "the names and information of the major subcontractors, but not the amount in which those subcontractors were paid" -- as he had allegedly done with prior projects within the City limits. Also according to Boles, based upon the City's issuance, at various stages of construction, of other construction-related permits to his subcontractors, the City "already [was] in possession of the information it [was] withholding the inspection for." Referencing "the governing rules stating that a building inspector shall inspect … property for safety," Boles further contended that the City and Smith either lacked the authority to and/or were exceeding their authority in refusing to inspect the beachfront property until the City received information to

which, according to Boles, it was not entitled.

After an unsuccessful appeal of the City's refusal to conduct the meter-release inspection at the beachfront property to the City's Construction Board of Adjustment and Appeals, Boles sued the City and Smith (case no. CV-16-900955) in the Baldwin Circuit Court, asserting claims seeking declaratory and injunctive relief as well as claims seeking monetary damages. In particular, as stated in Boles's fourth amended complaint, he sought a judgment declaring "that [t]he City and Smith have no authority to require Boles to provide financial information in regards to his subcontractors," a preliminary injunction directing that the City immediately conduct a meter-release inspection at the beachfront property as requested, a permanent injunction, compensatory damages, and "such other, further or different relief as may be just and proper." In their ensuing answers, the City and Smith pleaded, among other things, both "substantive immunity" and "the benefit of all statutes and common law conferring immunity on municipalities."

Following a hearing, the trial court awarded Boles, as to the beachfront property, a preliminary injunction "to the extent that the [City] is to conduct the electrical inspection and meter[-]release …

inspection which would allow [Boles] to continue construction on the building subject to the litigation." Pursuant to the trial court's order, the City performed the requested meter-release inspection at the beachfront property. All issues identified during that inspection were subsequently corrected, and the meter was released for service.

Subsequently, when construction at the Burkhart Drive property neared completion, the City emailed Boles, noting that, although his electrical subcontractor had requested a meter-release inspection, the City had yet to receive a completed subcontractor form from Boles for that project. The City's email correspondence further provided instructions for Boles's submission of the completed subcontractor form and indicated that, "[u]pon receipt and review, [the City would] schedule the electrical meter[-]release inspection." Boles, however, through legal counsel, declined to furnish the completed subcontractor form but, nonetheless, demanded that the City perform the requested meter-release inspection.

Thereafter, the City commenced in the Baldwin Circuit Court its own declaratory-judgment action against Boles (case no. CV-17-900361) with regard to the project at the Burkhart Drive property. Specifically,

among other relief, the City sought a judgment declaring that Smith was authorized to require a building-permit holder to provide a completed subcontractor form for a permitted project; that applicants like Boles, who have applied for and accepted a building permit, are required to provide the completed subcontractor form as a condition of inspection; and that the City was authorized to withhold scheduling meter-release inspections and/or a certificate of occupancy until the completed subcontractor form is provided.

Boles filed an answer denying the City's allegations and an accompanying counterclaim. In his counterclaim, Boles stated that he had offered to provide information regarding his subcontractors but was merely unwilling to disclose the amounts those subcontractors were paid, that he believed that the City already possessed the pertinent information, and that the City was exceeding its authority by refusing to inspect the project at the Burkhart Drive property. Thus, Boles again requested injunctive relief mandating an immediate inspection, a judgment declaring "that the City has no authority to require Boles to provide financial information in regards to his subcontractors," and damages. On the motion of Boles, case no. CV-16-900955 and case no.

CV-17-900361 were, over the City's objection, consolidated, and Boles was permitted to demand a jury trial on his counterclaims. In answer to Boles's counterclaims, the City acknowledged that it had not performed the meter-release inspection at the Burkhart Drive property based on Boles's continued refusal to complete the subcontractor form required by the City and, among other things, again asserted the applicability of "all statutes and common law conferring immunity on municipalities" and, more specifically, the doctrine of "substantive immunity."

The parties later obtained the trial court's ratification of an agreement aimed at resolving "preliminary inspection issues" with regard to the Burkhart Drive property. Pursuant to that agreement, Boles agreed to identify and to provide contact information for all subcontractors on that project who performed work in certain identified disciplines and who were paid in excess of $10,000 for their work on the project. In exchange, the City agreed to "perform all Inspections concerning the structure's compliance with the relevant building codes, to specifically include the electrical meter[-]release and certificate of occupancy inspections." Thus, as with the beachfront property, the meter-release inspection at the Burkhart Drive property ultimately

occurred during the pendency of the underlying litigation; the meter was released for service as a result; and a certificate of occupancy issued for the Burkhart Drive property.

After the settlement of Boles's claims against Smith and Boles's withdrawal of any claims for punitive damages, the matter ultimately proceeded to a jury trial on Boles's claims for damages allegedly resulting from the City's actions. At the conclusion of Boles's evidence, the City requested the entry of a judgment as a matter of law in its favor. Among other grounds, the City, relying on Rich v. City of Mobile, 410 So. 2d 385 (Ala. 1982), reasserted its claim of substantive immunity, which the City maintained "precludes the assessment of liability in this case." Specifically, according to the City, "the duty to inspect is a public duty, not a private duty," and "the benefit doesn't inure to the private property owner[,] it inures to the public as a whole." The trial court denied that motion.

At the close of all the evidence, the City renewed its motion for a judgment as a matter of law in its favor. Again, based on substantially similar findings, the trial court denied that request.

The trial court subsequently instructed the jury, among other

things, that, to return a verdict for Boles, it must find that Boles had successfully demonstrated that the City was negligent in failing to inspect his properties. The jury ultimately rendered a verdict in favor of Boles and awarded corresponding damages. Thereafter, in accordance with the verdict, the trial court entered a judgment and awarded damages to Boles "in the amount of $792,247.00 for lost rental income, $343,917.00 for lost holding costs, $2,375,955.00 for lost future profits on possible duplex construction, and $267,881.00 for consolidation loan costs, plus the costs of Court." The City subsequently filed a postjudgment motion seeking, alternatively, a judgment as a matter of law in its favor, a new trial, or a remittitur of the damages awards. In that motion, the City again maintained that it was entitled to substantive immunity and lodged various challenges to the damages awards. Following the denial by operation of law of its postjudgment motion, see Rule 59.1, Ala. R. Civ. P., the City appealed.[2]

Standard of Review

"This Court's standard for reviewing a ruling on a

[2]The City's appeal from the judgment as it pertains to case no. CV-16-900955 was assigned appeal no. 1210055; its appeal from the judgment as it pertains to case no. CV-17-900361 was assigned appeal no. 1210056. This Court consolidated the appeals.

motion for a [judgment as a matter of law ('JML')] is well-settled.

> "'When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in granting or denying the motion. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate issue is whether the nonmovant has presented sufficient evidence to allow the case or issue to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). In an action filed after June 11, 1987, the nonmovant must present substantial evidence to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. If the question is one of law, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992).'
>
> "Ex parte Alfa Mut. Fire Ins. Co., 742 So. 2d 1237, 1240 (Ala. 1999)."

Thompson Props. 119 AA 370, Ltd. v. Birmingham Hide & Tallow Co., 897 So. 2d 248, 260-61 (Ala. 2004).

Discussion

Boles's claims for damages hinged on there being a duty on the part of the City to inspect Boles's projects at the beachfront property and at the Burkhart Drive property and demonstrating that the City was negligent in failing to conduct those inspections. Among its several arguments on appeal, the City contends, as it did below, that, with regard to conduct involving building inspections, it is protected from liability by the doctrine of substantive immunity. We agree and find this argument determinative.

The doctrine of substantive immunity was adopted by this Court in Rich v. City of Mobile, 410 So. 2d 385 (Ala. 1982). In that case, the plaintiffs' residence was connected to and served by the sewer and water systems of the City of Mobile. Because an overflow trap had not been installed in the sewer line leading to the residence, the sewer line backed-up and overflowed into the plaintiffs' home. The plaintiffs sued, alleging that the city was negligent in failing to inspect or in inspecting the sewer lines and connection to the plaintiffs' residence. 410 So. 2d at 385. This Court held that the doctrine of substantive immunity prevented the city from being held liable:

> "There is, indeed, a sense in which the duty of the City's employees, as inspectors, is a duty flowing to the individual

> homeowners. But to stop here and impose liability is to overlook what we perceive as overriding public policy reasons to hold to the contrary.
>
> "These policy considerations may be expressed in terms of the broader requirement of the City to provide for the public health, safety, and general welfare of its citizenry. While, as here, the individual homeowner is affected by the discharge of the City sewer inspector's duty, the City's larger obligation to the whole of its resident population is paramount; and the imposition of liability upon the City, particularly where the Plaintiffs' reliance upon the public inspection is secondary and inferential to their reliance upon the building contractor, necessarily threatens the benefits of such services to the public-at-large.
>
> "…We believe these public policy considerations, however, override the general rule and 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, 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 386-87.

Decisions following Rich further applied the doctrine of substantive immunity to other claims regarding a municipality's alleged negligent failure to perform inspections. In Hilliard v. City of Huntsville, 585 So. 2d 889, 889-90 (Ala. 1991), the plaintiff contended that the City of Huntsville had negligently inspected the wiring in an apartment

complex, which later burned, resulting in the death of the plaintiff's wife and two children. In upholding the trial court's judgment in favor of the city, this Court stated:

> "Clearly, the same policy considerations that prevailed in Rich are equally compelling in this case. Although inspections performed by the city's electrical inspectors are designed to protect the public by making sure that municipal standards are met, and although they are essential to the well-being of the governed, the electrical code, fire code, building code, and other ordinances and regulations to which [the plaintiff] refers are not meant to be an insurance policy or a guarantee that each building in the city is in compliance. While [the plaintiff] calls to our attention the inherent danger of electricity, it is precisely because of the dangerous nature of that element that immunity should be granted to a municipality that, although not required by law to do so, chooses to provide for the public health, safety, and general welfare of its citizenry through the regulation of this inherently dangerous element."

585 So. 2d at 892.

A similar holding was reached in Ex parte City of Tuskegee, 295 So. 3d 625 (Ala. 2019) (plurality opinion). In that case, the City of Tuskegee's building code required rental properties to have smoke detectors and to be inspected before utilities could be turned on at the property. 295 So. 3d at 627. The plaintiff contended that the city had failed to properly inspect her mother's residence to ensure that it was equipped with proper

fire-detection and fire-alarm systems, which, the plaintiff alleged, led to her mother's death in a fire. 295 So. 3d at 637. The opinion stated: "As was the case in Hilliard, although individual residents of the City derive a benefit from the inspections, the inspections are designed to protect the public by ensuring that municipal standards are met," and, thus, the Court determined that the city was entitled to substantive immunity. 295 So. 3d at 641.

The doctrine of substantive immunity has also been held to apply when a municipality refuses to act. In Bill Salter Advertising, Inc. v. City of Atmore, 79 So. 3d 646 (Ala. Civ. App. 2010), a billboard-advertising company and its owner sued the City of Atmore and its building official who, based on an interpretation of the city's sign ordinance, refused to allow the advertising company to rebuild certain signs damaged by a hurricane. The plaintiffs asserted claims seeking declaratory and injunctive relief, as well as a claim for damages based on the theory that the defendants had allegedly intentionally interfered with the plaintiffs' business relationships. 79 So. 3d at 647.

The city's board of adjustment ultimately determined that the signs could be rebuilt under certain conditions. 79 So. 3d at 648. The trial

court subsequently entered a summary judgment in favor of the defendants on the intentional-interference claim, and the plaintiffs appealed to the Court of Civil Appeals. 79 So. 3d at 649.

The Court of Civil Appeals described the doctrine of substantive immunity in part as follows: "[T]he lack of anything other than an incidental duty to a particular individual prevents the municipality from being liable for damages, because a breach of a duty owed to the general public will not form the basis for a negligence claim by an individual citizen." 79 So. 3d at 652 (citing Hilliard, 585 So. 2d at 891). The court held:

> "In the present case, the city chose to enact a sign ordinance, and the city and [its building official], acting in his official capacity, decided that, under their interpretation of the ordinance, [the plaintiffs] could not rebuild [their] hurricane-damaged signs. The sign ordinance was not enacted to provide a benefit to the … plaintiffs. Instead, the ordinance was enacted to benefit the municipality as a whole. Thus, … we conclude that the … plaintiffs failed to establish a duty owed to them by the city …. Therefore, based on the doctrine of substantive immunity, the summary judgment in favor of the city and [its building official] … on the … plaintiffs' claim for damages arising out of the city defendants' interpretation and enforcement of the city's sign ordinance is affirmed."

79 So. 3d at 652-53.

In the instant cases, the City required inspections of residences before permitting them to be connected to electrical power. As part of that process, the City requested certain information, such as the information requested on the subcontractor form. Boles contends that the City had a duty to perform the meter-release inspections despite his failure to provide the completed subcontractor forms and that the City was negligent in failing to conduct those inspections. The City's performance of meter-release inspections, like the performance of the inspections at issue in Rich, Hilliard, and Tuskegee, was to "protect the public by making sure that municipal standards are met" and were "essential to the well-being of the governed." Hilliard, 585 So. 2d at 892. The City's performance of the meter-release inspections thus did not establish a legal duty to Boles. To hold that the City's building permitting process in fact imposed a legal duty to Boles to perform the meter-release inspections, even if he was not in compliance with that process, and that the breach of that duty imposes liability would "materially thwart the City's legitimate efforts to provide such public services." Rich, 410 So. 2d at 387. Finding liability on the part of the City in these cases would make the City disinclined to inspect property

in the first place, to the detriment of the public as a whole, which benefits from such inspections. This is especially true when the alleged breach of such a duty arose from nothing more than the City's requirement that a builder file a simple form intended to substantiate the builder's compliance with the City's policies.

Boles disputes that principles of substantive immunity apply to his damages claims. Specifically, he contends that Rich, Hilliard, and Tuskegee, involved claims alleging property damage or personal injury resulting from negligently performed inspections, did not involve a refusal to perform inspections, and, therefore, are factually distinguishable. However, such distinctions are immaterial. Substantive immunity, when it applies, prevents in the first place the imposition of a duty, the breach of which a municipality may be liable for, thereby preventing liability regardless of whether the purported duty was never performed or was performed negligently. Rich involved allegations of a "failure to inspect or negligent inspection," 410 So. 2d at 385, and Bill Salter involved a refusal to act based on an allegedly incorrect interpretation of a municipal ordinance. Further, the nature of the damages that result from the breach of a duty are immaterial to

whether the duty exists in the first place. See Bill Salter, 79 So. 3d at 653 (holding, in a case that did not involve a claim for property damage or personal injury, that substantive immunity prevented the creation of a duty for purposes of an intentional-interference-with-business-relationships claim).

Boles further contends that these cases are, instead, controlled by Lee v. Houser, 148 So. 3d 406 (Ala. 2013) (plurality opinion), in which a plurality of this Court rejected the application of substantive-immunity principles based on a determination that, although a municipality may be immune for certain zoning-related activity, "municipal immunity cannot extend to protect a municipality for the actions of its agents who sought extraterritorial jurisdiction over the private property of a citizen so that the municipality could prevent development of that property." 148 So. 3d at 419. Contrary to the facts in Houser, however, it appears undisputed that the purpose of the meter-release inspections at issue in these cases were indisputably aimed at promoting public safety, rather than merely "to prevent a private citizen from developing [his] private property for [his] economic benefit." 148 So. 3d at 419.

Finally, according to Boles, the circumstances of these cases are

distinct from the circumstances in cases "in which city employees undertook to perform their jobs but did so in an unsatisfactory manner" -- and in which substantive immunity was found to apply -- and are more akin to the circumstances in "cases involving city employees failure or refusal to do what their job required," including Williams v. City of Tuscumbia, 426 So. 2d 824 (Ala. 1983), Ziegler v. City of Millbrook, 514 So. 2d 1275 (Ala. 1987), and City of Birmingham v. Benson, 631 So. 2d 902 (Ala. 1993), in which substantive immunity was rejected.

As Boles acknowledges, however, the main opinion in Williams includes no finding as to the applicability of substantive-immunity principles. Further, although, as Boles also notes, the Court in Ziegler, which did not involve municipal inspections, relied on Williams to reject holding that substantive immunity applied, it did so on a rationale that is not applicable to these cases. Specifically, "this Court held in Ziegler … and in Williams that the City of Millbrook and the City of Tuscumbia, respectively, by creating professional fire departments, had thereby undertaken a duty to provide skillful fire protection" and "further held that, if the unskillfulness of the firefighters employed by the City of Millbrook and the City of Tuscumbia, respectively, caused a breach of

that duty, the respective cities would be directly liable for the breach." Hollis v. City of Brighton, 885 So. 2d 135, 141 (Ala. 2004). Finally, Benson declined to extend the doctrine of substantive immunity recognized in Rich to include "a police context" based on the conclusion that the "[p]olicy considerations supporting immunity do not come into play when a policeman is … on the scene and in a position to control an aggressor" and prevent a criminal assault but declines to do so. 631 So. 2d at 905. Thus, Ziegler, Williams, and Benson, which involved police and fire protection, and not building inspections, as did Rich, Hilliard, and Tuskegee, are clearly distinguishable and do not support a rejection of substantive immunity in these cases. Compare Rich, 410 So. 2d at 385 (holding substantive immunity applicable and affirming judgment for the city on claims of "negligent failure to inspect or negligent inspection"). See also Hilliard and Tuskegee, supra (demonstrating that inspection cases are the type of cases in which this Court has previously applied the doctrine of substantive immunity).

Here, it appears undisputed that the City's inspections of buildings before an electrical meter would be "released" for service and utilities turned on in preparation for the building's occupation clearly constituted,

as conceded by Boles in his own declaratory-judgment claims and by his counsel at trial, "safety inspection[s]." See also Rich, 410 So. 2d at 386. Accordingly, any resultant duty to perform the inspections was owed to the public at large rather than to any individual property owner -- including Boles. Thus, the City has demonstrated that it is entitled to substantive immunity on Boles's damages claims arising from actions taken by Smith in his role as the City's building inspector. Boles has not refuted that principles of substantive immunity apply.

Because the City was entitled to substantive immunity, Boles was not entitled to damages.[3] Accordingly, the trial court erred both in submitting Boles's damages claims to a jury and in denying the City's motion seeking a judgment as a matter of law. Accordingly, the trial court's judgment is reversed, and these matters are remanded for further proceedings consistent with this opinion.

1210055 -- REVERSED AND REMANDED.

1210056 -- REVERSED AND REMANDED.

---

[3]The parties had resolved Boles's claims for injunctive relief before trial, and the judgment addressed only the damages claims that were presented to the jury. Accordingly, we pretermit discussion as to whether either party was entitled to a declaratory judgment.

Stewart, J., concurs.

Shaw, J., concurs specially, with opinion, which Mendheim, J., joins.

Parker, C.J., concurs in the result, with opinion.

Sellers, J., dissents, with opinion, which Wise and Bryan, JJ., join.

Mitchell and Cook, JJ., recuse themselves.

SHAW, Justice (concurring specially).

I am the author of the main opinion. I write specially to note the following.

In these cases, the City of Orange Beach ("the City") refused to perform meter-release inspections because certain paperwork was not completed; it is alleged that its agent was thus negligent in failing to perform the inspections and that the City was vicariously liable for such negligence.

There is no dispute that the purpose of the meter-release inspections was to provide for public health, safety, and welfare. Generally stated, numerous prior decisions directly hold that the doctrine of substantive immunity prevents the imposition of liability for a municipality's failure to properly conduct inspections related to public health, safety, and welfare. For example, in Rich v. City of Mobile, 410 So. 2d 385 (Ala. 1982), the case that adopted the doctrine of substantive immunity, this Court held that claims related to a "failure to inspect" or a "negligent inspection" of sewer lines were barred. Id. at 385. In Hilliard v. City of Huntsville, 585 So. 2d 889 (Ala. 1991), substantive immunity barred claims related to the death of three persons allegedly caused by a

municipality's negligent inspection of wiring. Similarly, in Ex parte City of Tuskegee, 295 So. 3d 625 (Ala. 2019) (plurality opinion), it was alleged that a city's failure to inspect a fire system, purportedly in violation of its own ordinances, resulted in the death of an elderly woman. In those cases, the municipalities undertook to provide inspections. The failure to inspect, or the negligent performance of the inspections, even in violation of the municipalities' own polices, constituted no breach imposing liability because there was no duty created in the first place: substantive immunity "prevent[s] the imposition of a legal duty." Rich, 410 So. 2d at 387. See also Hilliard, 585 So. 2d at 891 ("[I]n Rich, the Court ... refused to hold that the duty imposed upon city plumbing inspectors was owed to individual homeowners. Consequently, the breach of such a duty, the Court held, would not support an action for damages."). If there is no duty, the manner of a purported breach, whether negligent performance or the negligent failure to perform, is of no consequence.

In this case, the City desired certain information before it would conduct the inspections. It had a form for builders to complete: the subcontractor form. If the plaintiff, Ian Boles, had provided the

completed form and the inspections then occurred in a negligent fashion, or if the City had released the properties for power-meter hookups without conducting inspections at all, and occupants of the structures died as a result, our directly-on-point caselaw would hold that no duty existed, and no liability would attach.

But here, Boles inexplicably refused to provide the completed forms, and the City thus refused to inspect. In light of our caselaw, the City's policy of providing inspections did not create a duty owed to Boles to perform the meter-release inspections or to perform them competently. The difference between the facts of these cases and the facts of the previously discussed substantive-immunity cases is that, in these cases, the City would provide the inspections only after the submission of certain paperwork. The existence of this restriction -- completing the subcontractor form -- whether related to "safety" or not, would not alter whether a duty to inspect was created. But if we were to hold that a refusal to inspect because of noncompliance with such an undemanding requirement is a different form of negligence that can create liability when other, clearly more dangerous forms of negligent inspection do not, we would no less "thwart the City's legitimate efforts" to provide public

services. Rich, 410 So. 2d at 387. These cases are not legally distinguishable from prior caselaw on this issue. Whether those past decisions are correct is not before us.

Any motivation for the requirement to file the completed subcontractor form appears to be a red herring when there is no duty to individuals on the part of the City to perform the inspection in a competent manner or to perform it in the first place. The subcontractor-form requirement was part of the City's overall building-inspections process in these cases. Although there may have been no written policy or ordinance requiring the submission of the completed subcontractor form, the City's building-permit packages nevertheless contained it from the beginning. There was no per se refusal by the City to perform the inspections in these cases; instead, it just wanted the forms completed. Boles had the requested information, could have provided it, and thus could have had the inspections. Although the City may have had the ability to independently search its records and find some of the information it desired, it could not possess all of it, and it was clearly much easier to simply require it from builders. As stated in the main

opinion, to impose liability on the City for the mere existence of this requirement in the building-inspection process

> "would make the City disinclined to inspect property in the first place, to the detriment of the public as a whole, which benefits from such inspections. This is especially true when the alleged breach of such a duty arose from nothing more than the City's requirement that a builder file a simple form intended to substantiate the builder's compliance with the City's policies."

___ So. 3d at ___. Municipalities must know if they will be held liable for faults in their inspection process; to reject the application of substantive immunity in this case and create new avenues of liability could lead to uncertainty with respect to whether municipalities should provide building inspections at all if some portion of the inspection process might later be deemed by the courts to have an insufficient connection to public health, safety, and welfare.

Because the doctrine of substantive immunity, which is the law of this State, prevents the imposition of a duty on the City, it was entitled to a judgment in its favor in these cases. Further, that holding pretermits the need to discuss the City's substantial challenges to the propriety of the amount of damages awarded in this case.

Mendheim, J., concurs.

PARKER, Chief Justice (concurring in the result).

I agree that reversal of the judgment is required by this Court's precedent regarding the substantive-immunity exception to municipal liability. In particular, I cannot find any sound jurisprudential distinction between this case and our prior cases holding that municipalities were immune for negligently failing to properly conduct inspections, Rich v. City of Mobile, 410 So. 2d 385 (Ala. 1982), and Hilliard v. City of Huntsville, 585 So. 2d 889 (Ala. 1991). Importantly, Ian Boles's damages claims must be viewed solely through the lens of negligence because the City of Orange Beach has statutory immunity from liability for its agents' intentional torts, see § 11-47-190, Ala. Code 1975; Neighbors v. City of Birmingham, 384 So. 2d 113 (Ala. 1980); Wheeler v. George, 39 So. 3d 1061, 1085 (Ala. 2009). Thus, the City's agents' intent and motives in failing to inspect Boles's properties were not directly relevant. Moreover, our precedent seems to suggest that the relevant question -- whether substantive immunity applies to a particular activity of a municipality -- must be decided at a relatively high level of generality, not based on the specific factual idiosyncrasies of the case or on the particular kind of private harm involved. See Rich, 410

So. 2d at 387-88 ("[T]hese public policy considerations ... override the general rule and prevent the imposition of a legal duty ... 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. [¶] ... [T]he substantive immunity rule ... must be 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." (emphasis added)); Hilliard, 585 So. 2d at 892 ("[I]t is precisely because of the dangerous nature of [electricity] that immunity should be granted to a municipality that ... chooses to provide for the public health, safety, and general welfare of its citizenry through the regulation of this inherently dangerous element."). Thus, although I do not concur in most of the reasoning in the main opinion, I concur in the result.

The real problem -- one that Boles has not briefed in this case but that this Court should take up in a future case -- is that substantive immunity has been mistaken from its beginning. This Court created it out of thin air in Rich.

A little history is helpful here, because Rich was not the first time this Court protected municipalities from liability without any constitutional or statutory basis. In the 19th century, the Court declared cities immune when they engaged in governmental functions, as opposed to ministerial (or "corporate") functions. See Smoot v. City of Wetumpka, 24 Ala. 112, 120-21 (1854); City Council of Montgomery v. Gilmer, 33 Ala. 116, 130-32 (1858); Campbell's Adm'x v. City Council of Montgomery, 53 Ala. 527, 530-31 (1875). But in 1907, the Legislature enacted a statute providing that municipalities were liable for the negligence of their agents:

> "No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless said injury or wrong was done or suffered through the neglect, carelessness or unskillfulness of some agent, officer or employee of the municipality engaged in work therefor and while acting in the line of his duty ...."

Ala. Acts 1907, Act No. 797, § 95. (That language is now in § 11-47-190, Ala. Code 1975, in substantially identical form.) The statute contained no exceptions to this liability. Thus, the statute did not incorporate this Court's earlier distinction between governmental and ministerial functions but instead provided a categorical rule of negligence liability.

The Court, undaunted, ignored this result of the statute's language and continued finding immunity for governmental functions. See City of Tuscaloosa v. Fitts, 209 Ala. 635, 96 So. 771 (1923); Hillman v. City of Anniston, 214 Ala. 522, 108 So. 539 (1926); City of Bay Minette v. Quinley, 263 Ala. 188, 82 So. 2d 192 (1955).

In 1975, the Court course-corrected, returning to the language of the statute and rejecting our prior extratextual immunity doctrine. See Jackson v. City of Florence, 294 Ala. 592, 320 So. 2d 68 (1975). We thoroughly explained that the municipal-liability statute contained no exception for governmental functions. 294 Ala. at 596, 320 So. 2d at 71. Rather, the statute was a categorical determination by the Legislature that municipalities would be liable for the negligent acts of their agents. See 294 Ala. at 596-98, 320 So. 2d at 71-73. Further, we detailed our precedent since the statute's enactment, to show that "[t]he rule of municipal immunity cannot be rationally defended." 294 Ala. at 596-98, 320 So. 2d at 71-73. In particular, the distinction between governmental and ministerial/corporate functions "ha[d] resulted in some curious categories. Garbage collecting ha[d] been held governmental, but sewer disposal [was] corporate. Repair and maintenance of streets [was]

proprietary or corporate, but operating a street sweeper to keep the streets clean [was] governmental." 294 Ala. at 597, 320 So. 2d at 72 (citations omitted). Amidst such disparate results, "the only clue to whether a particular function [was] governmental or corporate [had to] be found in cases expressly declaring that particular function to fall within one or the other category." Id. In other words, whether an activity was subject to liability could not be decided in a principled fashion, but varied from case to case. In contrast to this confusion,

> "[t]his judicial sleight of hand could have been avoided entirely by giving to the 1907 legislative enactment its clear meaning. Yet, as case after case [came] to this court urging it to correct this judicially created barrier to the courthouses of this state, the answer always given in denying that relief [was] that the relief sought, if to be obtained, must come from the legislature. In making that statement, this court [did] not recognize[] that in Alabama, it was this court which closed the courthouse doors in litigation of this kind as early as 1858; and when the legislature opened them in 19[07], we closed [them] again and, in so doing, thwarted the will of the legislature."

Id.

Thus, in Jackson, we recognized that the municipal-liability statute contained no exceptions; our obligation was to apply the statute as the Legislature wrote it.

> "The legislature had the power in 1907 to abolish municipal immunity for tort, there being no constitutional barrier to its action. This court should have bowed to that legislative prerogative rather than take the course it did, which was to treat the thoughtful legislation as no more than a restatement of the law as it then existed by judicial decision."

294 Ala. at 597-98, 320 So. 2d at 73. Therefore, in Jackson, we entirely abolished the judicially created doctrine of municipal immunity, "to let the will of the legislature, so long ignored, prevail." 294 Ala. at 599, 320 So. 2d at 74.

This Court's vigor to stick to the statute's text was regrettably short-lived. A mere seven years later, we took a step backward in Rich. Once again confronted by a municipal-liability case, we acknowledged that § 11-47-190 makes municipalities liable for negligence, and we nodded to Jackson and claimed to retain it as good precedent. 410 So. 2d at 387. But we then walked back Jackson's interpretation of the statute as a categorical rule of liability, recasting it as merely a "general" rule. Id. We then said that "public policy considerations ... override the general rule ... 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." Id.

With those words, we exhumed municipal immunity's corpse. And in doing so, we did not bother to quote or even address the language of the municipal-liability statute. Instead, we merely motioned at a bevy of "overriding public policy reasons": "the broader requirement of the City to provide for the public health, safety, and general welfare," "the City's larger obligation to the whole of its resident population," and an assertion that "the imposition of liability upon the City ... necessarily threatens the benefits of such services to the public-at-large." Id. at 386-87. It is hard to see those "reasons" as anything other than a fig leaf for the Court's distaste for the results of the unqualified municipal liability imposed by the statute. Perhaps recognizing the untethered nature of the doctrine, we tried to chain the beast:

> "We emphasize ... that only the narrowest of constructions of our instant holding will avoid violence to § 11-47-190 and its Jackson interpretation; and that the substantive immunity rule of this case must be 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. But as often happens with judicially invented restraints on judicially invented exceptions to statutes, that attempt was unduly optimistic. As illustrated by today's cases, once we depart from the text

in favor of an amorphous balancing test, the test has a way of eclipsing the text; the exception, of swallowing the rule.

One reason why Rich's exception is difficult to contain is that it has no real limits. Rich conceptualized the question of municipal immunity as a balancing of interests -- an individual citizen's interest in being made whole from a municipality's wrongdoing, against the public's interest in funding of public services. We said:

> "While ... the individual homeowner is affected by the discharge of the [City's] duty, the City's larger obligation to the whole of its resident population is paramount; and the imposition of liability upon the City ... necessarily threatens the benefits of such services to the public-at-large.
>
> "... We believe these 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, where the imposition of liability can be reasonably calculated to materially thwart the City's legitimate efforts to provide such public services.
>
> "....
>
> "We emphasize, however, ... that the substantive immunity rule of this case must be 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 (emphasis added). Translation: When municipal liability to individuals would materially decrease the money available for public services or would incentivize a municipality to decrease public services, that liability cannot be allowed. But that rationale applies far beyond the context of public-safety inspections. In reality, any liability of a municipality for any conduct that causes significant injury to an individual could materially diminish the public coffers and disincentivize public services, depending on the municipality's budget. Thus, if applied consistently, Rich's rationale could result in municipal immunity for all but the most minor injuries.[4]

As might be expected for a judicially created, amorphous exception, however, Rich has not been applied consistently or coherently. Instead,

---

[4]There is another problem with the rationale that liability would decrease the money available for public services (i.e., that immunity prevents diversion of public funds). That justification for immunity has been thoroughly discredited as lacking any sound moral or logical basis. See Annotation, Municipal Immunity from Liability for Torts, 120 A.L.R. 1376, 1377-78 (1939); Leon Green, Freedom of Litigation (III): Municipal Liability for Torts, 38 Ill. L. Rev. 355, 378-79 (1943-44); Molitor v. Kaneland Cmty. Unit Dist. No. 302, 18 Ill. 2d 11, 20, 22-24, 163 N.E.2d 89, 93-95 (1959); Jones v. State Highway Comm'n, 557 S.W.2d 225, 228-29 (Mo. 1977); Restatement (Second) of Torts § 895C cmts. c-d (Am. L. Inst. 1979); Note, Municipal Tort Immunity in Virginia, 68 Va. L. Rev. 639, 645-47 (1982); Linda M. Annoye, Revising Wisconsin's Government Immunity Doctrine, 88 Marq. L. Rev. 971, 977-79 (2005).

it has produced the same kind of head-scratching anomalies that existed before Jackson cleared the field. Under Rich, for failing to provide police protection, a municipality is sometimes immune, see Calogrides v. City of Mobile, 475 So. 2d 560 (Ala. 1985); Garrett v. City of Mobile, 481 So. 2d 376 (Ala. 1985); Nichols v. Town of Mount Vernon, 504 So. 2d 732 (Ala. 1987), and sometimes not immune, see City of Birmingham v. Benson, 631 So. 2d 902, 903-05 (Ala. 1993). The same is true for failing to provide fire protection: sometimes immune, see Hollis v. City of Brighton, 885 So. 2d 135, 141 (Ala. 2004), sometimes not immune, see Williams v. City of Tuscumbia, 426 So. 2d 824 (Ala. 1983); Ziegler v. City of Millbrook, 514 So. 2d 1275 (Ala. 1987). And flood protection: sometimes immune, see Ex parte City of Muscle Shoals, [Ms. SC-2022-0524, Mar. 31, 2023] ___ So. 3d ___ (Ala. 2023), sometimes not, see City of Mobile v. Jackson, 474 So. 2d 644, 645-46, 649 (Ala. 1985). And for zoning/land-use-related conduct: immune, see Payne v. Shelby Cnty. Comm'n, 12 So. 3d 71, 73-81 (Ala. Civ. App. 2008); Bill Salter Advertising, Inc. v. City of Atmore, 79 So. 3d 646, 647-48, 651-53 (Ala. Civ. App. 2010), or not, see Lee v. Houser, 148 So. 3d 406, 418-20 (Ala. 2013) (plurality opinion); City of Mobile v. Sullivan, 667 So. 2d 122 (Ala. Civ. App. 1995). This inconsistency is not

surprising. Because of Rich's untethered and ill-defined balancing test, our municipal-liability jurisprudence quite naturally devolved into a game of "we know it when we see it," cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Further, Rich distinguished between a municipality's duties to the public and its duties to individuals, a distinction that Rich admitted was illogical. We noted that a Wisconsin court had said, "'Any duty owed to the public generally is a duty owed to individual members of the public.'" 410 So. 2d at 386 (quoting Coffey v. City of Milwaukee, 74 Wis. 2d 526, 540, 247 N.W.2d 132, 139 (1976)). And we acknowledged: "From the standpoint of pure logic, we concede that the reasoning of the Wisconsin Court is difficult to refute. There is, indeed, a sense in which the duty of the City's employees, as inspectors, is a duty flowing to the individual homeowners." Id. But then this Court pivoted away from logic, saying that "public policy reasons" required us "to hold to the contrary." Id. The Court should have stuck with logic. People who owe duties to the public are ordinarily liable to individuals who are harmed by breach of those duties. For example, someone excavating near a public road "owes to the public a nondelegable duty to protect travellers from an unreasonable

risk of harm caused by the excavations." Sims v. Star-Mindingall Water Sys., 619 So. 2d 1368, 1369 (Ala. 1993) (emphasis omitted). If the excavator breaches that duty and thereby causes harm to an individual traveler, the excavator is liable to that individual. The duty to the individual is simply a particularization of the duty to the public.

Ultimately, however, the problem with Rich's substantive-immunity exception is that it was raw public policy, not statutory interpretation. The opinion itself made clear that it was based on "public policy considerations," Rich, 410 So. 2d at 387, not the text. As this Court often emphasizes these days, it is not our prerogative to create law out of thin air, including inventing exceptions to statutes when we dislike their results. "'This Court's role is not to displace the legislature by amending statutes to make them express what we think the legislature should have done. Nor is it this Court's role to assume the legislative prerogative to correct defective legislation or amend statutes.'" Grimes v. Alfa Mut. Ins. Co., 227 So. 3d 475, 488-89 (Ala. 2017) (citation omitted). This limit is fundamentally embedded in the nature of our judicial power:

> "Fidelity to ... separation[]of[]powers ... requires us to determine and adhere to the meaning of the statute's text, even if doing so leads to an inefficient or undesirable result. Therefore, 'our inquiry begins with the language of the

> statute, and if the meaning of the statutory language is plain, our analysis ends there.' We must 'interpret that language to mean exactly what it says.'"

Lang v. Cabela's Wholesale, LLC, [Ms. 1200851, June 24, 2022] ___ So. 3d ___, ___ (Ala. 2022) (citations omitted). This means that we must apply a statute as it is written and leave for the Legislature to decide whether and how it will be rewritten to adapt to any undesirable results. In particular, if the Legislature decides that some kind of municipal immunity is appropriate, it knows how to create it. The Legislature has previously carved out immunity from municipal liability via other statutes. See §§ 4-4-4 (municipal-airport construction and management), 6-5-338 (discretionary functions of peace officers). In the absence of that kind of legislation, this Court has no business creating exceptions to § 11-47-190 based on nothing more than policy judgments.

When this Court first abolished municipal immunity in Jackson, we recognized "the authority of the legislature to enter the entire field, and further recognize[d] its superior position to provide with proper legislation any limitations or protections it deems necessary." 294 Ala. at 600, 320 So. 2d at 75. But then in Rich, we created a substantive-immunity exception out of whole cloth. Although the invalidity of this

exception was not briefed in this case, I encourage future parties and amici to fully ventilate this issue. And I urge this Court to overrule Rich and its progeny at the next opportunity.

SELLERS, Justice (dissenting).

Recognizing that there are areas "where the imposition of liability can be reasonably calculated to materially thwart the City's legitimate efforts to provide … public services," this Court has crafted an exception to cities' liability: substantive immunity. Rich v. City of Mobile, 410 So. 2d 385, 387 (Ala. 1982). This "narrow exception" applies "when a municipality's responsibility to provide for the public safety, health, or general welfare outweighs the reasons for imposing liability on the municipality." Lee v. Houser, 148 So. 3d 406, 419 (Ala. 2013) (plurality opinion). The main opinion holds that substantive immunity applies in these cases because the undisputed purpose of the meter-release inspections at issue was to promote public safety. Although I agree with the main opinion's characterization of the inspections themselves, Ian Boles's claims are based on the City of Orange Beach's withholding of those inspections to compel an action unrelated to promoting public safety -- namely, completing a subcontractor disclosure form. In my view, the financial information requested on that form has nothing to do with public safety, rendering any claim of substantive immunity based on the

pretext of filing that completed form before an inspection can be scheduled inapplicable.

Although the city now has an ordinance conditioning the inspections on the submission of the completed subcontractor form, that ordinance was not enacted until 2018, after the events made the basis of these actions. The city has not pointed to any written policy in effect before the ordinance's enactment that would provide a basis to postpone an inspection, thereby delaying the issuance of a certificate of occupancy. The subcontractor form required Boles to provide each subcontractor's license number and contact information, to describe the type of work performed, and to list the amount paid for the performed work. According to Boles, the city already had the requested information, except for the amount the subcontractors were paid. Further, Boles offered to submit the forms to the city, albeit without listing the amounts he had paid his subcontractors. Apparently, that compromise was unappealing to the city.

Between the information that the city possessed, Boles's willingness to provide forms containing the same information, and the lack of a written policy requiring submission of the forms, the city's

mandate for the completed forms can be attributed only to its desire to know the amount Boles paid his subcontractors. Nothing about any amount paid to a subcontractor is related to health, much less safety or the general welfare of the city's residents. Since the city withheld the inspections based on Boles's failure to submit the completed form, its motivation for doing so seems wholly unconnected to public safety. Instead, the city's purpose in withholding the inspections appears to have been chiefly aimed at "prevent[ing] a private citizen from developing [his] private property for [his] economic benefit," Lee, 148 So. 3d at 419, unless he complied with its demands. That purpose implicates none of the policy concerns underlying substantive immunity. The city's actions here appear to be using a regulatory scheme that on the surface seems appropriate, but becomes a punishment to prevent a property owner from developing property to its highest and best use. Rather than regulating public health and safety, the imposition of these regulations became a cudgel to force compliance and an excuse to postpone inspections until the financial penalty of not having a certificate of occupancy became too great and the property owner had no recourse but to submit. Cities are entitled to substantive immunity when health and safety concerns

provide a legal rationale for regulatory actions that would otherwise create liability. But, when a city uses its regulations to punish landowners under the guise of protecting public health and safety by regulating matters that are only tangentially related to that objective, there should be no substantive immunity. In such a case, a city may be liable for any damage occasioned by its withholding of a vital city service to enforce regulations with little, if any, basis in protecting public health and safety. Accordingly, I respectfully dissent from the Court's decision to reverse the trial court's judgment.

Wise and Bryan, JJ., concur.