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Record No. 5101

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Clerk, Supreme Court of Appeals
Richmond, Va.

In the Supreme Court of Appeals of Virginia at Richmond

VIRGINIA MAE DOVE, ET AL.

v.

S. D. MAY, STATE HIGHWAY COMMISSIONER

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

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. 5101

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 14th day of October, 1959.

VIRGINIA MAE DOVE, ET AL, Appellants,

against

S. D. MAY, STATE HIGHWAY COMMISSIONER, Appellee.

From the Circuit Court of Fairfax County

Upon the petition of Virginia Mae Dove, Vernon Stout Dove, Alice Kitson, Clarence Kitson, Juanita McGuin. Lawrence McGuin, Clarence McGuin, Mae McGuin, Doris E. Cassedy, William S. Cassedy, Catherine Gayle, John Gayle, Earl Gibson, Marguerite Gibson, Mary L. McGuin, Margaret Talbert Schurtz, C. L. Devers, Shirley Hatten, Lois Shiflett, Harry McGuin, Naomi McGuin, Louise Baranowski, Wilfred R. McGuin, Viola Mae Estes, Marjorie Dove, Virginia Pullman, Leo M. Estes, C. P. Talbert, Georgie Talbert, James W. Talbert, Emma Fewell, Mary E. Devers, Harry McGuin, Sr., Elsie McGuin, Ann L. Cresent, John H. Cresent, Louis McGuin, Lester Dove, Helen Gibson Kearns and Robert W. Brown, guardian *ad litem* for the following infants: Lester Dove, Ralph Dove, Eugene Dove, Floyd Dove, Herbert Dove,

Leonard Dove, Gary McGuin, George McGuin, Kenny McGuin, Deborah McGuin, Brenda McGuin, Sharon McGuin, Robbin McGuin, Lewis McGuin, Betty McGuin, Barba McGuin, Freddie McGuin, Joseph McGuin, Susan Kearns, Janet Cassidy, Terry Baranowski, Vickie McGuin, Ronny McGuin, Laurene McGuin, Gina McGuin, Helen Kearns, Gertrude Gibson, Marie Gibson, James Gibson, Roy Gibson, Thomas Gibson, Clyde Truitt, Johnny Cresent, Deborah Cresent, Alan Gayle, Elsie Gayle, Christine Gayle, Cecil Gayle, Alice Gayle, Edward Gayle, Donald Cassidy, Catherine Estes, Alice Baranowski and Tracy McGuin an appeal is awarded them from a final order entered by the Circuit Court of Fairfax County on the 27th day of April, 1959, in a certain proceeding then therein depending wherein S. D. May, State Highway Commissioner, was plaintiff and Virginia Mae Dove and others were defendants; upon the petitioners over the age of 21 years, 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, no bond being required of the infants under the age of 21 years.

RECORD

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Filed in Circuit Court Clerk's Office Feb. 5, 1959.

THOMAS P. CHAPMAN, JR.
Clerk Fairfax County, Va.

PETITION.

To the Honorable Judges of the Circuit Court of Fairfax County, Virginia:

1. Your Petitioner, S. D. May, State Highway Commissioner of the State of Virginia, respectfully represents unto this Honorable Court that it is necessary for the construction, reconstruction, alteration, maintenance and repair of a portion of a highway embraced in the Virginia State Highway System known as Route 413, Fairfax County, Virginia, to acquire in fee simple a strip or parcel of land through certain real property formerly owned by Norma Virginia Talbert (subject, however, to the rights of the heirs or relatives of those members of the Talbert family buried in the cemetery hereinafter referred to), and which by Norma Virginia Talbert was devised to Virginia Mae Dove and her children, as shown by lines on a blueprint map of a portion of said highway, identified as Sheets 12, 33, 39-A, 39-C, and 47, Project 0413-029-002, 8229-02 (old), on file in the office of the Department of Highways, Richmond, Virginia, a copy of which blueprint map was attached to the certificate hereinafter referred to and recorded simultaneously therewith in the State Highway Plat Book among the land records of Fairfax County, Virginia.

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2. Your Petitioner further represents to this Honorable Court that it is requisite and suitable that the said strip of real property through the said property be of the width and on the grades as shown on the said blueprint map hereinabove referred to and outlined in red on said map; and the said parcel of real property to be condemned as aforesaid, located in Fairfax County, Virginia, is more particularly known and described as follows:

Being as shown on plans approved September 3, 1957, and lying on the south (left) side of the survey centerline and adjacent to the lands of Elsie V. McGuin and the lands of Lawrence E. Truitt and Daisey Truitt from the lands of

Cleveland L. English and Rena A. English opposite approximate Station 360+21.84 to the lands of the landowner at approximate Station 363+80.65, thence lying on both sides of and adjacent to the survey centerline from the last said Station to the lands of Elsie V. McGuin at approximate Station 377+27.34, including ramps and connection with Route 613, and containing 17.88 acres, more or less, land, of which 0.02 acre is included in the existing right of way and 17.86 acres, more or less, is additional land.

3. Your Petitioner further represents to this Honorable Court that all or a part of said Route 413 has been designated as a Limited Access Highway in accordance with the provisions of Title 33, Chapter 1, Article 3, of the 1950 Code of Virginia, as amended, and that an easement of access, light or air incident to the lands of the landowners abutting upon said Limited Access Highway and/or upon any of its ramps, loops, or connections at or with intersecting highways, is being taken, the line or lines upon which said easement is taken being shown in blue on said blueprint map and described as follows:

From a point on the proposed south right of way line opposite approximate Station 360+52 (survey centerline), the lands of Vernon Pettie and Clara B. Pettie; thence along said proposed south right of way line to a point opposite approximate Station 361+60, the lands of the landowner; thence in a southerly direction along the said proposed south right of way line a distance of approximately 380 feet to a point 682 feet opposite approximate survey Station 361+00, the page 3 } lands of Drewry T. Hughes and Aurelia M. Hughes, also from a point on the proposed south limited access and right of way line opposite approximate Station 361+90 (survey centerline) the lands of Elsie V. McGuin; thence along said proposed south limited access and right of way line to a point opposite approximate Station 377+48, the lands of Elsie V. McGuin.

4. That on or about the 27th day of August, 1958 Petitioner filed with the Clerk of the Circuit Court of Fairfax County, Virginia a certificate issued by the State Highway Commissoiner and countersigned by the State Treasurer stating that the sum of $31,926.00, or so much thereof as might be directed by the Court, would be paid pursuant to the order of the Circuit Court of Fairfax County, Virginia as provided by Article 5 of Chapter 1 of Title 33 of the 1950

Code of Virginia, to the owner or other persons interested therein

5. That thereupon pursuant to the provisions of the aforesaid Article 5 of Chapter 1 of Title 33 of the 1950 Code of Virginia title to the land described in Paragraph 2 and the easement described in Paragraph 3 vested in the Commonwealth of Virginia.

6. That the property which Petitioner here seeks to acquire includes a cemetery and the right of ingress and egress to the same, and Petitioner is advised that certain persons, chiefly members of the Talbert family, are buried there, but Petitioner has been unable to ascertain the names of the persons interested in said cemetery.

7. That Petitioner wishes to acquire the site of said cemetery, and to move the graves to some suitable location, the expense of such move to be borne by Petitioner.

8. Petitioner further alleges that he has attempted to purchase the said real property from the owner thereof, but has been unable to do so.

9. Petitioner further alleges that he has made efforts to determine the names of all interested parties, but has been unable to ascertain the names of the heirs or relatives of those persons, chiefly members of the Talbert family, who are buried in said cemetery or to obtain the names of the children of Virginia Mae Dove, or other persons who might take as remainderman under the Will of Norma Virginia Talbert.

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10. That the aforesaid State Highway Commissioner has designated Messrs. Jesse, Phillips, Klinge & Kendrick as his attorneys in this matter and has authorized them to institute condemnation proceedings and to make oath to the petition pursuant to the statute as provided in such cases.

WHEREFORE, your Petitioner respectfully prays to this Honorable Court in accordance with the provisions of Article 5 of Chapter 1 of Title 33 of the Code of Virginia, 1950, as amended, that Commissioners may be appointed to ascertain and report what will be a just and proper award to the owner for damages, if any, resulting to the property of the said owner or to the property of any other person from the construction and operation of the highway over the land of the said owner hereinabove described; that this Court shall direct all necessary inquiries to be taken by a Commissioner of this Court to ascertain what persons are entitled to any award which may be allowed herein; that pursuant to the provisions of Chapter 1 of Title 33 of the Code of Virginia, 1950, as amended, any and all defendants hereto who may

desire to do so may be required within ten days after the return day of the notice herein to file in writing in this case any grounds of defense which they may have hereto; that Virginia Mae Dove, Vernon S. Dove, any other persons having an interest in the subject matter of this condemnation, including the heirs at law of Norma Virginia Talbert who died in 1952, the children of Virginia Mae Dove, and any other persons who may take as remainderman under the Will of Norma Virginia Talbert, and any relatives of those persons buried in the cemetery described herein, all of whom are joined herein as parties unknown, be made parties Defendant to this suit; that this Court be directed to confirm the vesting of title in the Commonwealth of Virginia as aforesaid and take all such other steps to carry out the intention of Article 5 of Chapter 1 of Title 33 of the Code of Virginia, 1950, as amended, as may be necessary; that this Court consent to the removal of the bodies buried on the property which is here sought to be condemned, and that said
page 5 } bodies be reintered and further prays that this portion of the case be disposed of prior to the actual condemnation and hearing on the valuation of the land; and that your Petitioner may have such other, further and general relief as the nature of his case may require.

AND YOUR PETITIONER WILL EVER PRAY, ETC.

S. D. MAY
State Highway Commissioner
By EDWARD D. GASSON.

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ANSWER.

To the Honorable Judges of the Circuit Court of Fairfax County, Virginia:

The answer of Virginia Mae Dove, to a bill of complaint filed against her in Your Honor's Court by S. D. May, State Highway Commissioner, State of Virginia.

This respondent reserving to herself the benefits of all just exceptions to the said bill of complaint, for answer

thereto, or to so much thereof as she is advised that it is material she should answer, answers and says:

1. That the above cemetery has been existence since 1827 and is being used today as burial place, that many of the bodies buried were not embalmed and would be difficult to move.
2. That the road in question could be built without moving the cemetery.

And now, having fully answered the complainant's bill, this respondent prays to be hence dismissed with his reasonable costs by her in this behalf expended.

VIRGINIA MAE DOVE
By LESLIE T. SEAMAN
Her Attorney.

Filed Mar. 16, 1959

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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Filed Mar. 16, 1959.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

The answer of ALICE KITSON, CLARENCE KITSON, JUANITA McGUIN, LAWRENCE McGUIN, CLARENCE M. McGUIN, MAE McGUIN, DORIS E. CASSEDY, WILLIAM S. CASSEDY, CATHERINE GAYLE, JOHN GAYLE, EARL GIBSON, MARGUERITE GIBSON, MARY L. McGUIN, MARGARET TALBERT SCHURTZ, C. L. DEVERS, SHIRLEY HATTEN, LOIS SHIFLETT, HARRY A. McGUIN, NAOMI McGUIN, LOUISE BARANOWSKI, WILFRED R. McGUIN, VIRGINIA MAE DOVE, VERNON STOUT DOVE, VIOLA MAE ESTES, LEO M. ESTES, MARJORIE DOVE, VIRGINIA PULLMAN, C. P. TAL-

BERT, GEORGIE TALBERT, JAMES W. TALBERT, EMMA FEWELL, MARY E. DEVERS, HARRY McGUIN SR., ELSIE McGUIN, ANN L. CRESENT, JOHN H. CRESENT, LOUIS McGUIN, LESTER DOVE, and HELEN GIBSON KEARNS to the petition of S. D. May, State Highway Commissioner, filed against them as persons having an interest in that certain cemetary upon the lands of Virginia Mae Dove and her children under the Will of Norma Virginia Talbert, which lands are described in the petition.

1. Respondents respectfully would show that they and others similarly situated are members of the Talbert family, related to or direct and collateral descendants of Thomas Talbert who acquired the lands upon which the said cemetery is situated in the year 1837 and before; that the said lands were devised under the Will of said Thomas Talbert executed in 1841, and passed by *mesne* conveyances and devises to Norma Virginia Talbert who died in 1952, and under whose will the record title is in Virginia Mae Dove and her children; that the several deeds of conveyance touching said property have recognized and reserved the family burial ground, expressly reserving the right of ingress and egress to said burial ground to and for the members of the Talbert page 20 } family.

2. Respondents further say to the Court that said burial ground now contains at least twenty-four graves of known members of the Talbert family buried there during the past century and before, and the graves of an unknown number of slaves; that said burial ground is in current use, the last burial there having occurred not more than two years ago; that the grounds are planted, trimmed and kept with loving care by the living members of the Talbert family; that many members of the family including the undersigned respondents look to the said burial ground as their last resting place.

3. Respondents respectfully affirm that the public interest does not require the removal and desecration of the burial ground and the remains therein, but would show that the right-of-way required by the State Highway Commissioner can and should leave said burial ground untouched, with right of ingress and egress reserved to Respondents.

4. Respondents respectfully affirm that to the extent that a monetary value can be placed upon their interests in the burial ground sought to be acquired, said value is at least in the amount of Five Hundred Dollars ($500.00) for the right of each of the Respondents in the said ground, and respondents state that at least the sum of $500.00 should be

paid to each of them for damages in the event that the Court permits the removal of said burial ground, and in such event respondents pray the protection of the Court in the appointment of Commissioners and the fixing of just compensation.

5. Respondents would further state that a large number of the direct and collateral decendents of Thomas Talbert and of the members of the Talbert family entitled to look to the said burial ground, and having a like interest therein as that of Respondents, are infants, and Respondents pray that a guardian *ad litem* be appointed for the said infants, to defend their several interests in this cause.

page 21 } Respondents pray the protection of the Court and that no order shall be entered requiring or permitting the removal of the said family cemetery or of the remains of any who are buried there, nor preventing their free right of ingress and egress to the said cemetery.

And respondents will ever pray, etc.

KABLER AND BROWN
110 North St., Asaph Street
Alexandria, Virginia
Counsel for Respondents.

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Filed Apr. 9, 1959.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

DEMURRER OF INFANT DEFENDANTS BY GUARDIAN *AD LITEM.*

Come now the infant defendants Ronny McGuin, Laurene McGuin, Gina McGuin, Helen Kearns, Gertrude Gibson, Marie Gibson, James Gibson, Roy Gibson, Thomas Gibson, Clyde Truitt, Johnny Cresent, Deborah Cresent, Alan Gayle, Elsie Gayle, Christine Gayle, Cecil Gayle, Alice Gayle, Edward Gayle, Susan Kearns, Donald Cassidy, Janet Cassidy, Catherine Estes, Terry Baranowski, Alice Baranowski, Vickie Mc-

Guin and Tracy McGuin, Lester Dove, Ralph Dove, Eugene Dove, Floyd Dove, Herbert Dove, Leonard Dove, Gary McGuin, George McGuin, Kenny McGuin, Deborah McGuin, Brenda McGuin, Sharon McGuin, Robbin McGuin, Lewis McGuin, Betty McGuin, Barba McGuin, Freddie McGuin and Joseph McGuin, by Robert W. Brown, their guardian *ad litem*, duly appointed to defend their interests in this suit with this their demurrer to the above styled cause of petitioner, S. D. May, State Highway Commissioner, State of Virginia, and say that the said petition and answers filed thereto by other defendants, have been examined and they thereupon file this their demurrer to the said petition on the following grounds:

1. That the said petition is not brought under the procedure provided by statute for the removal of a graveyard in Section 57-39 of the Code of Virginia 1950, as amended.
2. The said petition fails to allege the statutory grounds or standards for removal of a graveyard as required by Section 57-39 of the Code of Virginia 1950, as amended.
3. The petitioner is not a county, city, trustee of a graveyard, or other proper party under the aforesaid
page 24 } statutory provisions to institute an action involving the removal of the graveyard involved hereunder.

And, having filed this their demurrer, forever pray the said petition be hence dismissed.

ROBERT W. BROWN
Guardian *ad litem.*

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ORDER.

On the 16th day of April, 1959 came the parties hereto by counsel and this matter was heard upon the petition filed herein by the Petitioner and upon the demurrer filed by the Guardian *ad Litem* for a number of infant Defendants, and it was argued, and the Court having maturely considered the same and being of the opinion that the demurrer should be overruled, and the Court having then heard argument upon the petition and all of the other papers filed and read herein, and being of the opinion that the determination of the State

Highway Commissioner as to the necessity of moving the bodies was binding on the Court and that the Highway Commissioner was entitled to move the bodies. Now therefore, it is

ORDERED, ADJUDGED, AND DECREED that the demurrer filed herein by Robert W. Brown as Guardian *ad Litem* for a number of the Defendants be, and the same hereby is, overruled; and it is further

ORDERED, ADJUDGED, AND DECREED that the determination of the State Highway Commissioner that it is necessary to acquire a right of way through the cemetery described in the petition herein and to move the graves to some suitable location is binding on the Court and that Petitioner is entitled to acquire the site of the cemetery and to remove the graves to some suitable location at the expense of Petitioner.

As to the matters and things determined by the Court in this order the same is to be deemed a final order from which an appeal can be taken.

To the foregoing order of the Court the Guardian *ad Litem* excepted upon the ground that the demurrer should page 30 } have been sustained on the grounds set forth in the demurrer, and the Guardian *ad Litem* as well as counsel for the other Defendants excepted upon the ground that the State Highway Commissioner has no right to condemn the land occupied by a private cemetery.

Entered: April 27th, 1959.

PAUL E. BROWN, Judge.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: The Clerk of the said Court:

Pursuant to Rule 5:1, Section 4, of the Rules of the Supreme Court of Appeals of Virginia, the defendants by counsel indicate their intention to petition the Supreme Court of Appeals for an appeal from the Order entered in this cause on

the 27th day of April, 1959, and the defendants rely upon the following assignments of error:

1. That the Court erred in over-ruling the demurrer filed by the Guardian *ad Litem.*
2. That the Court erred in its finding and decree that the determination of the State Highway Commissioner is binding on the Court in so far as said determination on the part of the State Highway Commissioner involves removal of the cemetery.
3. That the Court erred in its finding and decree that the Highway Commissioner is entitled to acquire the site of the cemetery or to remove the graves.
4. That the Court erred in its assumption that the right to condemn and remove a graveyard is implicit in the State Highway Commissioner's power given in the statute to determine the location of highways.

WILLIAM M. KABLER
Counsel for Defendants.

ROBERT W. BROWN
Guardian *ad Litem* for the Infant Defendants.

Filed Jun 9, 1959.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

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