CITATION OF APPEAL — Moore Printing Company, Bay Minette, Alabama

THE STATE OF ALABAMA
Baldwin County - Circuit Court

TO ANY SHERIFF OF THE STATE OF ALABAMA—GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the 15th day of April, Monday in ....., 19 71, in a certain cause in said Court wherein INEZ N. RADCLIFFE Plaintiff, and CITY OF FAIRHOPE, A MUNICIPAL CORP. Defendant, a judgement was rendered against said CITY OF FAIRHOPE, ALABAMA, A Municipal Corporation to reverse which Judgment, the said Defendant applied for and obtained from this office an APPEAL, returnable to the next Term of our Coutt of Civil Appeals Court of the State of Alabama, to be held at Montgomery, on the ..... day of ....., 19..... next, and the necessary bond having been given by the said CITY OF FAIRHOPE, ALABAMA, A Municipal Corporation by: R. C. Macon, as its Mayor, No surety required under Title 37, Section 443, Code of Alabama with ~~XXX~~ ~~sureties~~,

Now, You Are Hereby Commanded, without delay, to cite the said Inez N. Radcliffe or Chason, Stone & Chason, attorneys to appear at the next Term of our Court of Civil Appeals said ~~Supreme~~ Court, to defend against the said Appeal, if they think proper.

Witness, EUNICE B. BLACKMON, ~~Alice Jones Dock~~, Clerk of the Circuit Court of said County, this 20th day of May, A. D., 19 71

Attest:

Eunice B. Blackmon Clerk.

Received 24 day of May 19 71
and on 27 day of May 1971
I served a copy of the within Citation
on Inez N. Raddcliffe

By service on John E. Chason

TAYLOR WILKINS, Sheriff
By W A Tillery D. S.

Sheriff claims _____ miles at
Ten Cents per mile Total $_____
TAYLOR WILKINS, Sheriff
BY _____
DEPUTY SHERIFF

MAY 24 1971

CASE NO. 9153

CIRCUIT COURT
Baldwin County, Alabama

INEZ N. RADDCLIFFE

Vs. } **Citation in Appeal**

CITY OF FAIRHOPE, ALABAMA,
A Municipal corporation

Issued 20th day of May, 19 71

SERVE: John Earle Chason or n. C. Stone, Jr.

We, the jury, find for the Plaintiff and assess her damages at the sum of $ 3550.00

Laurence Ivan Lipscomb

Foreman

JURY LIST - BALDWIN COUNTY, ALABAMA - SPRING TERM - APRIL 12, 1971

Inez Radcliff vs City of F'hope

1. Alford, Ann B., Baldwin Times, Bay Minette
2. ~~Allen, James B., Jr., Farmer, Lillian~~ P10
3. Ballard, Lloyd J., Merchant, Bay Minette
4. ~~Becker, Earl V., Mailman, Bay Minette~~ P11
5. ~~Becker, Ina H., Bookkeeper, Bay Minette~~ D2
6. ~~Page, Cornellia B., Houwewife, Bay Minette~~ D3
7. ~~Lewis, Glen M., Salesman, Fairhope~~ P5
8. ~~Keevan, Jean D., Housewife, Fairhope~~ P12
9. ~~Malbis, George, Garage Operator, Spanish Fort~~ P3
10. Melton, Estelle, Housewife, Spanish Fort
11. ~~Nelson, Clarence A., Merchant, Fairhope~~ P8
12. ~~Blackwell, Earl, Merchant, Foley~~ D4
13. ~~Brantley, Doris Stuart, Housewife, Bay Minette~~ D5
14. Lipscomb, Edward, Farmer, Foley
15. ~~Teem, Keeneth, Linesman, Foley~~ D12
16. Pumphrey, Rex, Vulcan Signs, Foley
17. ~~Rada, Gus F., Farmer, Silverhill~~ D8
18. Ryan, Dorothy L., Housewife, Bay Minette
19. Stallworth, F. W., Painter, Summerdale
20. ~~Strong, Charles W., Jr., Merchant, Bay Minette~~ D11
21. ~~Tenison, Ralph Bruce, Monuments, Bay Minette~~ P4
22. ~~Chestang, Pleham, D. Brookley Field, Bay Minette~~ D7
23. ~~Coleman, Daisy Nell, Vanity Fair, Perdido~~ P9
24. ~~Coleman, Maynard, Civil Service, Perdido~~ P7
25. Cooper, Claude, Farmer, Rosinton
26. ~~Russell M. Crawford, Electrician, Bay Minette~~ D9
27. Deal, Harold L., State Of Alabama, Foley
28. ~~Deason, E. L., Retired, Foley~~
29. ~~Henry, J. W., Salesman, Fairhope~~
30. ~~Hocutt, William B., Office Work, Fairhope~~ D6
31. ~~Holman, Walter C., Printer, Fairhope~~ D10
32. ~~Huete, James S., Retired Fairhope~~
33. Irvin, E. L. Farmer, Foley
34. ~~Thames, Grady, Farmer Robertsdale~~ P1
35. ~~Tunstall, Soloman, Laborer, Stockton~~ P6
36. ~~Brown, Hilard, Bay Minette, Alabama~~ P2
37. ~~Woodson, G. W., Retired, Bay Minette, Alabama~~ D1
38. Bishop, Bobby Jean, Bookkeeper, Bay Minette, Alabama
39. Lipscomb, Lawrence, Farmer, Foley, Alabama

22
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12

36
12
24
12
12

P-XXXXX XXXXX XX

D-XXXXX XXXXX XX

STATE OF ALABAMA

IN THE CIRCUIT COURT - AT LAW

BALDWIN COUNTY

TO: ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summon City of Fairhope, Alabama, a municipal corporation, to appear within thirty days from the service of this Writ in the Circuit Court to be held for said County at the place of holding same, then and there to answer the Complaint of Inez N. Raddcliffe.

Witness my hand this 27 day of Feb, 1970.

Irene Luck
Clerk

INEZ N. RADDCLIFFE, Plaintiff,

vs.

CITY OF FAIRHOPE, ALABAMA, A Municipal Corporation, Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

CV 9153

COUNT ONE:

The Plaintiff claims of the Defendant the sum of Ten Thousand Dollars ($10,000.00) as damages for that heretofore on, to-wit, the 3rd day of May, 1968, the Defendant willfully ~~and~~ or wantonly caused or allowed the sewer lines located within the City of Fairhope, Alabama, which it maintained and operated, to overflow and flood the Plaintiff's home and residence located at ~~256~~ 206 Pier Street in the City of Fairhope, Alabama, with raw sewage and refuse. As a proximate result of such willful ~~and~~ or wanton conduct on the part of the Defendant, the Plaintiff was willfully ~~and~~ or

wantonly injured in this, to-wit: the furniture, furnishings, personal effects in and bathroom fixtures and floors of the Plaintiff's home and residence were damaged; foul, obnoxious and objectionable odors were caused to permeate Plaintiff's said home and residence; Plaintiff was put to great expense in renovating, cleaning and deodorizing said premises; Plaintiff was caused to suffer great mental pain and anguish. The Plaintiff further alleges that a statement of claim for the above enumerated damages was filed with the Defendant within six months after May 3, 1968 and that the said claim was thereafter disallowed by the Defendant, hence this suit.

COUNT TWO:

The Plaintiff claims of the Defendant the sum of Ten Thousand Dollars ($10,000.00) as damages for that heretofore on, to-wit, the 3rd day of May, 1968, the agents, servants or employees of said Defendant, while acting within the line and scope of their employment as such agents, servants or employees, willfully ~~and~~ or wantonly caused or allowed sewer lines located within the City of Fairhope, Alabama, which sewer lines were maintained and operated by the Defendant, to overflow and flood the Plaintiff's home and residence located at ~~256~~ 206 Pier Street, in the City of Fairhope, Alabama, with raw sewage and refuse. As a proximate result of such willful and wanton conduct of the agents, servants or employees of the Defendant, the Plaintiff was willfully ~~and~~ or wantonly injured in this, to-wit: the furniture, furnishings, personal effects in and bathroom fixtures and floor of the Plaintiff's home and residence were damaged; foul, obnoxious and objectionable odors were caused to permeate Plaintiff's said home and residence; Plaintiff was put to great expense in renovating, cleaning and deodorizing said premises; Plaintiff was caused to suffer great

mental pain and anguish. The Plaintiff further alleges that a statement of claim for the above enumerated damages was filed with the Defendant within six months after May 3, 1968, and that the said claim was thereafter disallowed by the Defendant, hence this suit.

CHASON, STONE & CHASON

By: John E. Chason
Attorneys for Plaintiff

The Plaintiff respectfully requests a trial of this cause by a jury.

CHASON, STONE & CHASON

By: John E. Chason
Attorneys for Plaintiff

FILED

FEB 27 1970

ALICE J. BUCK CLERK REGISTER

VOL 66 PAGE 749

We, the jury, find for the Plaintiff and assess her damages at the sum of $3550.00.

Laurence Ira Lipscomb
Foreman

No. 9153

INEZ N. RADDCLIFFE,

Plaintiff,

vs.

CITY OF FAIRHOPE, ALABAMA, A Municipal Corporation,

Defendant.

* * * * * * * * * * * * * * * * * * *

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

AT LAW

* * * * * * * * * * * * * * * * * * *

SUMMONS AND COMPLAINT

* * * * * * * * * * * * * * * * * * *

FILED
FEB 27 1970
ALICE J. DUCK CLERK REGISTER

CHASON, STONE & CHASON
ATTORNEYS AT LAW
P. O. BOX 120
BAY MINETTE, ALABAMA

Received 2 day of March 1970

and on 6 day of March 1970

I served a copy of the within S&C

on City of Fairhope

By service on Mrs. Smith, City Clerk

TAYLOR WILKINS, Sheriff

By [illegible] D.S.

W. Fairhope [illegible]

TAYLOR WILKINS, SHERIFF OF BALDWIN COUNTY, ALABAMA, CLAIM $1.50 EACH FOR SERVING 1 PROCESS(ES) AND TRAVEL EXPENSE ON EACH OF $2.00 PROCESS(ES) OR A TOTAL OF $3.50

VOL 66 PAGE 755

_____Div. No._____ CERTIFICATE OF APPEAL. (Civil Cases,)

No. 9153

BALDWIN County, Circuit Court.

INEZ N. RADDCLIFFE
Plaintiff.
vs.

CITY OF FAIRHOPE, ALABAMA, A Municipal Corporation
Defendant.

I, Eunice B. Blackmon Clerk of Circuit Court, of Baldwin County, Alabama, hereby certify that in the cause of Inez N. Raddcliffe plaintiff____, vs.

City of Fairhope,Alabama, a municipal corporation defendant____, which was tried and determined in this Court on the 15th day of April 1971, in which there was a judgment for Three Thousand, Five Hundred Fifty and no/100 Dollars, in favor of the plaintiff, (or judgment for defendant,) the Defendant on the ~~15th~~ 20th day of ~~April~~ May 1971, took an appeal to the Court of Civil Appeals, Court of Alabama to be holden of and for said State.

I further certify that J. B. Blackmon filed security for cost of appeal, to the Court of Civil Appeals Court, on the 20th day of May 1971, and that The City of Fairhope, a municipal Corporation, _____, are sureties on the appeal bond.

I further certify that notice of the said appeal was on the 27 day of May 1971, served on John Earle Chason as attorney of record for said appellee, and that the amount sued for was Ten Thousand and no/100 - - - - Dollars. (Or ~~certain lands~~) (Or ~~personal property~~.)

Witness my hand and the seal of this Court, this the 27 day of May 1971.

Eunice B. Blackmon
Clerk of the Circuit Court of
Baldwin County, Alabama.

ROBERTS & SON, BIRMINGHAM

INEZ N. RADDCLIFFE,		
Plaintiff,		IN THE CIRCUIT COURT OF
VS.		
		BALDWIN COUNTY, ALABAMA
CITY OF FAIRHOPE, ALABAMA, a Municipal Corporation,		AT LAW NO. 9153
Defendant.		

PLEA IN ABATEMENT

Now comes the defendant, City of Fairhope, Alabama, a municipal corporation, by its attorney, and alleges that this cause of action is barred by the one-year statute of limitations.

WHEREFORE, defendant moves the court to abate this action.

J. B. Blackburn

Attorney for Defendant

STATE OF ALABAMA)
*
BALDWIN COUNTY)

Before me, the undersigned authority, in and for said County in said State, personally appeared J. B. Blackburn, who, after being by me first duly and legally sworn, deposes and says: That he is attorney for the defendant in the above styled cause, that he has read the foregoing plea in abatement, and that the facts stated therein are true.

J. B. Blackburn

Sworn to and subscribed before me on
this the 31st day of March, 1970.

Ernestine R. Sims

Notary Public, Baldwin County, Alabama

I hereby certify that I mailed a copy of the foregoing plea in abatement to the office of Chason, Stome and Chason, attorneys for plaintiff, in Bay Minette, Alabama, on this the 31st day of March, 1970.

J. B. Blackburn

Attorney for Defendant

FILED

MAR 31 1970

ALICE J. BUCK CLERK REGISTER

9153

INEZ N. RADDCLIFFE, Plaintiff,	◊	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA
VS.	◊	
CITY OF FAIRHOPE, ALABAMA, a Municipal Corporation,	◊	AT LAW NO. 9153
Defendant.	◊	

PLEAS

Now comes the defendant, by its attorneys, and for plea to the complaint and to each and every count thereof, separately and severally, assigns, separately and severally, the following:

1. The defendant, for answer to the complaint, saith that it is not guilty of the matters alleged therein.

2. The defendant, for answer to the complaint, saith that the plaintiff's cause of action is barred by the statute of limitations of one year.

J. T. Blackburn

John V. Diehl

Attorneys for Defendant

I hereby certify that I delivered a copy of the foregoing pleas to Norborne C. Stone, Esquire, attorney for plaintiff, on this the 13th day of April, 1971.

J. T. Blackburn

Of Counsel for Defendant

Filed
4-13-71
Eunice B. Blackmon
Clerk

INEZ N. RADDCLIFFE, Plaintiff,	X	IN THE CIRCUIT COURT OF
vs.	X	BALDWIN COUNTY, ALABAMA
CITY OF FAIRHOPE, a municipal corporation, Defendant.	X	AT LAW NO. 9153

DEMURRER

Comes now the Plaintiff in the above styled cause and demurs to the plea in abatement heretofore filed by the Defendant in the above styled cause and shows unto the Court the following separate and several grounds in support thereof:

1. That said plea does not constitute a good and sufficient defense to a count for willful and wanton negligence.

CHASON, STONE & CHASON

By: John E. Chason
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this 21st day of April 1970.

John E. Chason

FILED

APR 21 1970

ALICE J. DUCK CLERK REGISTER

VOL 66 PAGE 751

9/5/3

INEZ N. RADDCLIFFE, Plaintiff,	0	
VS.	0	IN THE CIRCUIT COURT OF
		BALDWIN COUNTY, ALABAMA
CITY OF FAIRHOPE, ALABAMA, a Municipal Corporation,	0	AT LAW NO. 9153
Defendant	0	

DEMURRER TO ORIGINAL COMPLAINT

Now comes the defendant, by its attorney, and demurs to the original complaint heretofore filed in this cause and to each and every count thereof, separately and severally, and as grounds of such demurrer assigns, separately and severally, the following:

1. It does not state a cause of action.

2. No facts are alleged to state a cause of action against the defendant under the provisions of Title 37, Section 502 of the Code of Alabama.

3. No facts are alleged to state a cause of action against the defendant under the provisions of Title 37, Section 503 of the Code of Alabama.

4. No facts are alleged to show that the injury done to or wrong suffered by the plaintiff was done or suffered through the neglect, carelessness or unskillfulness of some agent, officer or employee of the defendant municipality engaged in work therefor and while acting in the line of his duty.

5. No facts are alleged to show that the injury done to or wrong suffered by the plaintiff was done or suffered through the neglect, carelessness or failure to remedy some defect in the streets, alleys, public ways or buildings of the defendant municipality after the same had been called to the attention of its City Council, or after the same had existed for such unreasonable length of time as to raise a presumption of knowledge of such defect on

Filed; April 9, 1971 Telfair J. Mashburn Judge

the part of the defendant City Council.

6. It affirmatively appears that the plaintiff has not complied with the provisions of Title 37, Section 503 of the Code of Alabama.

7. No facts are alleged to show that the plaintiff has complied with the provisions of Title 37, Section 503 of the Code of Alabama.

8. There is a misjoinder of causes of action.

9. It affirmatively appears from the allegations of Count Two of the complaint that it is an action of trespass on the case.

10. It affirmatively appears that Count Two of the complaint is barred by the one-year statute of limitations.

11. The allegations of the complaint are vague, indefinite and uncertain.

12. The allegations of the complaint are conclusions of the pleader.

13. No facts are alleged on which the relief sought can be granted.

14. It affirmatively appears that the plaintiff's cause of action is barred by the one-year statute of limitations.

J. B. Blackburn

Attorney for Defendant

I hereby certify that I delivered a copy of the foregoing demurrer to Norborne C. Stone, Esquire, attorney for plaintiff, on this the 9th day of April, 1971.

FILED

APR 9 1971

EUNICE B. BLACKMON CIRCUIT CLERK

J. B. Blackburn

Attorney for Defendant

INEZ M. RADDCLIFFE, Plaintiff, vs. CITY OF FAIRHOPE, ALABAMA, a Municipal Corporation, Defendant.	X	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW CASE NO. 9153

DEMURRER TO PLEA TWO:

Comes now the Plaintiff in the above styled cause, by her attorneys, and demurs to Plea Two heretofore filed by the Defendant and assigns in support thereof the following separate and several grounds:

1. Said Plea does not constitute a defense to the Complaint or either count thereof.

2. Said Plea does not constitute a defense to Count One of the Complaint.

3. Said Plea does not constitute a defense to Count Two of the Complaint.

4. Said Plea is immaterial.

5. Said Plea is filed to counts charging the Defendant with willful and wanton misconduct and the Complaint and each Count thereof was filed within six (6) years from the date of the alleged misconduct.

Respectfully submitted,

CHASON, STONE & CHASON

BY: _____
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this 13 day of April, 1971.

_____

Filed 4-14-71
Eunice B. Blackmon
Clerk

INEZ N. RADDCLIFFE, Plaintiff,	)	
VS.	)	IN THE CIRCUIT COURT OF
	)	BALDWIN COUNTY, ALABAMA
CITY OF FAIRHOPE, ALABAMA, a Municipal Corporation,	)	AT LAW NO. 9153
Defendant.	)	

APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS: That the undersigned City of Fairhope, Alabama, a Municipal Corporation, is held and firmly bound unto Inez N. Raddcliffe in the sum of Seventy-one Hundred Eighty and No/100 Dollars ($7180.00), for the payment of which well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal and dated this 20th day of May, 1971.

WHEREAS, at the April, 1971, term of the Circuit Court of Baldwin County, Alabama, and on, to-wit, the 15th day of April, 1971, the plaintiff recovered a judgment in the said court against the defendant for the sum of $3550.00 damages, and the further sum of $39.25 costs in that behalf expended; and,

WHEREAS, on this day the said defendant, City of Fairhope, Alabama, a Municipal Corporation, has made application for an appeal from the said judgment to the next term of The Court of Civil Appeals of the State of Alabama to reverse the said judgment; ~~and also for a supersedeas of the execution of the said judgment, which has been granted on entering into this bond~~:

NOW, THEREFORE, the condition of the foregoing obligation is such that if the City of Fairhope, Alabama, a Municipal Corporation, shall prosecute its said appeal to effect and satisfy such

judgment as the said appellate court may render in this case, then the said obligation to be null and void; otherwise, to remain in full force and effect.

CITY OF FAIRHOPE, ALABAMA,
a Municipal Corporation (SEAL)

By _____

As its Mayor

Taken and approved on this the 20th day of May, 1971.

Affix seal.

_____
Circuit Clerk

No surety on the above bond is required. See Title 37, Section 443 of the Code of Alabama.

FILED

MAY 20 1971

EUNICE B. BLACKMON CIRCUIT CLERK

INEZ N. RADDCLIFFE, Plaintiff,	)	
VS.	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA
CITY OF FAIRHOPE, ALABAMA, a Municipal Corporation,	)	AT LAW NO. 9153
Defendant.	)	

APPEAL

Now comes the defendant in the above styled cause, by its attorneys, and appeals to The Court of Civil Appeals of the State of Alabama from the judgment of the Circuit Court of Baldwin County, Alabama, rendered on, to-wit, April 15, 1971, and also from the judgment of the court overruling the defendant's motion for a new trial dated on, to-wit, May 10, 1971.

Dated this 17th day of May, 1971.

J. B. Blackburn

John V. Rush (B)

Attorneys for Defendant

STATE OF ALABAMA)
*
BALDWIN COUNTY)

I hereby acknowledge myself as security for costs of the above appeal.

Dated this 17th day of May, 1971.

J. B. Blackburn

Taken and approved on this the 20th day of May, 1971.

Eunice B. Blackmon
Circuit Clerk

FILED
MAY 20 1971
EUNICE B. BLACKMON CIRCUIT CLERK

CIRCUIT COURT
THIRTEENTH JUDICIAL COURT
FERRILL D. McRAE, JUDGE
MOBILE, ALABAMA
36602

JUDGE'S CHAMBERS

May 11, 1971

Mrs. Eunice B. Blackmon
Clerk of Circuit Court
County Courthouse
Bay Minette, Alabama 36507

Re: Inez N. Raddcliffe v.
City of Fairhope

Dear Mrs. Blackmon:

I am enclosing the Motion for New Trial which was forwarded to me by you on May 4, 1971, along with Mr. J. B. Blackburn's letter of the same date. Since the motion was submitted without argument, although it is not a part of the Court's record, I believe this letter should be in the file.

Thanking you and with kindest regards, I am

Very truly yours,

Ferrill D. McRae

FDMcR/mbs

Enclosures

J. B. BLACKBURN
ATTORNEY AT LAW
110 COURTHOUSE SQUARE
BAY MINETTE, ALABAMA 36507

May 4, 1971

P. O. DRAWER 59
TEL. 937-2061
AREA CODE 205

Judge Ferrill D. McRae
Circuit Judge
Mobile County Courthouse
Mobile, Alabama

Dear Judge McRae:

I filed a motion for a new trial in the case of Inez N. Raddcliffe vs. City of Fairhope, which you tried here on April 15, 1971.

I talked with Mr. Stone this morning and we have agreed that the motion be submitted without argument. I have requested the clerk to mail the motion to you.

Please rule on it before the expiration of thirty days from the date on which the case was tried.

Very truly yours,

J. B. Blackburn

J. B. BLACKBURN

This was April 15th.

JBB:mlb

CC: Mr. Norborne C. Stone
CC: Mr. John V. Duck

JUN 14 1972

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM, 1971-72

1 Div. 55

City of Fairhope, Alabama,
A Municipal Corporation

v.

Inez N. Raddcliffe

Appeal from Baldwin Circuit Court

WRIGHT, P. J.

Suit for damages was filed by Inez N. Raddcliffe against the City of Fairhope. The complaint was in two counts, each alleging willful or wanton conduct by the city and resultant injury to the plaintiff. Count One alleged that defendant willfully or wantonly caused or allowed its sewer line to overflow and flood plaintiff's house. Count Two alleged that defendant's agents, servants or employees, while acting within the line and

scope of their employment, willfully or wantonly caused or allowed the sewer line to overflow and flood plaintiff's house. Upon trial and verdict, judgment was rendered for plaintiff in the amount of $3,550.

The evidence introduced was to the effect that sewage backed up in the line and overflowed from the commode in plaintiff's bathroom, thereby flooding the house and running into the yard. The line was discovered to be stopped up by rags and clothing hung in the line at a distance below the house of plaintiff. The cause of the stoppage was not determined until after the overflow.

There was evidence that the house of plaintiff was located on a hill down which ran the sewer line. The line was stopped up at a point below the grade of the house. There was no manhole in the line between the point of stoppage and plaintiff's house. There was a manhole above the house. The nearest outlet for the blocked sewage was the commode of plaintiff.

There was evidence that plaintiff's house and another in the same vicinity on the line had been overflowed from the sewer in years past when the line would become stopped up. The city had knowledge or notice of such previous occurrences. The testimony of city employees was that in the event of the line becoming stopped up at a point below a house there was no way to prevent overflow into the house except by there being a manhole present which was at a lower elevation than the commode or another outlet in the

house. Such condition was explained by the premise that impounded water seeks its own level.

To the complaint, appellant first filed what was termed a plea in abatement. This plea was of the statute of limitations and was in fact a plea in bar. The plea was that the suit was barred by a one year statute of limitations. Demurrer to the plea was sustained.

Demurrer to the complaint was then filed and was overruled. Again, the plea of the one year statute of limitations was filed. Demurrer thereto was again sustained. The rulings of the court as to each of these pleas and to the demurrer to the complaint are assigned as error. We will dispose of these assignments first.

The injury to plaintiff's house occurred on May 3, 1968. Suit was filed on February 27, 1970, more than one year after the injury but less than six years. It is appellant's contention that the cause of action set out in the complaint, though alleging a willful or wanton act, is in fact one of trespass on the case rather than in trespass. If such is true and the statute of limitations is properly pleaded, it is barred by a one year limitation for beginning the action.

Tit. 7, § 21, 1940 Code of Alabama, as it applies to this case is as follows:

> "The following must be commenced within six years:
>
> . . . . . .

"Actions for any trespass to real or personal property."

Tit. 7, § 26, 1940 Code of Alabama, as applicable to this case is as follows:

"The following must be commenced within one year:

. . . . . .

"Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated."

There is only one definition of common-law trespass. This is quoted in Louisville & Nashville Railroad Company v. Johns, 267 Ala. 261, 101 So. 2d 265, from an unpublished opinion in Sibley v. Odum, 257 Ala. 292, 58 So. 2d 896, as follows:

"'Trespass is of three aspects: (1) vi et armis (personal injuries by force directly applied); (2) de bonis asportatis (the carrying away of the goods of another); (3) quaere clausum fregit (direct injuries to the freehold).

"'They all carry the necessary element of an intentional (or wanton, its equivalent in law), direct application of force by the defendant or under his authority. Unless there is

such direct force, there can be no trespass in any aspect. [Emphasis ours]

"'Case is when injury occurs to the person or property of another when as to the defendant so charged there is no intentional direct application of force, but either a negligent unintention application, or when the act was intentionally committed by one who is guilty of a trespass, but the defendant is legally responsible for such willful act of the other on such principle as respondeat superior. In that event the one is guilty of a trespass and for such trespass the other is responsible in case, because he did not commit a trespass and there was no writ which provided a remedy.'" (267 Ala. at page 277)

It seems to be commonly accepted among the bar that a count alleging a willful or wanton act is always a charge in trespass. Such is not literally true. To be a trespass there must be an act of direct force producing injury or damage. A wanton omission of duty to act is not a trespass. There is no direct force applied and the injury is not produced by application of force, but is consequential of an omission of a duty to act.

Wantonness has tended to become synonomous with trespass because it is usually connected with a direct application of force as in automobile collisions. From its legal definition in Alabama it may readily be seen it does not always amount to a trespass.

> "Wantonness has been defined as a conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from duty injury will likely or probably result. Before a party can be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury. Barnes v. Haney, 280 Ala. 39, 189 So. 2d 779; Graves v. Wildsmith, 278 Ala. 228, 177 So. 2d 448." Water Works and Sanitary Sewer Board v. Norman, 282 Ala. 41, 46, 208 So. 2d 788.

Tit. 7, § 21, of the Code requires that there be an action in trespass before the six year limitation upon suit may be applied.

Some confusion has been injected by the following statement in Doucet v. Middleton, 328 F. 2d 97, 101, (1964):

> "The Supreme Court of Alabama in the Johns case, supra, and the Legislature of Alabama in enacting what is now section 176 of Title 7 of the Code of Alabama clearly recognized that an action against a defendant for a willful or wanton injury committed by the defendant himself was in trespass and was covered by the six year statute of limitations, ..."

This statement as applied to the facts in Doucet is correct. There was a trespass committed.

We do not agree with a literal construction of this statement. The Supreme Court in the Johns case, supra, made no such pronouncement, but defined clearly the basis of an action of trespass as we have previously indicated herein. We state again that it is not the descriptive words "willful or wanton" which determine an act to be in trespass, but whether the act producing injury was one of application of direct force. We comment that this construction is based upon well defined principles of common law and of the legislative designation of the applicable statute of limitations. We may not approve of it, but we are bound to so interpret and apply it until it is changed by proper authority.

Thus it appears clear that Count Two of the complaint alleging responsibility of defendant to arise from the act of an agent, servant or employee

while acting within the line and scope of his employment under the principle of respondeat superior, though alleged to be wanton, is an action in case and thus barred by a limitation of one year.

Tit. 7, § 176(1)-(6), Code of Alabama 1940, as amended, has no application here as Count Two is not the form of action authorized therein.

Demurrer to the plea of the statute of limitations as to Count Two was wrongfully sustained.

We consider now Count One in relation to the plea of the statute of limitations.

Count One is in the form provided for in Tit. 7, § 217(1), Alabama Code of 1940, as Recompiled 1958. This is a new form of action created by the legislature, held constitutional in Aggregate Limestone Co. v. Robison, 276 Ala. 338, 161 So. 2d 820, and discussed by this court in Roberson v. Harris, 45 Ala. App. 537, 233 So. 2d 96. § 217(1) eliminated the distinction between trespass and case in pleading in an action where one is charged in trespass but the complaint is supported by proof that the act charged was in fact committed by a servant acting within the scope of his employment. It was stated in Aggregate Limestone Co. v. Robison, supra, as follows:

> "The plain meaning of this is that where proof that an agent committed an intentional, wanton, or negligent act while in the line and scope of his employment, liability for such act would

be imputed to the principal, regardless of the actual participation of the principal in the intentional, wanton or negligent act or omission under the doctrine of respondeat superior. This act, of course, sets up a new statutory form of action." (276 Ala. at page 342)

Note that the statute removes the common law distinction as between trespass and case only in pleading and proof. In line with the pronouncement of Louisville & Nashville Railroad Co. v. Johns, supra, it specifically provided that the statutes of limitations as to trespass and case still applied. Tit. 7, § 217(1):

"... subject, however, to the right of the party or parties against whom such testimony is offered to thereupon plead the statute of limitations which might have been applicable to the case made by the evidence offered."

In the instant case, the plea of the statute of limitations of one year applicable to a complaint in case was filed prior to trial by appellant. At the time of its filing it had no application to Count One of the complaint if said count was in trespass. Under such form of action, if it is laid in trespass, the application of a plea of the statute of limitations of one year can only be determined

after proof comes in showing that liability of the defendant is based upon the principle of respondeat superior.

The court cannot anticipate what the proof will be when determining the proper statute of limitations. It can only rely prior to trial on the matters disclosed by the pleading.

We must determine if Count One avers an action in trespass or case. We have said the averment that defendant committed a willful or wanton act does not per se render it in trespass. Is there an averment of application of a direct force by defendant against the property of plaintiff producing injury?

We must hold there is not. The complaint characterizes the act of defendant as "caused or allowed sewer lines ... to overflow and flood plaintiff's home." This is not a charge of application of direct force against the property of plaintiff. It has been held by the Supreme Court of Alabama in a long line of cases that an action for overflow of land by obstructing the flow of drainage is one of trespass on the case. Howell v. City of Dothan, 234 Ala. 158, 174 So. 624; Pan American Petroleum Co. v. Byars, 228 Ala. 372, 153 So. 616. The sustaining of demurrer to appellant's plea of the statute of limitations of one year to Count One was error.

Assignment of Error Two complains of the overruling of appellant's demurrer to the complaint. The ground of demurrer argued appears to be Ground Two, though such is not stated in brief.

Ground Two of the demurrer is that there is no fact alleged stating a cause of action under Tit. 37, § 502, of the Code. The Code section referred to is the statute authorizing suits against a municipal corporation for acts of negligence of its agents and employees. We see no need to discuss this statute in the vein argued by appellant. We do not have to consider the cited statute for authority of one damaged by the negligent construction or maintenance of a sewer system by a city or town to bring suit. That authority has long been determined by the courts of this state to arise from § 234 of the Constitution of Alabama. Arndt v. Cullman, 132 Ala. 540, 31 So. 478; City of Birmingham v. Crane, 175 Ala. 90, 56 So. 723; City of Birmingham v. Greer, 220 Ala. 678, 126 So. 859; City of Huntsville v. Miller, 271 Ala. 687, 127 So. 2d 606; City of Anniston v. Isbell, 273 Ala. 696, 144 So. 2d 18.

The nonapplicability of § 502 to cases of the nature charged in the complaint here was discussed in City of Birmingham v. Corr, 229 Ala. 321, 157 So. 56, and in Brown v. City of Fairhope, 265 Ala. 596, 93 So. 2d 419. The counts of the complaint in this case are apparently the same as those in Brown v. City of Fairhope, supra. Counsel for appellee here was counsel for plaintiff there. Demurrer in that case was held wrongfully sustained.

Assignments of Error Four and Five relate to a motion filed in writing on the day of trial but prior to qualifying the jury. The motion was to require defendant to reveal the name of its insurance carrier so that the jury could be qualified in relation thereto. The motion was granted by the court, but counsel for defendant refused to comply with the court's request for the name of the insurance carrier.

Appellant, without citation of authority, charges error in the granting of the motion. It further charges error in the court subsequently qualifying the jury as to The Travelers Group after counsel had refused to disclose the identity of its true carrier. The qualification as to Travelers was upon information furnished by plaintiff's counsel.

We find no error in the granting of the motion to require disclosure of the name of the defendant's insurance carrier so that the jury might be properly qualified.

It appears to be appellant's position that such information may only be discovered by deposition or interrogatory prior to trial. Such may be a proper method, but it is not the only method. Tit. 30, § 52, 1940 Code of Alabama, Recompiled 1958, and the rule of cases decided thereunder give to a plaintiff the right, upon seasonable and proper motion to have the venire qualified as to their relation to or interest in any insurance company which would be liable in whole or in part for any judgment rendered against the defendant. Prince v. Lowe, 263 Ala. 410, 82 So. 2d 606; Parker v. Williams, 267 Ala. 12, 99 So. 2d 210.

We can see no better or more reasonable manner for obtaining the identity of such insurance company than by asking counsel prior to asking qualifying questions of the jury. If so requested by the court, counsel should respond with the name if he knows or may obtain it. Surely, appellant cannot complain of the ruling on the motion, the mandate of which its counsel refused and failed to comply with.

Counsel is in no position to complain in this case when the jury was qualified as to The Travelers Group. If such was not in fact the insurance carrier for his client, he could easily have given the correct one. It appears to us that reasonable cooperation between counsel and the court would avoid similar confrontations and possible contempt of court.

In view of our determination that the plea of the statute of limitations of one year was good as to both counts of the complaint, it follows that defendant was entitled to the affirmative charge as requested in writing. Since we have determined error to reverse, we pretermit consideration of other errors charged in the appeal.

REVERSED AND RENDERED.

Bradley and Holmes, JJ., concur.

I, J, O. Sentell, Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court,
Witness my hand this 14th day of June 1972

J. O. Sentell
Clerk, Court of Civil Appeals of Alabama

JUNE 14, 1972

THE STATE OF ALABAMA - - - - - - - - - - - - - - - JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1971-72

1st Division No. 55	*	
	*	
The City of Fairhope, a Municipal Corporation	*	BALDWIN CIRCUIT COURT
vs.	*	
Inez N. Raddcliffe	*	

Come the parties by attorneys and the record and matters of error assigned therein being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the judgment of the Circuit Court be reversed and annulled; and proceeding to render the judgment that the Circuit Court should have rendered, it is CONSIDERED, ORDERED AND ADJUDGED that judgment be, and the same is hereby, rendered in favor of the defendant.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff pay the costs incurred in the Circuit Court, for which costs let execution issue.

IT IS FURTHER ORDERED AND ADJUDGED that the appellee, Inez N. Raddcliffe, pay the costs of appeal in this Court and in the Court below, for which costs let execution issue.

I, J, O. Sentell, Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court,

Witness my hand this 14th day of June 1972

J. O. Sentell

Clerk, Court of Civil Appeals of Alabama

FILED

JUN 15 1972

EUNICE B. BLACKMON CIRCUIT CLERK