Rel: December 6, 2019



# SUPREME COURT OF ALABAMA

**OCTOBER TERM, 2019-2020**

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**1180109**

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**City of Daphne**

**v.**

**David Fannon and Sarah Fannon**

**Appeal from Baldwin Circuit Court**
**(CV-15-900239)**

WISE, Justice.

The City of Daphne ("the City"), the defendant below, appeals from a judgment entered by the Baldwin Circuit Court in favor of David Fannon and Sarah Fannon, the plaintiffs below, in an action seeking damages pursuant to § 235, Ala.

Const. 1901, for the taking of, injury to, or destruction of the Fannons' property for public use. The City also challenges the judgment as a matter of law for the Fannons on its counterclaims. We affirm in part, reverse in part, and remand.

## Facts and Procedural History

In 1990, the Fannons purchased an unimproved lot on Lovett Lane in Daphne and constructed a house on that lot. To the north of, and parallel to, their lot was a 30-foot right-of-way that was owned by the City and that extended from Mobile Bay east up a slope past Lovett Lane to Captain O'Neal Drive. A streambed that was approximately three feet wide meandered along the right-of-way, partially onto the Fannons' lot, and back into the right-of-way and then into Mobile Bay. Also, the right-of-way was wooded and heavily covered with vegetation.

Within one year after purchasing the lot, the Fannons built a two-story house on the lot. As they were preparing the foundation, they placed an 18-inch-diameter PVC pipe under the foundation and along the path of the streambed where it meandered onto their lot so that the water would continue to

flow into Mobile Bay. They constructed concrete head walls around both ends of the pipe and used riprap on both ends to hold the pipe in place. For the next few years, the Fannons saw consistent seepage of water from underground into the right-of-way, but they testified that it was never more than an inch or two. During rain events, the Fannons sometimes saw approximately five or six inches of rain in the streambed; they testified that that water flowed through their 18-inch pipe and then back onto the right-of-way to the Mobile Bay.

David testified that, during the mid 1990s, the City took out all the vegetation that was on the right-of-way between Captain O'Neal Drive and Lovett Lane and covered the area, which was a sand bed, with riprap. He also testified that the vegetation started growing back within one year and that the changes did not seem to affect the way water flowed in the area. The Fannons testified that, in 1997, Hurricane Denny stalled over Mobile Bay for some time and brought approximately 20 inches of rain but that that large amount of water did not damage their property or the right-of-way. They further testified that their property did not suffer any water

damage as a result of Hurricane Ivan in 2004 or Hurricane Katrina in 2005.

David testified that, in late 2005, city workers removed the riprap from the right-of-way between Captain O'Neal Drive and Lovett Lane. The workers then installed a 48-inch-diameter pipe that dumped into the streambed near the edge of the Fannons' property. They also put down about 15 feet of riprap downstream from the outflow of the pipe. David testified that he notified the City about concerns that the work would change the water flow around his property and indicated that he would hold the City responsible for any damage but that the City did not respond.

David testified that, after the changes, the streambed washed out and eroded when it rained. As a result, in late 2006, he installed a 60-foot swale, which is basically a manmade ditch, in the right-of-way adjacent to the Fannons' property. It was 2 to 2½ feet deep and about 5 feet wide, and he used railroad ties on both sides and put down heavy cloth and riprap to slow the water.

David testified that, in March 2010, he was still concerned about the additional water flowing onto his

property. As a result, he wrote a letter to the mayor of the City explaining the work that had been done in 2005 and that nothing had been done afterward to finish piping the water into Mobile Bay. David testified that he once again advised the City that he would hold it responsible for anything that happened to their property when and if a big rain came. He stated that he never received a response from the City.

The Fannons testified that, on April 29 and 30, 2014, the area received about 30 inches of rainfall. David testified that the swale was nearly destroyed, that only about 7 feet of the 60-foot swale was still there, that the remaining cloth and riprap were washed away or buried under sand, and that a lot of sand was washed out from around tree roots. David stated that, as a result of the sand being washed out and uncovering the roots of trees, seven or eight tall trees that were in the right-of-way along the side of the swale fell onto the Fannons' house. He also stated that the limbs from the trees "scour[ed] some shingles and hit some things" and scratched a good bit of the stucco on the outside of the house.

David testified that he contacted the City about removing the trees from the Fannons' house and property to prevent further damage. The Fannons both testified that, during a conversation with Ashley Campbell, the environmental-programs manager for the City, Campbell told David to "do what you have to do to protect your property" while the City attempted to confirm the boundaries of the City's property. As a result, the Fannons hired someone to remove the trees from their house. David then had 80 feet of 30-inch pipe installed in the City's right-of-way near their house in an effort to prevent further erosion.

Avalisha Fisher, a civil engineer and FEMA certified floodplain manager, was hired by the Fannons to determine whether the City's installation of the 48-inch pipe caused the Fannons to have more water dumped onto their property and also whether the pipe caused an increase in the velocity of storm water coming onto the Fannons' property. She testified that some of her calculations showed that the pipe could have increased the velocity of the water by five times the previous rate and that that increase could have had impacts at the outlet of the pipe and up and down the streambed from there.

She also testified that the pipe and the riprap and other materials at the outlet had not been installed in such a way as to slow down the water and take some of the energy out of it farther down the pipe and even past the end of the pipe; as a result, she said, erosion was evident at the outflow point. Fisher testified that, because the trajectory of the pipe was different from the normal water flow in the right-of-way streambed, she "would predict some unpredictable results and probably some erosion [that] might not have been anticipated." She further testified that, but for the installation of the 48-inch pipe by the City, she did not know how the erosion that caused the trees to fall onto the Fannons' house would have occurred.

John Curry, an expert for the City in the field of civil engineering in hydraulics and hydrology, examined the property in April 2015, almost one year after the damage to the Fannons' house, to determine what could have caused erosion in the right-of-way adjacent to the house. He testified that he believed that Fisher's calculations as to the velocity of the water through the pipe were too high. Curry stated that the 18-inch pipe that was installed under the foundation of the

Fannons' house was not large enough to handle all the water coming from the City-installed 48-inch pipe during the April 2014 storm; that water could have pooled between the 18-inch pipe and 48-inch pipe and partially backed up into the 48-inch pipe; and that that pool would have slowed down the water coming from the 48-inch pipe and avoided some erosion in that area closer to the 48-inch-pipe outlet. Although he did not believe that the 48-inch pipe led to the damage to the Fannons' house, he also stated that, because of the storm and the natural layout of the land, he nonetheless would have anticipated significant erosion on the slope behind the house. Curry further stated that, when designing storm-water systems, it is important to consider conditions that already exist downstream and how a system will affect those conditions. Finally, he stated that, if the condition downstream is undersized or not adequate to accept the flow, there could be overflows, erosion, and other problems.

On February 24, 2015, the Fannons sued the City and Richard D. Johnson, the acting director of public works for the City, in the Mobile Circuit Court. The complaint stated claims alleging negligent drainage design and maintenance

(Count I),[1] trespass (Count V), and inverse condemnation (Count VI) against the City. It stated a claim of wantonness (Count III) against Johnson. Finally, it stated claims of negligence (Count II) and abuse of process (Count IV) against both the City and Johnson.

On April 13, 2015, Johnson filed a motion to dismiss the complaint against him pursuant to Rule 12(b)(1) and (b)(6), Ala. R. Civ. P. On April 15, 2015, the City filed a motion to dismiss Counts II and IV of the complaint against it pursuant to Rule 12(b)(1) and (b)(6), Ala. R. Civ. P. Ultimately, the motions to dismiss were denied.

On March 17, 2016, the City filed an answer to the complaint and included multiple affirmative defenses. It also filed counterclaims against the Fannons alleging negligence and trespass in connection with the installation of the 80 feet of 30-inch pipe in the right-of-way in 2014. The City alleged that, because the construction was not done in the proper manner, the Army Corps of Engineers had cited the City

[1]This claim included an allegation that, "[a]s a proximate result of said negligence, the Fannons incurred damage to their property, significant expenses in repairs, a diminution in value of their real property and mental anguish."

for violating the Clean Water Act and that the City would be required to take action to correct the violation that was created by the Fannons.

On March 17, 2016, Johnson filed an answer to the complaint and included several affirmative defenses. He later amended his answer.

On July 14, 2017, Johnson filed a motion for a summary judgment and a memorandum in support of that motion. On July 17, 2017, the City filed a motion for a partial summary judgment. On September 15, 2017, the Fannons filed responses to Johnson's and the City's motions. On September 19, 2017, the trial court entered a summary judgment in favor of Johnson and a partial summary judgment in favor of the City on Counts II and IV. The City also moved for a summary judgment as to the Fannons' claims for damages resulting from mental anguish (see note 1 supra), and the trial court granted that motion.

On July 20, 2018, the Fannons filed an answer to the City's counterclaims. They included several affirmative defenses in their answer. On June 6, 2018, the City moved to voluntarily dismiss its counterclaims against Sarah, and the trial court granted that motion to dismiss.

The case was tried before a jury on August 6-10, 2018. At the close of the Fannons' case, the City filed a motion for a judgment as a matter of law, arguing, in part, that the Fannons had failed to prove that the damages were ascertainable at the time the City installed the 48-inch pipe; the trial court denied that motion. At the close of all the evidence, the City filed a motion for a judgment as a matter of law, again arguing, in part, that the Fannons had failed to prove that the damages were ascertainable at the time the City installed the 48-inch pipe.[2] David made an oral motion for a judgment as a matter of law on the City's counterclaims alleging negligence and trespass, which the trial court granted. The trial court denied the City's motion for a judgment as a matter of law, and the jury returned a verdict in favor of the Fannons on their inverse-condemnation claim and awarded compensatory damages in the amount of $450,000. The City filed multiple posttrial motions, again arguing that the Fannons had failed to prove as part of their inverse-condemnation claim that the damages were ascertainable at the

[2]During the charge conference, the Fannons abandoned their claims of negligent drainage design and maintenance (Count I) and trespass (Count V).

time the City installed the 48-inch pipe; the trial court denied those motions. This appeal followed.

Standard of Review

> "'"When reviewing a ruling on a motion for a [judgment as a matter of law], 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).... 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 [judgment as a matter of law], 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)."'

> "[Alabama Dep't of Transp. v. Land Energy, Ltd.,] 886 So. 2d [757,] 791-92 [(Ala. 2004)] (quoting Ex parte Alfa Mut. Fire Ins. Co., 742 So. 2d 1237, 1240 (Ala. 1999))."

Housing Auth. of Birmingham Dist. v. Logan Props., Inc., 127 So. 3d 1169, 1173 (Ala. 2012).

Discussion

I.

The City argues that it was entitled to a judgment as a matter of law on the Fannons' inverse-condemnation claim. Specifically, it contends that the damages resulting from the only injury that was attributed to the installation of the 48-inch pipe -- i.e., trees falling from the right-of-way and scraping the Fannons' house -- were not ascertainable at the time the pipe was installed nine years before the injury occurred. We agree with the City.

Section 235, Ala. Const. 1901, provides, in relevant part:

> "Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction."

In Logan Properties, 127 So. 3d at 1173-74, this Court explained:

> "Section 235 does not expressly discuss inverse condemnation; however, statutes and this Court's caselaw have long recognized that, if an entity holding eminent-domain powers fails to make compensation before taking, injuring, or destroying private property, the aggrieved property owner is entitled to assert an inverse-condemnation claim against that municipal corporation. See Jefferson Cnty. v. Southern Natural Gas Co., 621 So. 2d 1282, 1287 (Ala. 1993) ... ('"Inverse condemnation" refers to a legal action against a governmental authority to recover the value of property that has been taken by that governmental authority without exercising its power of eminent domain -- it is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when the taking authority has not initiated condemnation proceedings.'), and § 18-1A-32, Ala. Code 1975 ('A condemnor shall not intentionally make it necessary for an owner of property to commence an action, including an action in inverse condemnation, to prove the fact of the taking of his property.'). Applying § 235, a plaintiff asserting an inverse-condemnation claim is required to put forth substantial evidence of the following elements: (1) that the defendant is an entity 'invested with the privilege of taking property for public use'; (2) that the plaintiff's property was 'taken, injured, or destroyed'; and (3) that that taking, injury, or destruction was caused 'by the construction or enlargement of [the defendant's] works, highways, or improvements.' See, e.g., Mahan v. Holifield, 361 So. 2d 1076, 1079 (Ala. 1978) ('[Section 235] has been interpreted to support a cause of action by a private landowner whose property is taken or damaged by a municipality as a consequence of its acts of construction or enlargement.')."

However, § 235 has limited application. As this Court noted in Hamilton v. Alabama Power Co., 195 Ala. 438, 70 So. 737 (1915):

> "As has been repeatedly stated, by this court, section 235 of our Constitution was borrowed from Pennsylvania, and in placing it in our Constitution of 1875, and readopting it in the Constitution of 1901, we did so in view of the construction that had been given it by the Supreme Court of the state from which it was taken. This section has often been construed by the Pennsylvania court, and the court said: 'It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason, among others, that it requires payment to be made therefor, or security to be given, in advance. This is only possible where the injury is the result of the construction or enlargement, for how can injuries which flow only from the future operation of the road, and which may never happen, be ascertained in advance, and compensation made therefor?' Pa. R. Co. v. Merchant, 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659 [(1888)]; Railroad Co. v. Lippincott, 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618 [(1887)]; Pa. R. Co. v. Walsh, 124 Pa. 544, 17 Atl. 186, 10 Am. St. Rep. 611 [(1889)]."

195 Ala. at 449, 70 So. at 741.

Also, in Mahan v. Holifield, 361 So. 2d 1076 (Ala. 1978), property belonging to the plaintiffs, Cherokee Hills Lake, Inc., and Phil Mahan, was flooded when a dam broke in 1973. The plaintiffs alleged that the flooding resulted in large

amounts of silt and debris being deposited on their land. The plaintiffs sued the City of Tuscaloosa and R.F. Holifield, alleging negligent construction and maintenance and wantonness. Both plaintiffs alleged claims of "breach of a quasi-contract, or one implied by law." 361 So. 2d at 1078.

> "Evidence adduced at trial showed that defendant Holifield acquired ownership of Woodland Hills Lake and the property surrounding the lake in 1955. The dam was erected by the previous owner. Woodland Hills Subdivision was platted in 1957, and Holifield began selling off adjoining lots, but retained ownership of the lake. A fifty-foot easement across the dam was dedicated in the plat to the City of Tuscaloosa for the purpose of maintaining a roadway. This road was, in fact, maintained by the City and there is no question but that the City expressly or impliedly accepted the dedication.
>
> "When the Woodland Hills dam broke for the first time in 1961, the City, with its labor crews and equipment, rebuilt it. There was testimony that Holifield provided dirt and concrete to aid the City's reconstruction project. At that time, the City constructed a spillway in the center of the dam and for some time thereafter continued a program of general maintenance. In 1972, the City performed general repair work on the spillway area which had begun to deteriorate rapidly. It was this deterioration which allegedly led to the 1973 break.
>
> "Several expert witnesses testified to the poor construction of the dam, including improper spillway placement, incorrect overflow pipes, poor quality base material, improper slope, and improper monitoring and maintenance practice.

> "At the close of the plaintiffs' evidence, the trial court granted defendant Holifield's motion for a directed verdict.[3] The City's motion for a directed verdict was denied and the plaintiffs were permitted to amend their pleadings. The jury returned a verdict in favor of the City.
>
> "The plaintiffs raise numerous issues for our review. As to defendant Holifield, they argue that the trial court erroneously granted the motion for a directed verdict. They say that the facts created at least a scintilla of evidence showing that Holifield negligently breached his duty to properly reconstruct and maintain the dam.
>
> "....
>
> "It should be noted that a cause of action against the City sounding in tort was foreclosed by the plaintiffs' failure to comply with the six-month notice requirement of the Statute of Non-Claims (now Section 11-47-23, Code 1975). Instead, the plaintiffs' stated cause of action sounded in assumpsit and relied on Art. XII, § 235, Constitution of Alabama (1901)."

Mahan, 361 So. 2d at 1078. On appeal, the plaintiffs raised two issues regarding the trial court's judgment entered on the verdict in favor of the City of Tuscaloosa:

> "(1) Does negligent maintenance of a city street give rise to a cause of action under Sec. 235 of the Constitution?

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[3]Effective October 1, 1995, the motion for a directed verdict was renamed a motion for a judgment as a matter of law. See Rule 50, Ala. R. Civ. P.

> "(2) Was it prejudicial error for the trial court to charge the jury that the plaintiffs were required to show negligence on the part of the City in this particular lawsuit?"

361 So. 2d at 1079. In addressing these issues, this Court stated:

> "[Section 235] has been interpreted to support a cause of action by a private landowner whose property is taken or damaged by a municipality as a consequence of its acts of construction or enlargement. In such actions, the property owner may waive the tort and sue in assumpsit for compensation. Hunter v. City of Mobile, 244 Ala. 318, 13 So. 2d 656 (1943).
>
> "The issue, then, in light of Hunter, is whether the plaintiffs' property was 'either taken or damaged for public purposes.' This Court has long recognized that:
>
> > "'The right of recovery of compensation by the property owner, under the provisions of section 235 of the Constitution, is confined, of course, to where the municipality is engaged in the construction or enlargement of the works, highways, or improvements of the city.' City of Birmingham v. Graves, 200 Ala. 463, 76 So. 395 (1917).
>
> "The taking which is the basis of the alleged implied contract in this case is the reconstruction of the dam in 1961. Injury did not occur until 1973, when the dam broke for the second time. Damages recoverable under section 235 of our Constitution, however, are only those capable of being ascertained at the time the city's works are being constructed or enlarged. Johnson v. City of Birmingham, 25 Ala. App. 389, 147 So. 452 (1933),

citing Hamilton v. Alabama Power Co., 195 Ala. 438, 70 So. 737 (1915). This Court has held that damages occurring subsequent to the time of taking are not recoverable:

> "'The injuries complained of did not exist, nor could the damages therefor be ascertained upon the construction of the dam, but arose subsequent thereto as the result of the maintenance of same in conjunction with subsequent intervening cause. In other words, the injuries complained of were not capable of being ascertained at the time the dam was constructed, or even so reasonably contemplated as to authorize payment or security therefor as provided by said section 235 at the time of the construction or enlargement of the ways, works, etc.' Meharg v. Alabama Power Co., 201 Ala. 555, 556, 78 So. 909, 910 (1918), accord City of Bessemer v. Chambers, 242 Ala. 666, 8 So. 2d 163 (1942).

"In Hunter v. City of Mobile, supra, the plaintiffs were allowed to waive the tort and recover under an implied contract based upon section 235, but that case can be distinguished because in Hunter the tortious conduct and the 'taking' were concurrent. The value of the plaintiffs' commercial property was diminished by the construction of the Bankhead Tunnel in front of their property on Government Street.

"We conclude that the injury to plaintiffs caused by the collapse of the Woodland Hills Dam was not ascertainable at the time of the alleged taking 12 years earlier and was not the type of taking, injury or destruction contemplated by section 235. While we recognize that the remedial nature of the section suggests its liberal construction, to allow so broad a field of operation as the plaintiffs

> would have us adopt would allow a contract action in every case of alleged negligent construction or maintenance by a municipal corporation. This result, we feel, is not mandated by our constitution or by this Court's prior decisions."

Mahan, 361 So. 2d at 1079-80. See also Meharg v. Alabama Power Co., 201 Ala. 555, 556, 78 So. 909, 910 (1918) ("The injuries complained of did not exist, nor could the damages therefor be ascertained upon the construction of the dam, but arose subsequent thereto and as the result of the maintenance of same in conjunction with subsequent intervening causes. In other words, the injuries complained of were not capable of being ascertained at the time the dam was constructed, or even so reasonably contemplated as to authorize payment or security therefor as provided by said section 235 at the time of the construction or enlargement of the ways, works, etc."). Contrast Jefferson Cty. v. Southern Nat. Gas Co., 621 So. 2d 1282, 1288 (Ala. 1993) ("[T]here was sufficient evidence that the injury to Sonat's pipelines, which was the proximate result of the County's widening of Valley Creek, was clearly ascertainable at the time of construction.").

In this case, the City installed a 48-inch pipe in the right-of-way near the Fannons' house. Shortly thereafter,

David installed a swale in the right-of-way, and there were no erosion problems for approximately nine years. However, an unprecedented rain event occurred on April 29 and 30, 2014, and it caused erosion in the right-of-way. Some of that erosion was around tree roots, which caused trees growing in the City's right-of-way to fall onto the Fannons' house and damage the house. Although experts for the Fannons and the City testified that some erosion from the installation of the 48-inch pipe was possible, neither testified that it was foreseeable or ascertainable at the time of the installation of the 48-inch pipe that trees in the right-of-way would fall onto the Fannons' house and damage it nine years later. In fact, the Fannons did not present any evidence to establish that it was ascertainable, or foreseeable, during the construction of the drainage project nine years earlier, that erosion would occur and cause trees from the City's right-of-way to fall onto and damage the Fannons' house. As the Court of Appeals noted in Johnson v. City of Birmingham, 25 Ala. App. 389, 393, 147 So. 452, 455 (1933):

> "Engineering is for the most part an exact science, and in the main it determines conclusions from data and measurement accurate in themselves and forming results which may be depended upon. But

> drainage is one branch of engineering wherein the flow of water to be controlled depends in a large degree upon estimates of rainfall over a period of years, and, while the terrain to be drained may be accurately surveyed and platted, the conduits for handling the flow must of necessity rest largely in the individual estimate of the engineer making the survey. The projected improvement may be correct from an engineer's standpoint and its construction according to plans and specifications free from negligence, imputable to the city, but, if it subsequently appears that the estimated pipe or conduit is insufficient to carry the water flow, a continuance of this condition would be actionable negligence, entitling plaintiff to damages. Such injuries as are here complained of did not exist, nor could the damages therefor be ascertained upon the construction of the improvements described in the pleas, but they arose subsequent thereto, as the result of the same in conjunction with subsequent intervening causes ...."

Accordingly, the trial court erred in denying the City's motions for a judgment as a matter of law as to the Fannons' inverse-condemnation claim.

II.

The City also argues that the trial court erred in entering a judgment as a matter of law in favor of David on the City's counterclaims of trespass and negligence. Specifically, it contends that there were questions of fact as to these claims that should have been decided by the jury. We disagree.

The Fannons testified that, before they had the 30-inch pipe installed in the right-of-way, Campbell specifically told David to "do what you have to do to protect your property." Campbell testified that she did not recall her exact wording, but she stated that her response referred only to the removal of the trees from the Fannons' house and not to the installation of the 30-inch pipe in the right-of-way. However, as the trial court noted when ruling on the motion for a judgment as a matter of law in favor of David, the City did not present any evidence to establish that Campbell stated to the Fannons that she was limiting that permission to the cutting and removal of trees.

Richard Johnson, the director of public works and an engineer for the City, testified that he had talked to David about the trees that were on his house and that he had told David that, if David was going to have the trees cut down, Johnson would not get in the way. He also testified that they had had a discussion about permits possibly being required if David wanted to do any type of drainage work, even on his own property. However, even though Johnson stated that he did not give David permission to go onto the right-of-way to install

the 30-inch pipe, the trial court noted that he did not specifically testify that he made any statement to the Fannons that rescinded Campbell's permission to David to do what he had to do to protect his property, and the City did not present any other evidence to that effect.

In addition, as the trial court noted, the Fannons presented undisputed evidence that they believed that the situation was an emergency because another big rain was expected in the area and that David had had work done, including the installation of a 30-inch pipe, as a temporary measure to prevent any further damage to the Fannons' property from the anticipated rain while the City determined ownership of the right-of-way. The trial court also noted that the Fannons presented undisputed evidence that David stopped going into the right-of-way and performing any work in that area after the City issued a cease-and-desist letter and that the 30-inch pipe, which was a temporary measure to protect the Fannons' property, worked well for almost one year after it was installed. Further, the trial court noted that the City had not presented any evidence to establish that the Fannons had a duty to design and install structures in that right-of-

way that would be permanent and up to the City's specification and that it had not presented any evidence indicating that it had made any efforts to remove any of the items the Fannons had placed in the right-of-way until almost one year after the last work the Fannons did in that area. Finally, the trial court noted that the City had not presented any evidence as to the value of the right-of-way before and after the installation of any structures in that right-of-way by the Fannons.

In entering the judgment as a matter of law in favor of David as to the City's trespass counterclaim, the trial court specifically found that the Fannons presented undisputed evidence that Campbell told David to "do what you have to do to protect your property" and that neither she nor anyone else limited that permission to cutting trees or restricted them from doing work in the right-of-way to protect their property. When granting the judgment as a matter of law as to the City's negligence counterclaim, the trial court specifically found that the Fannons had presented undisputed evidence that they believed that another big rain event was coming before they had the 30-inch pipe installed, that the City was in the

process of determining where the boundary lines were and was not doing anything to alleviate the drainage and erosion problems, and that David installed the 30-inch pipe as an emergency measure to alleviate the drainage and erosion problems in the short term pursuant to the permission from Campbell to do what he had to do to protect his property. As the trial court noted, the City did not present any evidence to refute the Fannons' position that there was an emergency situation, as defined in the City's right-of-way ordinance, and that David took steps to protect their property until the City could take remedial action. We agree that the City did not refute the Fannons' evidence as to its trespass and negligence counterclaims, and we conclude that the trial court did not err in entering a judgment as a matter of law as to those counterclaims.[4]

## Conclusion

For the above-stated reasons, we affirm the trial court's judgment as a matter of law in favor of David on the City's counterclaims alleging trespass and negligence; reverse the

[4]Based on our resolution of these issues, we pretermit discussion of the remaining arguments as to these issues raised on appeal.

trial court's judgment in favor of the Fannons on their inverse-condemnation claim; and remand the case to the trial court for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Bolin, Shaw, Mendheim, and Stewart, JJ., concur.

Bryan and Sellers, JJ., concur in the result.

Parker, C.J., dissents.

Mitchell, J., recuses himself.