

DUNCAN TURNBULL and  
ALICE W. TURNBULL,  
Plaintiffs

-VS-

Lamar Rencher, John Foster,  
Russell Sherman, C. K. Zehner,  
F. H. Deitz, Jr.,  
H. C. Mullins, John Hadley,  
E. F. Goldsmith and  
Ira B. Myer, State Health  
Officer, State of Alabama

Defendants

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA

AT LAW

CASE NO. 16,488

PETITION FOR MANDAMUS

TO HONORABLE TELFAIR J. MASHBURN, JUDGE OF SAID COURT:

Come now your petitioners and respectfully make known unto  
Your Honor as follows:

1. That your plaintiffs are legal residents of Baldwin County, Alabama. That the defendant E. F. Goldsmith is the agent, servant or employee of the Baldwin County, Alabama Board of Censors, sometimes referred to as the Baldwin County (Alabama) Board of Health; that defendant Ira B. Myer is the Public Health Officer of the State of Alabama and he resides in Montgomery County, Alabama; that Lamar Rencher, Russell Sherman, John Foster, F. H. Deitz, Jr., H. C. Mullins and John Hadley together with E. F. Goldsmith compose the Baldwin County (Alabama) Board of Censors.
2. That your petitioners are the owners in fee of Lots 20 through 25, of Turnbull's Subdivision as recorded in Map Book 5, page 68, Probate Records of Baldwin County, Alabama.
3. That on June 16, 1971, your petitioners received from Bedsole Surveying Company six individual Water Supply and Sewage Report, Alabama Department of Public Health, Bureau of Sanitation, showing that each of said lots met the percolation tests for installation of septic tanks thereon. Said reports were duly signed by W. L. Bedsole as registered surveyor and your petitioner Duncan Turnbull as owner and were submitted on June 25, 1971, to C. K. Zehner, an agent, servant or employee of Baldwin County Health Department, for approval to install septic tanks on each of

said lots. Copies of said reports are attached hereto as Exhibits "A" through "F" and are made a part hereof as if fully set forth herein.

4. That the defendant C. K. Zehner with the concurrence of each of the other named defendants in this cause arbitrarily and without legal cause or justification disapproved installation of septic tanks on each of the aforementioned Lots 20 through 25, inclusive, "on basis of original report by same surveyor"; said disapproval was dated July 9, 1971.

5. That your petitioners cannot sell and convey good title to any of the aforementioned lots unless installation of septic tanks on each lot is approved by the defendants in this cause.

6. That the failure or refusal by the defendants in this cause to approve installation of septic tanks as aforesaid constitutes failure on their part to perform a ministerial duty imposed upon them in their capacities as public health officers by the statutes of this State to the detriment of your plaintiffs.

WHEREFORE, the premises considered, your petitioners pray that Your Honor will grant an alternative writ of mandamus or a rule ni si, directed to the defendants, returnable to the Circuit Court of Baldwin County, Alabama, ordering and commanding said defendants to forthwith issue approval of permits to your plaintiffs to install septic tanks upon the aforementioned Lots 20 through 25, inclusive, or to appear at a time to be set by Your Honor and show cause why they should not do so. Your plaintiffs further pray for any other and further relief and for such other and further orders and judgments to which they may be entitled.

✓   
PETITIONER

**FILED**

JUL 12 1972

✓   
PETITIONER

EUNICE B. BLACKMON CIRCUIT  
CLERK

STATE OF ALABAMA  
BALDWIN COUNTY

Before me, the undersigned authority, personally appeared  
Duncan Turnbull and Alice W. Turnbull who are known to me and who,  
being by me first duly sworn, depose and say that they have read  
the foregoing and that the matters contained therein are true and  
correct.

*Duncan Turnbull*  
DUNCAN TURNBULL

*Alice W. Turnbull*  
ALICE W. TURNBULL

Sworn to and subscribed before me on this 8 day of  
July, 1972.

My Commission Expires:

Sept 3, 1977

*Virginia S. Murray*  
NOTARY PUBLIC  
STATE AT LARGE, STATE OF ALABAMA

FILED

JUL 18 1972

EUNICE B. BLACKMON CIRCUIT  
CLERK

## EXHIBIT "A"

INDIVIDUAL WATER SUPPLY AND SEWAGE DISPOSAL REPORT  
Alabama Department of Public Health  
Bureau of Sanitation

## Part I

(To be completed and signed by a Registered Engineer or Land Surveyor)

City or Beat No. Baldwin County, Alabama Location: Sec. 6 T -6-S R -1-E  
Owner Duncan Turnbull Owner's Address Point Clear, Alabama 36564  
Subdivision TURNBULL SUBDIVISION Block No. ---- Lot No. 20 Size lot 20,486 sq. ft.  
Date: Subdivision recorded 1959 Approved \_\_\_\_\_ Percent Developed 50%  
Grease Trap: ☒ Yes ☐ No Garbage Grinder: ☐ Yes ☒ No Bdrms 3  
Laundry Waste: ☐ Yes ☐ No  
If other than residential property give estimated sewage flow per day RESIDENTIAL

Signature of Owner

Duncan Turnbull

Water Supply: ☐ Public ☐ Community ☒ Individual  
Nearest Dist. to Sewer 6 miles ; To Public Water Supply 6 miles  
Percolation Test: (See Back for Instructions) Test Hole 1 10 min. 0.0' to 4.0' = GREY SANDY SOIL  
2 per inch 4.0' to 6.0' = ORANGE SANDY CLAY  
Soil Borings: Type Soil \_\_\_\_\_

Water level in hole from surface of ground ALL 6 FT. TEST HOLES DRY

A plot plan dated \_\_\_\_\_ and prepared by Bedsole Surveying Company  
showing layout of septic tank with reference to the topography, house, lot lines and existing or proposed wells is attached to and made a part of this report.

Report made by: Bedsole Surveying Company

Signature

Reg. No. 1911Address 73 N. Sage Ave., Mobile, Ala. 36607Date 6-16-71

## Part II

(For use by Health Authorities)

It is our opinion that the use of an individual septic tank system on the lot (☐ is suitable provided it conforms to) (☒ is not suitable by reason of) the following conditions: \_\_\_\_\_

Disapproved on basis of original report by same surveyor

It is understood that the opinion rendered in this report does not cover the construction of the septic tank system. Acceptance will be based upon compliance with all health department requirements.

Signature and Title Baldwin County Health DepartmentSignature C. H. Fisher, R.S.Date 7-9-71

San-3

## EXHIBIT "B"

INDIVIDUAL WATER SUPPLY AND SEWAGE DISPOSAL REPORT  
Alabama Department of Public Health  
Bureau of Sanitation

## Part I

(To be completed and signed by a Registered Engineer or Land Surveyor)

City or Beat No. Baldwin County, Alabama Location: Sec. 6 T -6-S R -1-E  
Owner Duncan Turnbull Owner's Address Point Clear, Alabama 36564  
Subdivision TURNBULL SUBDIVISION Block No. ---- Lot No. 21 Size lot 20,486 sq. ft.  
Date: Subdivision recorded 1959 Approved \_\_\_\_\_ Percent Developed 50%  
Grease Trap: ☒ Yes ☐ No Garbage Grinder: ☐ Yes ☒ No Bdrms 3  
Laundry Waste: ☒ Yes ☐ No  
If other than residential property give estimated sewage flow per day RESIDENTIAL  
Signature of Owner Duncan Turnbull

Water Supply: ☐ Public ☐ Community ☒ Individual  
Nearest Dist. to Sewer 6 miles ; To Public Water Supply 6 miles  
Percolation Test: Test Hole 1 Stabilized Rate 12 minutes per inch Additional Tests  
(See Back for Instructions) 2  
Soil Borings: Type Soil 0.0' to 4.0' = GREY SANDY SOIL  
4.0' to 6.0' = ORANGE SANDY CLAY  
Water level in hole from surface of ground 6 ft. test hole dry

A plot plan dated \_\_\_\_\_ and prepared by Bedsole Surveying Company  
showing layout of septic tank with reference to the topography, house, lot lines and existing or proposed wells is attached to and made a part of this report.

Report made by: Bedsole Surveying Company Reg. No. 1911  
Signature [Signature] Date 6-16-71  
Address 73 N. Sage Ave., Mobile, Ala. 36607

## Part II

(For use by Health Authorities)

It is our opinion that the use of an individual septic tank system on the lot (☐ is suitable provided it conforms to) (☒ is not suitable by reason of) the following conditions: \_\_\_\_\_

On approval on basis of original report by same surveyor

It is understood that the opinion rendered in this report does not cover the construction of the septic tank system. Acceptance will be based upon compliance with all health department requirements.

Baldwin County Health Department  
Signature and Title C. H. Glendon R.D.  
Date 7-9-71

San-3

## EXHIBIT "C"

INDIVIDUAL WATER SUPPLY AND SEWAGE DISPOSAL REPORT  
Alabama Department of Public Health  
Bureau of Sanitation

## Part I

(To be completed and signed by a Registered Engineer or Land Surveyor)

City or Beat No. Baldwin County, Alabama Location: Sec. 6 T -6-S R -1-E  
Owner Duncan Turnbull Owner's Address Point Clear, Alabama 36564  
Subdivision TURNBULL SUBDIVISION Block No. ---- Lot No. 22 Size lot 20,486 sq. ft.  
Date: Subdivision recorded 1959 Approved \_\_\_\_\_ Percent Developed 50%  
Grease Trap: ☒ Yes ☐ No Garbage Grinder: ☐ Yes ☒ No Bdrms 3  
Laundry Waste: ☒ Yes ☐ No  
If other than residential property give estimated sewage flow per day RESIDENTIAL  
Signature of Owner Duncan Turnbull

Water Supply: ☐ Public ☐ Community ☒ Individual  
Nearest Dist. to Sewer 6 miles ; To Public Water Supply 6 miles  
Percolation Test: Test Hole 1 Stabilized Rate Additional Tests  
(See Back for 2 14 minutes per inch Instructions)  
Soil Borings: Type Soil 0.0' to 4.0' = GREY SANDY SOIL  
4.0' to 6.0' = ORANGE SANDY CLAY  
Water level in hole from surface of ground 6 ft., test hole dry  
A plot plan dated \_\_\_\_\_ and prepared by Bedsole Surveying Company  
showing layout of septic tank with reference to the topography, house, lot lines and existing or proposed wells is attached to and made a part of this report.  
Report made by: Bedsole Surveying Company  
Signature [Signature] Reg. No. 1911  
Address 73 N. Sage Ave., Mobile, Ala. 36607 Date 6-16-61

## Part II

(For use by Health Authorities)

It is our opinion that the use of an individual septic tank system on the lot (☐ is suitable provided it conforms to) (☒ is not suitable by reason of) the following conditions: \_\_\_\_\_

Disapproved on basis of Original Report  
by same surveyor

It is understood that the opinion rendered in this report does not cover the construction of the septic tank system. Acceptance will be based upon compliance with all health department requirements.

Baldwin County Health Department  
Signature and Title [Signature]  
Date 7-9-71

San-3

## EXHIBIT "D"

INDIVIDUAL WATER SUPPLY AND SEWAGE DISPOSAL REPORT  
Alabama Department of Public Health  
Bureau of Sanitation

## Part I

(To be completed and signed by a Registered Engineer or Land Surveyor)

City or Beat No. Baldwin County, Alabama Location: Sec. 6 T -6-S R -1-E  
Owner Duncan Turnbull Owner's Address Point Clear, Alabama 36564  
Subdivision TURNBULL SUBDIVISION Block No. ----- Lot No. 23 Size lot 20,486 sq. ft.  
Date: Subdivision recorded 1959 Approved \_\_\_\_\_ Percent Developed 50%  
Grease Trap: ☒ Yes ☐ No Garbage Grinder: ☐ Yes ☒ No Bdrms 3  
Laundry Waste: ☒ Yes ☐ No  
If other than residential property give estimated sewage flow per day RESIDENTIAL

Signature of Owner Duncan Turnbull

Water Supply: ☐ Public ☐ Community ☒ Individual  
Nearest Dist. to Sewer 6 miles; To Public Water Supply 6 miles  
Percolation Test: Test Hole 1 Stabilized Rate 14 minutes per inch Additional Tests  
(See Back for Instructions) 2  
Soil Borings: Type Soil 0.0' to 4.0' = GREY SANDY SOIL  
4.0' to 6.0' = ORANGE SANDY CLAY  
Water level in hole from surface of ground 6 ft. test hole dry

A plot plan dated \_\_\_\_\_ and prepared by Bedsole Surveying Company  
showing layout of septic tank with reference to the topography, house, lot lines and existing or proposed wells is attached to and  
made a part of this report.

Report made by: Bedsole Surveying CompanySignature [Signature] Address 73 N. Sage Ave., Mobile, Ala. 36607Reg. No. 1911Date 6-16-71

## Part II

(For use by Health Authorities)

It is our opinion that the use of an individual septic tank system on the lot (☐ is suitable provided it conforms to) (☒ is not suitable by reason of) the following conditions: \_\_\_\_\_

Disapproved on basis of original report by same surveyor

It is understood that the opinion rendered in this report does not cover the construction of the septic tank system. Acceptance will be based upon compliance with all health department requirements.

[Signature] County Health Department  
Signature and Title C. M. Zehner RD

Date 7-9-71

San-3

Received 12 day of July 1922  
And on 3 day of Aug 1922  
I served a copy of the within John Foster  
On \_\_\_\_\_

By service on \_\_\_\_\_

TAYLOR WILKINS, Sheriff

By Charles Chaudron

Sheriff claims 72 Miles at  
Ten Cents per mile Total \$ 7.20  
TAYLOR WILKINS, Sheriff  
By Charles Chaudron  
DEPUTY SHERIFF



## EXHIBIT "E"

INDIVIDUAL WATER SUPPLY AND SEWAGE DISPOSAL REPORT  
Alabama Department of Public Health  
Bureau of Sanitation

## Part I

(To be completed and signed by a Registered Engineer or Land Surveyor)

City or Beat No. Baldwin County, Alabama Location: Sec. 6 T -6-S R -1-E  
Owner Duncan Turnbull Owner's Address Point Clear, Alabama 36564  
Subdivision TURNBULL SUBDIVISION Block No. ---- Lot No. 24 Size lot 20,486 sq. ft.  
Date: Subdivision recorded 1959 Approved \_\_\_\_\_ Percent Developed 50%  
Grease Trap: ☒ Yes ☐ No Garbage Grinder: ☐ Yes ☒ No Bdrms 3  
Laundry Waster: ☒ Yes ☐ No  
If other than residential property give estimated sewage flow per day RESIDENTIAL  
Signature of Owner Duncan Turnbull

Water Supply: ☐ Public ☐ Community ☒ Individual  
Nearest Dist. to Sewer 6 miles ; To Public Water Supply 6 miles  
Percolation Test: Test Hole 1 Stabilized Rate Additional Tests  
(See Back for Instructions) 2 12 minutes per inch  
Soil Borings: Type Soil 0.0' to 4.0' = GREY SANDY SOIL  
4.0' to 6.0' = ORANGE SANDY CLAY  
Water level in hole from surface of ground 6 ft. test hole dry

A plot plan dated \_\_\_\_\_ and prepared by Bedsole Surveying Company  
showing layout of septic tank with reference to the topography, house, lot lines and existing or proposed wells is attached to and  
made a part of this report.  
Report made by: Bedsole Surveying Company  
Signature \_\_\_\_\_ Reg. No. 1911  
Address 73 N. Sage Ave., Mobile, Ala. 36607 Date 6-16-71

## Part II

(For use by Health Authorities)

It is our opinion that the use of an individual septic tank system on the lot ~~(is suitable provided it conforms to)~~ ☒ is  
not suitable by reason of) the following conditions: \_\_\_\_\_

Disapproved on basis of original report  
by Dome Surveyor

It is understood that the opinion rendered in this report does not cover the construction of the septic tank system. Acceptance will be based upon compliance with all health department requirements.

Baldwin County Health Department  
Signature and Title C. W. Zahner, R.D.  
Date 7-9-71

San-3

Received 12 day of July 1972  
and on 25 day of July 1972  
I served a copy of the within St Pet  
on Russell Sherman

By service on \_\_\_\_\_

TAYLOR WILKINS, Sheriff  
By W. A. Zolbert D. S.  
0

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

Received 12 day of July 1972  
and on 25 day of July 1972  
I served a copy of the within St Pet  
on C. K. Behner

By service on \_\_\_\_\_  
TAYLOR WILKINS, Sheriff  
By W. A. Zolbert D. S.  
0

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

Received 12 day of July 1972  
and on 25 day of July 1972  
I served a copy of the within St Pet  
on John Hadley

By service on \_\_\_\_\_  
TAYLOR WILKINS, Sheriff  
By W. A. Zolbert D. S.  
0

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

Received 12 day of July 1972  
and on 25 day of July 1972  
I served a copy of the within St Pet  
on C. S. Goldsmith

By service on \_\_\_\_\_  
TAYLOR WILKINS, Sheriff  
By W. A. Zolbert D. S.  
0

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

## EXHIBIT "F"

INDIVIDUAL WATER SUPPLY AND SEWAGE DISPOSAL REPORT  
Alabama Department of Public Health  
Bureau of Sanitation

## Part I

(To be completed and signed by a Registered Engineer or Land Surveyor)

City or Beat No. Baldwin County, Alabama Location: Sec. 6 T. 6-S R. 1-E  
Owner Duncan Turnbull Owner's Address Point Clear, Alabama 36564  
Subdivision TURNBULL SUBDIVISION Block No. ----- Lot No. 25 Size lot 20,486 sq. ft.  
Date: Subdivision recorded 1959 Approved \_\_\_\_\_ Percent Developed 50%  
Grease Trap: ☒ Yes ☐ No Garbage Grinder: ☐ Yes ☒ No Bdrms 3  
Laundry Waste: ☒ Yes ☐ No  
If other than residential property give estimated sewage flow per day RESIDENTIAL  
Signature of Owner Duncan Turnbull

Water Supply: ☐ Public ☐ Community ☒ Individual  
Nearest Dist. to Sewer 6 miles ; To Public Water Supply 6 miles  
Percolation Test: Test Hole 1 Stabilized Rate 12 minutes per inch Additional Tests  
(See Back for Instructions) 2  
Soil Borings: Type Soil 0.0' to 4.0' = GREY SANDY SOIL  
4.0' to 6.0' = ORANGE SANDY CLAY  
Water level in hole from surface of ground 6 ft. test hole dry  
A plot plan dated \_\_\_\_\_ and prepared by Bedsole Surveying Company  
showing layout of septic tank with reference to the topography, house, lot lines and existing or proposed wells is attached to and made a part of this report.  
Report made by: Bedsole Surveying Company  
Signature [Signature] Reg. No. 1911  
Address 73 N. Sage Ave., Mobile, Ala. 36607 Date 6-16-71

## Part II

(For use by Health Authorities)

It is our opinion that the use of an individual septic tank system on the lot (☐ is suitable provided it conforms to) (☒ is not suitable by reason of) the following conditions: \_\_\_\_\_

Disapproved, on basis of Regional Report  
by same Surveyor

It is understood that the opinion rendered in this report does not cover the construction of the septic tank system. Acceptance will be based upon compliance with all health department requirements.

[Signature] County Health Department  
Signature and Title [Signature]  
Date 7-9-71

San-3

VOL

71

VOL

71 PAGE 335

Serve:

Lamar Rencher  
306 S. Greeno Rd  
Fairhope, Alabama

John Foster  
Wilson Buildings  
Foley, Alabama

Russell Sherman  
301 East Third Street  
Bay Minette, Alabama

C. K. Zehner  
Baldwin County Health Dept.  
Hand Avenue  
Bay Minette, Alabama

F. H. Deitz  
306 South Greeno Rd  
Fairhope, Alabama

H. S. Mullins  
306 South Greeno Rd  
Fairhope, Alabama

John Hadley  
Hadley Motor Company  
Bay Minette, Alabama

E. F. Goldsmith  
Baldwin County Health Dept.  
Bay Minette, Alabama

Ira B. Myer  
Dept. of Public Health  
State Office Building  
Montgomery, Alabama

RECEIVED

JUL 12 1972

TAYLOR WILKINS

CASE NO. 10,488

DUNCAN TURNBULL and  
ALICE W. TURNBULL,

Plaintiffs

-VS-

LAMAR RENCHER, et al  
Defendants

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW  
JUL 13 1972

\* LUNICE B. BLACKMON \*  
\* CLERK \*

ATTORNEY FOR PLAINTIFFS

KENNETH COOPER  
Post Office Box 1000  
Bay Minette, Alabama 36507  
Phone: 205 - 937-7412

RECEIVED IN OFFICE

JUL 13 1972

M. S. BUTLER, Sheriff

EXECUTED BY SERVING  
A COPY OF THE WITHIN

*Duncan Turner*  
*Alice W. Turner*  
*Officer*

This the 13 day 1972

M. S. BUTLER  
Sheriff Montgomery County

By *McNally*  
Deputy Sheriff

M. S. Butler, Sheriff of Montgomery,

County, Alabama, Claim \$1.50 each for

serving process and \$1.00

travel expense on each of

processes or a total of

*McNally* Deputy Sheriff

381

3169

210 miles  
Ten Cents per mile Total \$ 21.00  
TAYLOR WILKINS  
DEPUTY SHERIFF

Received 12 day of July 1972  
and on 15-17-72 day of July 1972  
I served a copy of the within

on *Lamar Turner*  
at *Bay Minette*  
By *McNally*  
DEPUTY SHERIFF

By *Dr. H.C. Mullins*  
Dr. Lamar Rencher - Dr. F.H. Deitz

TAYLOR WILKINS, Sheriff  
By *L.V. Cooper*

71 PAGE 336

DUNCAN TURNBULL and  
ALICE W. TURNBULL,

Plaintiffs

-VS-

LAMAR RENCHER, JOHN FOSTER,  
et al

Defendants

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA

AT LAW

CASE NO. 10,488

ORDER FOR RULE NI SI

WHEREAS, Duncan Turnbull and Alice W. Turnbull have filed in this Court and presented to Honorable Telfair J. Mashburn a petition for an alternative writ of mandamus or rule ni si; and

WHEREAS, the said Judge Telfair J. Mashburn has ordered issuance of rule ni si directed to the defendants in this cause;

THEREFORE, each defendant is ordered to appear before this Honorable Court on the 7<sup>th</sup> day of August, 1972, at 9:00 A. m. and show cause why the permits prayed for in the petitioners' petition in this cause should not be issued.

Eunice B. Blackmon  
CLERK, CIRCUIT COURT

FILED

JUL 13 1972

EUNICE B. BLACKMON CIRCUIT  
CLERK

SUMMONS AND COMPLAINT

MOORE PRINTING CO. BAY MINETTE ALA.

STATE OF ALABAMA

Baldwin County

Circuit Court, Baldwin County

No. 12,488

TERM. 1972

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon Lamar Rencher, John Foster, Russell Sherman,  
C. K. Zehner,  
F. H. Deitz, Jr., H. C. Mullins, John Hadley, E. F. Goldsmith and  
Ira B. Myer, State Health Officer, State of Alabama

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint  
filed in the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against

above-named individuals Defendant

by Duncan Turnbull and Alice W. Turnbull

Plaintiff

witness my hand this 15<sup>th</sup> day of July 1972

Emmie B. Blackburn, Clerk

Page.....

STATE OF ALABAMA  
BALDWIN COUNTY

CIRCUIT COURT

Plaintiffs

VS.

Defendants

SUMMONS AND COMPLAINT

Filed ..... 19.....

Clerk

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

Received In Office

19.....

Sheriff

I have executed this summons

this ..... 19.....

by leaving a copy with

Sheriff

Deputy Sheriff

DUNCAN TURNBULL and  
ALICE W. TURNBULL,

Plaintiffs

VS.

Lamar Rencher, John Foster,  
Russell Sherman, C. K. Zehner,  
F. H. Deitz, Jr., H. C. Mullins,  
John Hadley, E. F. Goldsmith, and  
Ira B. Myers, State Health Officer,  
State of Alabama

Defendants

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA

AT LAW

NO. 10488

DEMURRER OF DEFENDANTS

Come now the defendants, separately and severally, and demur to the petition and to each aspect thereof, separately and severally, and assign the following grounds, separately and severally:

1. The petition fails to state a cause of action upon which relief can be granted.
2. It affirmatively appears from the petition and particularly paragraph 4 thereof that permit disapproval by defendants was for cause, namely, "on basis of original report by same surveyor," and that such disapproval was not arbitrary or without legal cause or justification.
3. It affirmatively appears from the petition that the reasons defendants disapproved a permit to plaintiff for installation of septic tanks were, "on basis of original report by same surveyor," and hence said disapproval was not arbitrary, without legal cause or justification.
4. The petition fails to aver facts showing that defendants' disapproval "on basis of original report by same surveyor" was arbitrary, and without legal cause or justification.
5. Plaintiffs fail to aver the content of the "basis of original report by the same surveyor" assigned by defendants as the reason for disapproval, and, therefore, fail to aver facts showing said reason to be arbitrary and without legal cause or justification.
6. The petition fails to aver that all requirements of statute and rules and regulations of the State and county boards of health have been met in respect to the request for a permit to install septic tanks.



7. It affirmatively appears from the petition that an "original report" concerning suitability of said lots for installation of septic tanks was made to the county board of health prior to the reports of June 16, 1971, which are averred and set out as exhibits to the petition, but the said original report is not averred nor set out as an exhibit.

8. It affirmatively appears that the decision of the State or county board of health or its agents, as to whether or not a permit will be issued for the installation of a septic tank, involves an exercise of discretion by the health authorities.

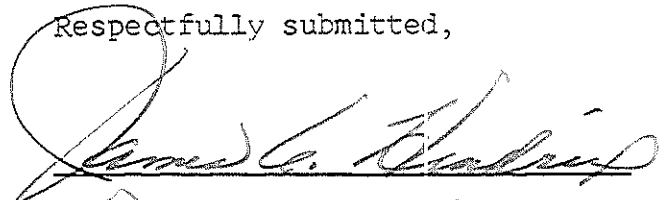
9. The petition fails to aver facts showing that the discretion of the defendants in deciding whether or not a permit for installation of septic tanks shall be issued has been abused.

10. The petition fails to aver that the requirements of any other test or percolation tests other than percolation tests on June 16, 1971 have been met.

11. It affirmatively appears from the petition that the only test averred in the petition as having met requirements for a permit to install septic tanks is a percolation test made on, to-wit, June 16, 1971, and said sole test at one particular time is not sufficient in law to require the issuance of said permit.

12. It affirmative appears from the petition that a satisfactory percolation test at one particular time is not the only standard for defendants' decision to grant or refuse a permit to install septic tanks.

Respectfully submitted,

  
District Attorney

FILED

AUG 18 1972

EUNICE B. BLACKMON CIRCUIT  
CLERK

I hereby certify that I have served a copy of the foregoing demurrer of defendants upon Hon. Kenneth Cooper, attorney for plaintiffs, ~~by mailing a copy hereof, postage prepaid, properly addressed to him at Bay Minette, Alabama, on this the~~ personal service 22 day of August, 1972.

James G. Kudirja

FILED

AUG 22 1972

EUNICE B. BLACKMON CIRCUIT  
CLERK

DUNCAN TURNBULL and  
ALICE W. TURNBULL

Plaintiffs

Vs.

Lamar Rencher, John Foster,  
Russell Sherman, C. K. Zehner,  
F. H. Deitz, Jr., H. C. Mullins,  
John Hadley, E. F. Goldsmith, and  
Ira B. Myer, State Health Officer,  
State of Alabama

Defendants

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

NO. 10488

RETURN AND ANSWER

Come now the defendants, separately and severally, and in response to the rule nisi heretofore issued show to the Court as follows:

1. Defendants admit the averments of fact in paragraph 1 of the petition and for further answer and return aver:

(a) Defendant E. F. Goldsmith is the County Health Officer of Baldwin County.

(b) Defendant "Ira B. Myer" spells his name Ira L. Myers and he is the "State Health Officer," not the "Public Health Officer."

(c) That the other defendants, who are medical doctors, together with the presiding officer of the county governing body, John Hadley, constitute the county board of health. Title 22, Section 4, Code of Alabama, Recompiled 1958.

2. Defendants admit the averment of facts in paragraph 2 of the petition.

3. Defendants admit the averment of facts in paragraph 3 of the petition.

4. In answer and return to paragraph 4 of the petition, defendants C. J. Zehner and E. F. Goldsmith deny that disapproval of installation of septic tanks on lots 20 through 25 was with the concurrence of each of the other named defendants and said defendants Zehner and Goldsmith aver that said disapproval was upon their concurrence alone "on basis of original report by same surveyor."

Defendants deny that said disapproval was arbitrary and without legal cause or justification.

Defendants aver that in a subdivision report made by Bedsole Surveying Company and signed by Luther L. Flowers (2675) on or about December 7, 1959 and submitted to the Baldwin County Health Department in behalf of petitioners and covering the said lots 20 to 25, inclusive, showed that the ground water level for lots 20, 22, 24 and 26 were 4, 3, 2.7, and 3.5 feet below surface, respectively, which is not a satisfactory compliance with the rules and regulations of the Board of Health covering installation of septic tanks. Defendants aver that there has been no substantial change in such ground water levels.

Defendants aver that on the basis of said report of December 1959, the permit for installation of septic tanks was disapproved by defendants Zehner and Goldsmith.

Defendants aver that the report submitted to defendant Zehner in June of 1971, showing all test holes on lots 20-25 to be dry is not representative of said lots 20-25, and that said disapproval of the installation of septic tanks on said lots was based on the said prior report made to the Baldwin County Health Department in December 1959.

Defendants aver that further tests were conducted by defendant Zehner on, to-wit, September 16 and 22, 1971, the results of said test showing that in six foot holes on said lots 20-25, which were filled with water on September 16, 1971, the water level in said holes fell only 17 inches from the surface by September 22, 1971, during which period there was no rainfall.

Defendants aver that said lots 20-25 are in an area of Baldwin County covered by "Lynchburg" type soil which is relatively slow to absorb water and the area of said lots has a seasonal high water table of a depth below surface of considerably less than five feet.

Defendants aver that the disapproval of said lots for the installation of septic tanks was based upon reason and the rules and regulations of the State Committee of Public Health.

5. In answer and return to paragraph 5 of the petition, defendants neither admit nor deny that petitioners cannot sell and convey

good title to said lots without approval of the installation of septic tanks by defendants; but for further answer defendants aver that such subdivision cannot be developed by sale or lease of lots without approval of the county health officer and the State Health Officer, or otherwise said development would be in violation of rules and regulations of the State Committee of Public Health and subject to penalties.

6. Defendants deny that the failure to approve said lots for installation of septic tanks is a failure to perform a ministerial duty imposed by statute; and for further answer aver that defendants' disapproval of said lots for installation of septic tanks was a decision involving the exercise of discretion and that such act was reasonable and in accordance with the statutes and rules and regulations of the State Committee of Public Health.

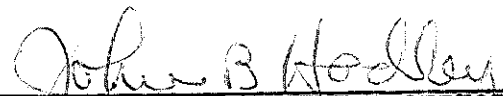
WHEREFORE, PREMISES CONSIDERED, and defendants having fully answered and made return to the rule nisi heretofore issued and having shown cause why defendants should not issue approval of permits to plaintiffs to install septic tanks upon said lots, <sup>petitioners</sup> pray that this Court will set this cause down for hearing and upon final hearing deny relief to petitioners.



E. F. GOLDSMITH, M. D.  
HEALTH OFFICER OF BALDWIN COUNTY



C. K. ZEHNER  
REGISTERED SANITARIAN  
BALDWIN COUNTY HEALTH DEPARTMENT



JOHN HADLEY, PRESIDING OFFICER  
Baldwin County Governing Body & Ex  
Officio Member of Baldwin County  
Board of Health



LAMAR RENCHER, M. D.  
MEMBER, BALDWIN COUNTY BOARD OF HEALTH

John Foster, M.D.  
JOHN FOSTER, MEMBER  
BALDWIN COUNTY BOARD OF HEALTH

Russell Sherman, M.D.  
RUSSELL SHERMAN, M. D.  
MEMBER, BALDWIN COUNTY BOARD OF HEALTH

F. H. Deitz, Jr., M.D.  
F. H. DEITZ, JR., M. D.  
MEMBER, BALDWIN COUNTY BOARD OF HEALTH

H. C. Mullins, M.D.  
H. C. MULLINS, M. D.  
MEMBER, BALDWIN COUNTY BOARD OF HEALTH

Ira L. Myers  
IRA L. MYERS, M. D.  
STATE HEALTH OFFICER

DEFENDANTS

STATE OF ALABAMA )

Baldwin COUNTY )

Before me, the undersigned Notary Public in and for said county in said State, personally appeared E. F. Goldsmith and C. K. Zehner, whose names are subscribed to the foregoing return and answer, who are personally known to me as the Health Officer of Baldwin County and as a Sanitarian of the Baldwin County Health Department, respectively, and after being duly sworn depose and say that the matters averred in the foregoing return and answer are true and correct.

On this the 18 day of Aug, 1972.

Erin R. White  
Notary Public

I hereby certify that I have served a copy of the foregoing return and answer upon Hon. Kenneth Cooper, attorney for plaintiffs, by ~~mailing a copy hereof, postage prepaid, properly addressed to him at Bay Minette, Alabama, on this the~~ 22 day of August, 1972.

AUG 22 1972

EUNICE B. BLACKMON CIRCUIT CLERK

DUNCAN TURNBULL and  
ALICE W. TURNBULL,

Plaintiffs

-VS-

LAMAR RENCHER, JOHN FOSTER,  
et al

Defendants

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA

AT LAW

CASE NO. 10,488

TO THE CLERK OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA:

Let an order for rule nisi, prayed for in the foregoing  
petition, be issued forthwith to defendants, returnable to the  
Circuit Court of Baldwin County, Alabama, on the 7<sup>th</sup> day of

August, 1972, at 9:00 A. m.

Issued this 12<sup>th</sup> day of July, 1972.

Joseph J. Madaleno  
CIRCUIT JUDGE

DUNCAN TURNBULL and  
ALICE W. TURNBULL  
Plaintiffs

-VS-

LAMAR RENCHER, JOHN FOSTER,  
et al

§  
§  
§  
§  
§

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA  
CIVIL ACTION

CASE NO. 10,488

### JUDGMENT

This cause having been regularly set for trial on September 18, 1973, came the parties hereto, in their own proper persons, with their respective attorneys of record, and issue having been joined between the plaintiffs and the defendants, this cause is tried by the Court without the intervention of a jury, testimony having been taken ora tenus; the Court, after hearing the evidence, and arguments of counsel, is of the opinion that the plaintiffs are not entitled to the relief prayed for, and that the plaintiff's prayer for the relief prayed for in his said petition for mandamus should not be granted. It is, therefore,

ORDERED, ADJUDGED and DECREED by the Court that the Petition For Mandamus prayed for by the plaintiffs, Duncan Turnbull and Alice W. Turnbull, is denied. And it is further

ORDERED, ADJUDGED and DECREED by the Court that the court costs of this proceeding be taxed against the plaintiffs, for which let execution issue.

Dated this 12<sup>th</sup> day of November, 1973.

W. J. A. Maslett  
CIRCUIT JUDGE

FILED

NOV 1 1973

EUNICE B. BLACKMON CIRCUIT  
CLERK

Minute Book 13

Page 288

ENCL 71 PAGE 346



DUNCAN TURNBULL AND  
ALICE TURNBULL

Plaintiffs

-VS-

LAMAR RENCHER,  
JOHN FOSTER, et al

Defendants

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

CIVIL ACTION

CASE NO. 10488

NOTICE OF APPEAL

Comes now the plaintiffs, Duncan Turnbull and Alice Turnbull,  
by their attorney of record, Kenneth Cooper, and appeal to the  
Court of Civil Appeals of Alabama, from the JUDGMENT rendered  
against them in this cause on the 1st day of November, 1973.

*Kenneth Cooper*

ATTORNEY FOR PLAINTIFFS  
Post Office Box 1000  
Bay Minette, Alabama 36507

FILED

FEB 18 1974

EUNICE B. BLACKMON CIRCUIT  
CLERK

DUNCAN TURNBULL AND  
ALICE TURNBULL

Plaintiffs

-VS-

LAMAR RENCHER,  
JOHN FOSTER, et al

Defendants

§

§

§

§

§

§

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA


CIVIL ACTION

CASE NO. 10488

### SECURITY FOR COSTS

I, hereby acknowledge myself security for all costs of appeal to the Alabama Court of Civil Appeals, from the Judgment rendered in the above entitled cause on the 1st day of November, 1973, and hereby agree to pay all such costs. And for the payment of this bond, I hereby waive my right of exemption to personal property under the Constitution and Laws of the State of Alabama.

WITNESS my hand and seal, this the 6th day of December, 1973.

  
ATTORNEY FOR PLAINTIFFS  
Post Office Box 1000  
Bay Minette, Alabama 36507

TAKEN and APPROVED, this the \_\_\_\_ day of December, 1973.

FILED

FEB 18 1974

EUNICE B. BLACKMON CIRCUIT CLERK

JUN 28 1974

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1973-1974

Civ. 348

Duncan Turnbull, et al.

v.

Lamar Rencher, et al.

Appeal From Baldwin County Circuit Court

PER CURIAM:

Appellants Turnbull are the owners of six lots in Baldwin County, Alabama, described as Lots 20 through 25 of Turnbull's Subdivision as recorded in Map Book 5, page 68 of the Probate Records of Baldwin County, Alabama.

Appellees are the members of the Baldwin County Board of Health, the county health officer, the county sanitation officer, and Dr. Ira Myers, the State Health Officer.

On June 25, 1971, appellants filed with the county health board applications for permits to install a septic tank on each of the above described lots. Attached to each application was a report of

the result of a soil examination and percolation test prepared and signed by W. L. Bedsole of Bedsole Surveying Company of Mobile, Alabama. The information contained in these six reports tended to show that a septic tank on each of these lots would function successfully.

Appellee C. K. Zehner, the county sanitation officer, wrote at the bottom of each report the following: "It is our opinion that the use of an individual septic tank system on the lot is not suitable by reason of the following conditions: Disapproved on basis of original report by same surveyor", whereupon the health officer and board of health denied the applications and refused to issue the permits.

Subsequently, the property owners filed a petition addressed to the Honorable Telfair J. Mashburn, as Judge of the Circuit Court of Baldwin County, Alabama, for an alternative writ of mandamus or a rule nisi requiring the respondents to issue the permits, or appear and show cause why they should not do so. Respondents, after service, first filed a demurrer, which apparently was never ruled upon, then filed a full and complete answer putting in issue the allegation that the failure to approve said lots for installation of septic tanks was a failure to perform a ministerial duty imposed by statute, but on the contrary was a decision involving the exercise of discretion and that such act was reasonable and in accordance with the

statutes and rules and regulations of the State Committee of Public Health.

Trial was had without a jury and the evidence heard by Judge Mashburn on September 18, 1973. At the end of the trial, Judge Mashburn announced that he did not find that the defendants acted or operated arbitrarily and that he would deny the petition. Judgment accordingly was entered on November 1, 1973. From the judgment, plaintiffs in the court below perfected this appeal.

We are somewhat handicapped in the deciding of this case in that neither the plaintiffs nor the respondents enlightened us, by pleadings, proof or briefs, as to the existence of statutes or state or local regulations pertaining to the placing of septic tanks on residential property or the issuance of permits for the installation of same. However, plaintiffs alleged in their complaint that the failure or refusal by the defendants to approve the installation of septic tanks on their property constituted a failure on the part of defendants to perform a ministerial duty imposed upon them in their capacities as public health officers by "the statutes of this State". Respondents by their answer tacitly admitted that they were charged with the responsibility of granting permits of the kind applied for, but that they were clothed with the discretion of deciding in each case whether to grant the application would be inimical to the public health. One of the issues then was whether the duty of issuing such permits

was ministerial or quasi-judicial. Plaintiffs claimed it ministerial, the respondents quasi-judicial.

Plaintiffs cite no authority for their contention that the duty was ministerial. Defendants cite Meecham, Public Officer and Officers, pp. 421 and 422 as saying that boards of health are quasi-judicial.

We must assume, therefore, that respondents' were acting under some regulation of the State Board of Health making it unlawful for citizens to install septic tanks without first having obtained the approval of the county board of health. The state board of health would have had the authority to adopt such a regulation under the provisions of Tit. 22, Sec. 7, (1), (4), (6), and (7). However, that may be, the case was tried on the contention by the Plaintiffs that the county board of health had the power to issue such permits and that the issuance thereof was a ministerial duty, with no discretion, or that the board acted arbitrarily and abused its discretion by its denial, and the defendants insisting that they were clothed with discretion, and that their decision was made in the exercise of a wise and just discretion, and in the public interest.

There seems no doubt that mandamus is the proper remedy when an administrative board or commission or official has acted, or refused to act, because of bias, favoritism, fraud, or other improper

reason. City Council of Montgomery v. West, 149 Ala. 311, 42 So. 1000. However, to warrant the court in issuing a writ of mandamus, it must appear that the complaining party has a clear legal right to the performance of the particular duty sought to be enforced. 52 Am.Jur. 2d, Section 64, page 388.

The evidence discloses that the same Mr. Bedsole who made the percolation tests and signed the reports attached to relators' June, 1971 applications had made similar tests for the same property owners in 1959 and reported that the lots were not suitable for septic tanks. Witness Zehner, sanitation officer for the Baldwin County Health Department, visited the lots in July and September 1971. In examining the test holes made by Bedsole in June he found them to either have caved in or to be filled with water. A week after finding the holes water filled, a subsequent check found the water to have fallen only 17 inches.

Upon finding the soil conditions, drainage and percolation to be substantially unchanged since the report of 1959, Zehner recommended to the county health officer that the application for permission to build septic tank and field lines on all the lots be denied. Such denial was duly entered.

It was shown that the 1971 report of Bedsole was made in June, a relatively dry month when the water table would tend to be at a low stage. Testimony was given that the suitability of property for septic tank effluent disposal should be determined as of the time of highest rainfall and highest level of the water table. A system which might work well in dry months would overflow and be a health hazard during wet months when the water table is near or above the level of the dispersal field lines.

It was held in L & N RR Co. v. W.E. Solschenberger, 270 Ala. 536, 120 So.2d 704, that on mandamus proceeding to review decree of trial court rendered on testimony taken ore tenus before the court, the usual presumption in favor of the correctness of the court's findings of fact is indulged. In State ex rel. Falkner v. Armstrong, City Comptroller, et al, 217 Ala. 564, 117 So. 187, realtor applied to the city commission for a license to operate a dance hall. License was refused, and his petition for mandamus having been denied, relator appealed. In affirming the court said

"If relator shall be able to allege that the city commission, or their authorized agents, in refusing to grant him a license, are actuated by a motive and purpose having no proper relation to the public safety, peace, good order, or decency, the court should, after proof -- for all presumptions should be indulged in favor of their action -- interfere."

In this case we think there was a failure of proof that respondents' action in refusing the permits was actuated by any other motive than the protection of the public health, and the trial court correctly denied their application for mandamus.


AFFIRMED.

The foregoing opinion was prepared by Honorable T. Werth Thagard, Supernumerary Circuit Judge, under Section 2 of Act No. 288, Acts of Alabama, July 7, 1945 as amended. His opinion is hereby adopted as that of the Court.

Wright, P.J., Bradley and Holmes, I. J. O. Sontell, 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,

-6-

Witness my hand this 28<sup>th</sup> day of June 19 74

  
Clerk, Court of Civil Appeals of Alabama



THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS OF ALABAMA

October Term, 1973-74

Div. No. Civ. 348

To the Clerk ~~Register~~ of the Circuit Court,  
Baldwin County—Greeting:

Whereas, the Record and Proceedings of the Circuit Court  
of said county, in a certain cause lately pending in said Court between  
Duncan Turnbull, et al, Appellant,  
and  
Lamar Rencher, et al, Appellee,  
wherein by said Court it was considered adversely to said appellant, were brought before the  
Court of Civil Appeals, by appeal taken, pursuant to law, on behalf of said appellant:

NOW, IT IS HEREBY CERTIFIED, That upon consideration thereof the Court of Civil Appeals,  
on the 28th day of June, 1974, affirmed said cause, in all respects, and  
ordered that appellant s, Duncan Turnbull and Alice W. Turnbull

and Kenneth Cooper

sureties for the costs of appeal, pay the costs of appeal in this Court and in the Court below.

It is further certified that, it appearing that said parties have waived their rights of exemption  
under the laws of Alabama, it was ordered that execution issue accordingly.

Witness, J. O. Sentell, Clerk of the Court of Civil

Appeals of Alabama, at the Judicial Building,

this the 28th day of June, 1974.

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

THE COURT OF CIVIL APPEALS  
OF ALABAMA

October Term, 19 73-74

\_\_\_\_\_  
Div., No. Civ. 348

Duncan Turnbull, et al

\_\_\_\_\_  
*Appellant,*

*vs.*

Lamar Rencher, et al

\_\_\_\_\_  
*Appellee.*

*From* Baldwin Circuit *Court.*

No. 10,488

**CERTIFICATE OF  
AFFIRMANCE**

The State of Alabama,

\_\_\_\_\_  
*County.*

} *Filed*

this FILED 19

JUL 1 1974

EUNICE B. BLACKMON CIRCUIT  
CLERK

BROWN PRINTING CO., MONTGOMERY

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 1st

November ~~Monday~~ 19<sup>73</sup>, in a cer-

tain cause in said Court wherein Duncan Turnbull & Alice W. Turnbull

Plaintiff, and Lamar Rencher, John Foster, Russell Sherman  
C. K. Zenner, F. H. Deitz, Jr. H. C. Mullins, John Hadley, E. F. Goldsmith, & Ira B. Myer,  
State Health Officer, State of Alabama Defendant, a judgment was rendered against said

Plaintiffs

to reverse which Judgment, the said Plaintiffs

applied for and obtained from this office an APPEAL, returnable to the next

Court of Civil Appeals  
Term of our 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 Plaintiffs

with Kenneth Cooper, sureties,

Now, You Are Hereby Commanded, without delay, to cite the said Defendants  
or James A. Hendrix

District, attorney, to appear at the next Term of our  
Court of Civil Appeal  
said Supreme Court, to defend against the said Appeal, if next they think proper.

Witness, EUNICE B. BLACKMON, Clerk of the Circuit Court of said County, this 1st  
day of March, A. D., 19<sup>74</sup>.

Attest:

Eunice B. Blackmon Clerk

#10,488

**CIRCUIT COURT**  
**Baldwin County, Alabama**

DUNCAN TURNBULL & ALICE W. TURNBULL

Vs. } Citation in Appeal

LAMAR RENCHER, JOHN FOSTER, RUSSELL SHERMAN,  
C. K. ZEHNER, F. H. DEITZ, JR., H. C. MULLINS,  
JOHN HADLEY, E. F. GOLDSMITH & IRA B. MYER, STATE  
HEALTH OFFICER, STATE OF ALABAMA

Please serve: James A. Hendrix, District Attorney  
Bay Minette, Ala.

Issued \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

**RECEIVED**

MAR 06 1974

J. WILKINS  
SHERIFF

Received 6 day of March 1974  
and on 8 day of March 1974  
I served a copy of the within Citation  
on James A. Hendrix  
By service on James A. Hendrix

TAYLOR WILKINS, Sheriff  
By J. M. Byrd D. S.

DUNCAN TURNBULL AND  
ALICE TURNBULL

Plaintiffs

-VS-

LAMAR RENCHER,  
JOHN FOSTER, et al

Defendants

§

§

§

§

§

§

IN THE CIRCUIT COURT OF

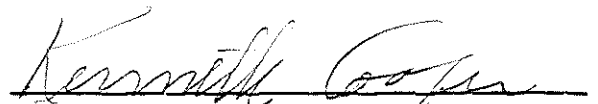
BALDWIN COUNTY, ALABAMA

CIVIL ACTION

CASE NO. 10488

NOTICE OF APPEAL

Comes now the plaintiffs, Duncan Turnbull and Alice Turnbull,  
by their attorney of record, Kenneth Cooper, and appeal to the  
Court of Civil Appeals of Alabama, from the JUDGMENT rendered  
against them in this cause on the 1st day of November, 1973.



ATTORNEY FOR PLAINTIFFS  
Post Office Box 1000  
Bay Minette, Alabama 36507

FILED

FEB 18 1974

EUNICE B. BLACKMON CIRCUIT  
CLERK

~~FILED~~

~~DEC 6 1973~~

~~EUNICE B. BLACKMON CIRCUIT  
CLERK~~

DUNCAN TURNBULL AND  
ALICE TURNBULL

Plaintiffs

-VS-

LAMAR RENCHER,  
JOHN FOSTER, et al

Defendants

Ø  
Ø  
Ø  
Ø  
Ø  
Ø

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

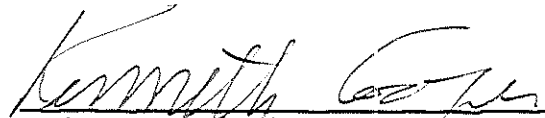
CIVIL ACTION

CASE NO. 10488

### SECURITY FOR COSTS

I, hereby acknowledge myself security for all costs of appeal to the Alabama Court of Civil Appeals, from the Judgment rendered in the above entitled cause on the 1st day of November, 1973, and hereby agree to pay all such costs. And for the payment of this bond, I hereby waive my right of exemption to personal property under the Constitution and Laws of the State of Alabama.

WITNESS my hand and seal, this the 6th day of December, 1973.



ATTORNEY FOR PLAINTIFFS  
Post Office Box 1000  
Bay Minette, Alabama 36507

TAKEN and APPROVED, this the 18 day of Feb, 1974.



FILED

FEB 18 1974

EUNICE B. BLACKMON CIRCUIT CLERK

RECEIVED  
BALDWIN COUNTY  
FEB 19 1974

No. 10,488

BALDWIN County, Circuit Court.

DUNCAN TURNBULL & ALICE W. TURNBULL  
Plaintiff.  
vs.

LAMAR RENCHER, JOHN FOSTER, RUSSELL SHERMAN, C. K. ZEHNER, F. H. DEITZ, JR., H. C. MULLINS,  
JOHN HADLEY, E. F. GOLDSMITH & IRA B. MYER, STATE HEALTH OFFICER, STATE OF ALABAMA  
Defendant.

I, Eunice B. Blackmon Clerk of Circuit Court,  
of Baldwin County, Alabama, hereby certify that in the  
cause of Duncan Turnbull & Alice W. Turnbull plaintiff,  
vs.

Lamar Rencher, John Foster, Russell Sherman, C. K. Zehner, F. H. Deitz, Jr., H. C. Mullins,  
John Hadley, E. F. Goldsmith & Ira B. Myer, State Health Officer, State of Alabama  
defendant,

which was tried and determined in this Court on the 1st day of  
November 19 73, in which there was a judgment ~~for~~ in which Petition for  
Mandamus denied Dollars, in favor of the plaintiff; (or judgment  
for defendant,) the Plaintiffs on the 18th day of  
February 19 74, took an appeal to the Court of Civil Appeals  
Court  
of Alabama to be holden of and for said State.

I further certify that Plaintiffs  
filed security for cost of appeal, to the Court of Civil Appeals Court, on  
the 18th day of February 19 74, and that Kenneth Cooper,  
was  
~~are~~ sureties on the appeal bond.

I further certify that notice of the said appeal was on the 8th  
day of March 19 74, served on James A. Hendrix  
as attorney of record for said appellee, and that the suit ~~amount sued for~~  
was a Petition for Mandamus for Permission to install ~~septic tank~~ septic tank  
Dollars. (Or certain lands)  
(Or personal property.)

Witness my hand and the seal of this Court, this the 1st  
day of March 19 74.

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

JUN 28 1974

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1973-1974

Civ. 348

Duncan Turnbull, et al.

v.

Lamar Rencher, et al.

Appeal From Baldwin County Circuit Court

PER CURIAM:

Appellants Turnbull are the owners of six lots in Baldwin County, Alabama, described as Lots 20 through 25 of Turnbull's Subdivision as recorded in Map Book 5, page 68 of the Probate Records of Baldwin County, Alabama.

Appellees are the members of the Baldwin County Board of Health, the county health officer, the county sanitation officer, and Dr. Ira Myers, the State Health Officer.

On June 25, 1971, appellants filed with the county health board applications for permits to install a septic tank on each of the above described lots. Attached to each application was a report of



the result of a soil examination and percolation test prepared and signed by W. L. Bedsole of Bedsole Surveying Company of Mobile, Alabama. The information contained in these six reports tended to show that a septic tank on each of these lots would function successfully.

Appellee C. K. Zehner, the county sanitation officer, wrote at the bottom of each report the following: "It is our opinion that the use of an individual septic tank system on the lot is not suitable by reason of the following conditions: Disapproved on basis of original report by same surveyor", whereupon the health officer and board of health denied the applications and refused to issue the permits.

Subsequently, the property owners filed a petition addressed to the Honorable Telfair J. Mashburn, as Judge of the Circuit Court of Baldwin County, Alabama, for an alternative writ of mandamus or a rule nisi requiring the respondents to issue the permits, or appear and show cause why they should not do so. Respondents, after service, first filed a demurrer, which apparently was never ruled upon, then filed a full and complete answer putting in issue the allegation that the failure to approve said lots for installation of septic tanks was a failure to perform a ministerial duty imposed by statute, but on the contrary was a decision involving the exercise of discretion and that such act was reasonable and in accordance with the

statutes and rules and regulations of the State Committee of Public Health.

Trial was had without a jury and the evidence heard by Judge Mashburn on September 18, 1973. At the end of the trial, Judge Mashburn announced that he did not find that the defendants acted or operated arbitrarily and that he would deny the petition. Judgment accordingly was entered on November 1, 1973. From the judgment, plaintiffs in the court below perfected this appeal.

We are somewhat handicapped in the deciding of this case in that neither the plaintiffs nor the respondents enlightened us, by pleadings, proof or briefs, as to the existence of statutes or state or local regulations pertaining to the placing of septic tanks on residential property or the issuance of permits for the installation of same. However, plaintiffs alleged in their complaint that the failure or refusal by the defendants to approve the installation of septic tanks on their property constituted a failure on the part of defendants to perform a ministerial duty imposed upon them in their capacities as public health officers by "the statutes of this State". Respondents by their answer tacitly admitted that they were charged with the responsibility of granting permits of the kind applied for, but that they were clothed with the discretion of deciding in each case whether to grant the application would be inimical to the public health. One of the issues then was whether the duty of issuing such permits

was ministerial or quasi-judicial. Plaintiffs claimed it ministerial, the respondents quasi-judicial.

Plaintiffs cite no authority for their contention that the duty was ministerial. Defendants cite Meecham, Public Officer and Officers, pp. 421 and 422 as saying that boards of health are quasi-judicial.

We must assume, therefore, that respondents' were acting under some regulation of the State Board of Health making it unlawful for citizens to install septic tanks without first having obtained the approval of the county board of health. The state board of health would have had the authority to adopt such a regulation under the provisions of Tit. 22, Sec. 7, (1), (4), (6), and (7). However that may be, the case was tried on the contention by the Plaintiffs that the county board of health had the power to issue such permits and that the issuance thereof was a ministerial duty, with no discretion, or that the board acted arbitrarily and abused its discretion by its denial, and the defendants insisting that they were clothed with discretion, and that their decision was made in the exercise of a wise and just discretion, and in the public interest.

There seems no doubt that mandamus is the proper remedy when an administrative board or commission or official has acted, or refused to act, because of bias, favoritism, fraud, or other improper

reason. City Council of Montgomery v. West, 149 Ala. 311, 42 So. 1000. However, to warrant the court in issuing a writ of mandamus, it must appear that the complaining party has a clear legal right to the performance of the particular duty sought to be enforced. 52 Am.Jur. 2d, Section 64, page 388.

The evidence discloses that the same Mr. Bedsole who made the percolation tests and signed the reports attached to relators' June, 1971 applications had made similar tests for the same property owners in 1959 and reported that the lots were not suitable for septic tanks. Witness Zehner, sanitation officer for the Baldwin County Health Department, visited the lots in July and September 1971. In examining the test holes made by Bedsole in June he found them to either have caved in or to be filled with water. A week after finding the holes water filled, a subsequent check found the water to have fallen only 17 inches.

Upon finding the soil conditions, drainage and percolation to be substantially unchanged since the report of 1959, Zehner recommended to the county health officer that the application for permission to build septic tank and field lines on all the lots be denied. Such denial was duly entered.

It was shown that the 1971 report of Bedsole was made in June, a relatively dry month when the water table would tend to be at a low stage. Testimony was given that the suitability of property for septic tank effluent disposal should be determined as of the time of highest rainfall and highest level of the water table. A system which might work well in dry months would overflow and be a health hazard during wet months when the water table is near or above the level of the dispersal field lines.

It was held in L & N RR Co. v. W.E. Solschenberger, 270 Ala. 536, 120 So.2d 704, that on mandamus proceeding to review decree of trial court rendered on testimony taken ore tenus before the court, the usual presumption in favor of the correctness of the court's findings of fact is indulged. In State ex rel. Falkner v. Armstrong, City Comptroller, et al, 217 Ala. 564, 117 So. 187, realtor applied to the city commission for a license to operate a dance hall. License was refused, and his petition for mandamus having been denied, relator appealed. In affirming the court said

"If relator shall be able to allege that the city commission, or their authorized agents, in refusing to grant him a license, are actuated by a motive and purpose having no proper relation to the public safety, peace, good order, or decency, the court should, after proof -- for all presumptions should be indulged in favor of their action -- interfere."

In this case we think there was a failure of proof that respondents' action in refusing the permits was actuated by any other motive than the protection of the public health, and the trial court correctly denied their application for mandamus.

AFFIRMED.

The foregoing opinion was prepared by Honorable T. Werth Thagard, Supernumerary Circuit Judge, under Section 2 of Act No. 288, Acts of Alabama, July 7, 1945 as amended.

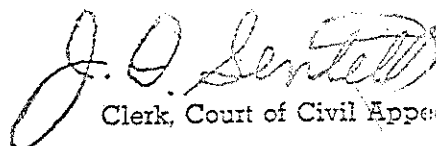
His opinion is hereby adopted as that of the Court.

Wright, P.J., Bradley and Holmes, 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,

-6-

Witness my hand this 28<sup>th</sup> day of June 19 74



Clerk, Court of Civil Appeals of Alabama