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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5006

In the Supreme Court of Appeals of Virginia at Richmond

A. HADRUP, ET AL., ETC.

v.

THOMAS BATTAILE SALE, JR., ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5006

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of March, 1959.

A. HADRUP, ET AL., ETC., Appellants,

against

THOMAS BATTAILE SALE, JR., ET AL., Appellees.

From the Circuit Court of the City of Fredericksburg

Upon the petition of A. Hadrup, W. C. Spratt and W. C. Spratt, Jr., partners, trading as Fredericksburg Pipe and Supply Company, assignees of A. Hadrup, an appeal is awarded them from a decree entered by the Circuit Court of the City of Fredericksburg on the 24th day of October, 1958, in a certain proceeding then therein depending wherein the said petitioners were plaintiffs and Thomas Battaile Sale, Jr., and others were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of five hundred dollars, with condition as the law directs.

RECORD

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page G12 }

* * * * *

Filed 26 Sept. '58.

L. M. B.

OPINION OF THE COURT.

This cause was referred to Master Commissioner William D. Williams by decree of 10 January, 1958.

As a result thereof 1175 pages of testimony was taken at hearing held before the Commissioner. On 3 June, 1958 he filed his report herein which consists of 24 pages of typewritten matter.

Numerous exceptions have been filed to this report by many of the above counsel and some are trying to sustain the report.

The Court has carefully read the report which shows much work on the part of the Commissioner and only two of the exceptions require any further consideration.

1. His report is clearly correct as to the mechanics liens, with the exception of the houses which had been
page G13 } sold more than sixty days before, these the liens were placed thereon.

As to the Orgus houses: These houses were sold to Orgus on 18 April, 1957. The lien was placed thereon on 10 October, 1957. There is no proof that Shelton ever had a contract with Orgus to do any work on these houses; such work as he may have done on the Orgus houses was as a mere volunteer for which there can be no recovery. *Wallace* v. *Brumback,* 177 Va. 36, 12 S. E. (2d) 801 (1941)

2. The Commissioner's report is also correct as to the 2½% allowed to Goolrick, Ashby & Whitticar on all notes represented by them which were in default at the time when the receivership suit was filed.

This brings us to the two most troublesome questions in the case. First, we shall consider the question raised as to the building of the retaining wall.

The City ordinance requires the land owner to build a concrete sidewalk. The city is responsible for the grading of

the street, its paving and for the cost of curbs and gutters. I find nothing in the ordinance which requires a land owner to build a retaining wall. (City Ordinance, Sec. 22-1, 22-2 and 22-3)

But the city owed the land company some money; it was not due until the work provided for in the agreement had been completed; the work had not been completed; the land company wanted its money, so the city agreed to pay

page G14 } the money in advance if the land company agreed to finish the work and in addition thereto build a retaining wall.

The exceptant contends that there was no consideration for this agreement. The law is otherwise. Section 91, title Contracts 12 Am. Juris. pp. 584-585; 4 Michie's Juris. Sec. 33, p. 365; *Loney* v. *Belcher,* 169 Va. 160, 192 S. E. 891 (1937); *Bantz* v. *Basnett,* 12 W. Va. 772 (1878). See also 6 R. C. L., title Contracts Sec. 73, pp. 664-665 and notes 14 and 15. The exception to the report as to this matter is overruled. But there is no reason why a concrete wall would not be just as effective as a rock wall and it is held that the erection of a concrete wall will be a full compliance with the contract.

This disposes of all the exceptions insisted on to the Commissioner's report, with the exception of Battaile Sale to the Commissioner's report.

It appears from the record (p. 1208) that Sale bought his house on 19 March, 1957. That Hadrup's lien was filed on 29 July, 1957 (R., p. 612). That after 19 March, 1957 no work was done on this house or materials furnished by Hadrup. Any work that Hadrup did on the house must have been done for the prior owner before 19 March, 1957, and Hadrup's lien against Sale's house should have been filed within sixty days after 19 March, 1957 whether the house was finished or not. When there is a change of ownership,

page G15 } that is notice to contractors and workmen who do no further work on the house, that the statute has begun to run and the lien even on an unfinished house must be filed within the limitation period from the date of sale.

Shelton did work on the house at the instance of Sale after 19 March, 1957 and he could file a lien for the new work within 60 days from the completion of the house, but not for any work done prior to 19 March, 1957 unless filed within 60 days from 19 March, 1957. *Bolton* v. *Johns,* 5 Past. 145, 47 Am. Dec. 61 (1947) and note; and 18 R. C. L. sec. 109, p. 967-8.

While the Court is of the opinion that the sale would

not have barred the filing of the lien if it had been filed in time, the filing of such a lien four months after the property is *bona fide* sold to a third person such a lien comes too late.

One who has the right to place a mechanic's lien on another's property must take notice of when a sale is made and must thereafter within sixty days after such sale is made place his lien on the building in question whether it is finished or not. One has the right to purchase an unfinished building and those who have the right to put mechanic's liens on such building must do so within sixty days thereafter. One who furnishes work or material on a building is entitled to file his lien if not paid "at any time after the work is done and the material furnished by him and before the expiration of sixty days from the time such building * * * is completed or the work thereon otherwise terminated * * *" (Code Section 43-4) so far as past work and materials are page G16 } concerned;

When the property is sold to a *bona fide* purchaser the work is otherwise terminated.

Possibly the new purchaser would leave the house in an unfinished condition depending on the amount of work to be done thereon and certainly the former owner's creditors cannot put liens on his property unless they strictly comply with the law.

After a house is sold to a *bona fide* purchaser, the work thereon under the former owner's contracts must be "otherwise terminated." Thereafter if any work is to be done on the house, it has to be by new contracts entered into by the new owner. The former owner has no right to order new work on the house sold. It is only the new owner who can order such work. And such new work is not a continuation of the work under the former owner's contracts.

Therefore, when a house is sold to a *bona fide* purchaser, the work on such house under contracts made by the former owner are necessarily terminated and they must file their liens within the sixty days fixed by the statute when the work has been "otherwise terminated."

Therefore, the exception as to any lien filed on Sale's house after sixty days from the sale thereof is sustained.

As to the claim of set-off the Court is of the opinion that the Commissioner is correct in his findings and the exception is overruled.

LEON M. BAZILE, Judge.

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This cause came on this day to be again heard on the report filed June 3, 1958, by W. D. Williams, Master Commissioner, who was appointed by a decree of reference entered in said cause on June 10, 1958.

And the Court having maturely considered the exceptions filed in said cause by Normandy Village, Inc., Valley Lane Corporation, Dawn Lane Corporation, M. H. Sharlin, David L. Kinsey, Walter Ogus and Valerie E. Ogus, John Wood, Jr., Gordon Shelton, T. Battaile Sale, Jr. and Margaret B. Sale, Massaponax Sand and Gravel Corporation, Ethel E. Evans, Wilson Bros., Inc., Sherwin-Williams Paint Co., Inc. and,

It further appearing to the Court that since the filing of their exceptions, the following parties have assigned their claims to M. H. Sharlin and David L. Kinsey, and have withdrawn their exceptions to said report, namely, Massaponax Sand and Gravel Corporation, Ethel E. Evans and John Wood, Jr., and,

It further appearing to the Court that the only matters before the Court to now consider are as follows:

(1) Whether the Commissioner erred in allowing the mechanic's liens filed by Gordon Shelton to be declared valid as to the property of Normandy Village, Inc., Walter Ogus and Valerie E. Ogus, David L. Kinsey and M. H. Sharlin, and T. Battaile Sale, Jr. and Margaret B. Sale, known as Lots 78 and 79 owned by Normandy Village, Inc.; Lots 69, 70, 71 and 72 owned by David L. Kinsey and M. H. page G18 } Sharlin; Lot 67 owned by T. Battaile Sale, Jr. and Margaret B. Sale and Lots 80, 82, 84, 85, 86 and 88 owned by Walter Ogus and Valerie E. Ogus, in varying amounts, all of said lots being in Normandy Village Subdivision.

(2) Whether the mechanic's lien filed by A. Hadrup against T. Battaile Sale, Jr. and Margaret B. Sale on Lot 67 in Normandy Village Subdivision, in the amount of $1,265.00, should be sustained as a valid mechanic's lien.

(3) Whether or not Normandy Village, Inc. was liable for the construction of a stone retaining wall on the property line of Lots 28 and 31 in Normandy Village Subdivision, which lots abut to Fall Hill Avenue, as set forth in an agree-

ment between Normandy Village, Inc. and the City of Fredericksburg, Virginia.

(4) Whether a fee of 2½% should be paid to the Law Firm of Goolrick, Ashby and Whitticar, attorneys for note holders of certain Deeds of Trust which were in default at the time of the institution of this proceeding.

(5) Whether T. Battaile Sale, Jr. and Margaret B. Sale are allowed a claim of set-off for an indebtedness owed by them to Normandy Village, Inc. of $3,275.00 with interest from March 19, 1957.

(6) The exception of Sherwin-Williams Paint Co., Inc. that its claim was not considered by W. D. Williams, Master Commissioner.

And the Court having maturely considered the memorandum filed by counsel in this cause, the Court doth hereby sustain the Commissioner's report filed by W. D. Williams on June 3, 1958, in all particulars, except the mechanics' liens hereafter noted are declared not to be valid mechanics' liens:

page G19 } The mechanics' liens filed by Gordon Shelton against the six properties owned by Walter Ogus and Valerie E. Ogus, which are Lots 80, 82, 84, 85, 86 and 88 in Normandy Village Subdivision and the mechanic's lien filed by Gordon Shelton against T. Battaile Sale, Jr. and Margaret B. Sale on Lot 67 of Normandy Village Subdivision, and the mechanic's lien filed by A. Hadrup against T. Battaile Sale, Jr. and Margaret B. Sale against Lot 67 in Normandy Village Subdivision, and the Court doth so adjudge, order and decree, and to which ruling of the Court counsel for Gordon Shelton and A. Hadrup do hereby take exception.

And the Court doth further adjudge, order and decree that the said Gordon Shelton and A. Hadrup shall become general creditors of Normandy Village, Inc., Valley Lane Corporation and Dawn Lane Corporation, in the amounts sued for in their mechanic's liens.

The Court doth further adjudge, order and decree that Julien J. Mason and William M. Scaife, Jr., Special Receivers of Normandy Village, Inc., do forthwith obtain bids from at least two, or more, reputable contractors for the building of the retaining wall on the property formerly owned by Normandy Village, Inc. except property now owned by the City of Fredericksburg, but the said Special Receivers are authorized to let said bids for a concrete retaining wall in-

stead of a stone retaining wall, to which order of the Court exception is taken by counsel for Normandy Village, Inc., M. H. Sharlin and David L. Kinsey.

And the Court doth further note exception on the part of T. Battaile Sale, Jr. and Margaret B. Sale, by counsel, as to the Court's ruling that the setoffs claimed by T. Battaile Sale, Jr. and Margaret B. Sale are not allowed.

page G20 } And the Court doth further note exception by counsel for M. H. Sharlin and David L. Kinsey to the ruling of the Court that the mechanics' liens are allowed Gordon Shelton on Lots 69, 70, 71 and 72 of the Normandy Village Subdivision; that exception is taken by counsel for Normandy Village, Inc. to mechanics' liens being allowed by Gordon Shelton on Lots 78 and 79 of Normandy Village Subdivision and by counsel for Normandy Village, Inc., Dawn Lane Corporation and Valley Lane Corporation, counsel for Wilson Bros., Inc. and counsel for M. H. Sharlin and David L. Kinsey to the allowance of a fee of 2½% to Goolrick, Ashby and Whitticar, attorneys for note holders of Deeds of Trust in default, and all of which exceptions are hereby noted.

And it further appearing to the Court that the claim of Sherwin-Williams Paint Co., Inc., in the sum of $445.21 is a just claim against Normandy Village, Inc., the Court doth decree that said Company be declared to be one of the general creditors of Normandy Village, Inc.

Enter this 24 October, 1958.

LEON M. BAZILE, Judge.

* * * * *

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Filed Nov. 12, 1958.

M. H. WILLIS, Clerk.

November 10, 1958.

Mr. M. H. Willis, Clerk
Circuit Court of the City of Fredericksburg
Fredericksburg, Virginia

Re: Normandy Village, Inc., et als.

v.

A. Hadrup, et als.

Dear Mr. Willis:

I wish to give you notice of our intention to appeal that certain suit styled A. Hadrup, et als. *v.* Thomas Battaile Sale, Jr., et als. which was heard in the above styled consolidated causes and will accordingly present to the Supreme Court of Appeals of Virginia a petition for an appeal to the final order entered therein upon the following assignments of error.

1. The Court erred in overruling the report of W. D. Williams, Master Commissioner, which upheld the validity of a mechanic's lien filed by A. Hadrup, General Contractor, and W. C. Spratt and W. C. Spratt, Jr., Partners, Trading as Fredericksburg Pipe & Supply Company against the house and lot known as Lot #67 Section 4 of Normandy Villiage Subdivision, Fredericksburg, which was owned by Thomas Battaile Sale, Jr., and Margaret B. Sale. The action of the Court was contrary to the law and the evidence and in direct conflict with the provisions of Chapter 1, Title 43, Code of Virginia, 1950, as amended.

2. The Court erred in overruling the findings of Commissioner Williams in regard to the mechanic's lien set out in paragraph 1, in as much as no proper exception was taken thereto by counsel for any party in interest.

3. The Court erred in considering an exception noted to the finding of Commissioner Williams in regard to the mechanic's lien set out in paragraph 1, in as much as it was not filed on behalf of any party in interest in that cause and it failed to set out any proper or clearly designated assignment of error.

It is requested that you proceed to make up the record in the cause in accordance with the rules promulgated by the Supreme Court of Appeals of Virginia.

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Very sincerely yours,

WM. J. GIBSON.

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Filed December 1, 1908.

M. H. WILLIS, Clerk
By CHARLES H. BERRY, Deputy.

STATEMENT OF FACTS.

In the summer of 1954, M. H. Sharlin, David L. Kinsey and Henry A. Cheschire formed a Delaware Corporation, incorporated as Normandy Village, Incorporated. Normandy Village, Inc., purchased a large tract of real estate in the City of Fredericksburg, subdivided it, and began the construction of a large number of houses. As the project continued various other corporations were formed by the same parties for the same purposes.

In the summer of 1957, the affairs of the corporations became hopelessly entangled and a large number of claims were asserted against them and mechanics' liens were filed against lots and houses of the corporations and against lot and houses of those who purchased properties from them. The various suits were consolidated by a proper order of the Court with a suit styled Normandy Village Incorporated *v.* A. Hadrup, et als. There was a reference to W. D. Williams, a Special Commissioner in Chancery for the Circuit Court of the City of Fredericksburg, Virginia, who was directed, among other inquiries to report upon the following:

page G24 } "The validity of the mechanic's liens which have been asserted in these causes against the properties standing in the names of the parties hereto."

One of the suits was filed by A. Hadrup, General Contractor, and W. C. Spratt and W. C. Spratt, Jr., Partners, Trading as Fredericksburg Pipe & Supply Company against Thomas Battaile Sale, Jr., and Margaret B. Sale, et als. on the 17th day of October, 1957, to enforce their mechanic's lien for the sum of One Thousand Two Hundred and Sixty-five Dollars ($1,265.00) filed on the 29th day of July, 1957, against the house and lot known and designated as lot #67 Section

4, Normandy Village, Fredericksburg, Virginia, which was conveyed to the Sales by Normandy Village, Inc., by deed dated April 3rd, 1957, and duly recorded in the Clerk's Office of the Circuit Court of the City of Fredericksburg, Virginia.

The mechanic's lien was filed for the plumbing and heating work performed in the house pursuant to the terms of A. Hadrup's Contract with Normandy Village, Inc., in the amount of $1,265.00, an assignment of this sum was duly made by A. Hadrup to the Fredericksburg Pipe and Supply Company. Although all of the plumbing work was not completed prior to the transfer of the property by Normandy Village, Inc., to the Sales and the house itself was not completed at that time, the work to be performed and supplies furnished by A. Hadrup had been completed. The Sales made no inquiry as to whether or not the people who performed the work or furnished the supplies had been paid. While the mechanic's lien was filed on July 29, 1957, the house was not completed by the Sales until the second week in August, 1957. Sale was indebted to Normandy Village, Inc., for the sum of $3,250.00, evidenced by a negotiable note which was not produced and requested in the hearing before the Commissioner that, if the mechanic's lien be upheld, page G25 } he be allowed a credit for that amount upon his note in favor of Normandy Village, Inc.

The Commissioner, W. D. Williams, in his report filed on the 3rd day of June, 1958, upheld the validity of the mechanic's lien and disallowed the contention of Thomas Sale that he be allowed a credit for that sum upon his note.

Counsel for Thomas Battaile Sale and Margaret B. Sale did not except to the report of the commissioner in so far as it upheld the validity of the lien, but did except to the refusal of the Commissioner to allow the credit. Julian J. Mason, as attorney for Normandy Village, Inc., Valley Lane Corporation, Dawn Lane Corporation, M. H. Sharlin, David L. Kinsey, Walter M. Ogus and Valerie Ogus, in his exceptions to the report of the Commissioner in so far as they applied to this suit, set out as follows:

"The Commissioner further found that the mechanic's lien taken by A. Hadrup against Thomas Battaile Sale and Margaret B. Sale was a good and valid mechanic's lien, to which exception is taken."

Over the objections of counsel for A. Hadrup, et als., being the same as were assigned as error in the letter filed by him

with the Clerk, the Court entered a decree overruling the report of the Commissioner and denying the validity of the lien, from that decree this appeal is noted.

We agree that the foregoing is a correct statement of the facts pertaining to this cause.

COLEMAN & GIBSON
Attorneys at Law
403 William Street
Fredericksburg, Virginia
By WM. J. GIBSON

page G26 } Seen:

GOOLRICK ASHBY & WHITTICAR
Attorneys at Law
Princess Anne Street
Fredericksburg, Virginia
By JAMES ASHBY, JR.

JULIAN J. MASON
Attorney at Law
Bowling Green, Virginia

JOHN A. JAMISON
Attorney at Law
912 Princess Anne Street
Fredericksburg, Virginia.

I, Leon M. Bazile, Judge of the Circuit Court of the City of Fredericksburg, Virginia, do hereby certify that the foregoing is a true and correct copy or report of all of the proceedings, testimony, exhibits and other incidents of the trial of the cause of A. Hadrup, et als., v. Thomas Batt*ia*le Sale, Jr., et als., tried in the consolidated causes of Normandy Village, Inc., et als., *v.* A. Hadrup et als. in the Circuit Court of the City of Fredericksburg.

Given under my hand this 1 day of December, 1958.

LEON M. BAZILE, Judge.

1 December 1958.

* * * * *

page G30 } I, M. H. Willis, Clerk of the Circuit Court of the City of Fredericksburg, Virginia, certify that Pages G 12 thru G 20, indexed as the Opinion of the Court and Final Decree, are photo copies of the original papers from the cause of Normandy Village, Inc., et als. *v.* A. Hadrup, et als. (Consolidated Causes). The *orignal* opinion and decree are being transmitted to the Supreme Court of Appeals of Virginia in the cause of Normandy Village, Inc. et als. *v.* A. Hadrup, et als.

Given under my hand this 9th day of January 1959.

M. H. WILLIS, Clerk.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME COURT OF APPEALS
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RICHMOND, VIRGINIA