

2989  
194-394  
Record No. 3978

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**HARRY L. BIBBER AND ANOTHER**

v.

**B. H. McCREARY AND OTHERS**

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FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

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**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.

M. B. WATTS, Clerk.

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

194 VA 394

## 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 the 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) The opening brief of the appellant shall be filed in the clerk's office within twenty-one 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. The brief of the appellee shall be filed in the clerk's office not less than twenty-one days, and the reply brief of the appellant not less than two days, before the first day of the session at which the case is to be heard.

(b) Unless the appellant's brief is filed at least forty-two days before the beginning of the next session of the Court, the case, in the absence of stipulation of counsel, will not be called at that session of the Court; 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.

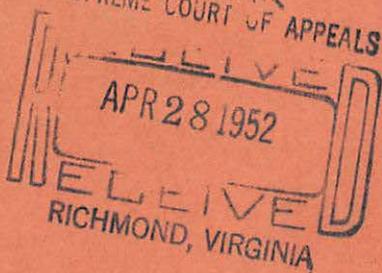
(c) Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

**§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



RICHMOND, VIRGINIA

IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND.

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**Record No. 3978**

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VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Friday, the 30th day of November, 1951.

HARRY L. BIBBER AND ANOTHER      Plaintiffs in Error,  
*against*

B. H. McCREARY AND OTHERS,      Defendants in Error.

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From the Circuit Court of Fairfax County.

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Upon the petition of Harry L. Bibber and Zinaida T. Bibber, his wife, a writ of error is awarded them to judgments rendered by the Circuit Court of Fairfax County on the 29th day of March, 1951, and the 24th day of May, 1951, respectively, in a certain notice of motion for judgment then therein depending wherein the said petitioners were plaintiffs and B. H. McCreary, Dollis E. McCreary, his wife, and Curtis E. Martin, Incorporated, 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 three hundred dollars, with condition as the law directs.

## RECORD

Virginia:

In the Circuit Court of Fairfax County.

Harry L. Bibber and Zinaida T. Bibber, his wife, Plaintiffs,  
*v.*B. H. McCreary and Dollis E. McCreary, his wife, R. F. D. #4,  
Ingleside, Virginia, and Curtis E. Martin, Incorporated, a  
Corporation, 120 South Royal Street, Alexandria, Virginia,  
Defendants.

AT LAW No. 3985.

\* \* \* \* \*

## MOTION FOR JUDGMENT.

To: The Honorable Judges of Said Court.

The plaintiffs, Harry L. Bibber and Zinaida T. Bibber, respectfully represent:

That on the 14th day of January, 1950, the plaintiffs purchased a new dwelling house from the defendants, B. H. McCreary and Dollis E. McCreary, his wife, through the real estate office of Curtis E. Martin, Incorporated, the agent of the vendor, the said real property being more particularly described in the deed of conveyance as "Lot numbered twenty (20), Section Numbered Two (2), Woodlawn Acres, as the same is duly dedicated, platted and recorded in Deed Book 601, page 307, of Fairfax County, Virginia, land records. It being a part of the same property acquired by the said B. H. McCreary by Deed, dated October 31st, 1949, and recorded in Deed Book 722, Page 461, and recorded in Deed Book 725, Page 319, of the Fairfax County, Virginia, land records," and that the defendants, B. H. McCreary and Dollis E. McCreary, and their selling agent Curtis E. Martin, Incorporated, represented to the plaintiffs prior to and subsequent to the sale that the aforesaid real property was fit for the purpose intended; that is, that the plaintiff purchasers and their small children could occupy this dwelling house as a home and the plaintiffs relying upon the implied representations made to them by the vendors, and their agents, the plaintiffs applied their Veterans Administration benefits towards the purchase

page 2 } price, paying the sum required by the vendors and their agent, and moved into the dwelling house, newly constructed, and thereafter, the Sanitary Sewer System, which was constructed with the dwelling by the vendors, and which is an essential part of this specific real property, became defective almost immediately, and the plaintiffs notified the defendants of this defect forthwith, and the defendants have refused to remedy, repair, remove or replace the Sanitary Sewer System so that it will serve the purpose intended, and that due to this defect in the construction and material of this Sewer System, the refuse from the Septic tank has overflowed onto the land of the plaintiffs, and is seeping through the lawn and standing in pools under the dwelling house and outside of the said dwelling house, whereby creating an offensive odor and is detrimental to the health of the plaintiff occupants, and the plaintiffs have caused to be dug a ditch around this specific lot in order to drain off this refuse, but, due to the same condition existing on adjoining property owners land, the aforesaid ditch has filled with this refuse, and will continue to do so, causing the plaintiffs to be deprived of the quiet and peaceful enjoyment of their property and putting the plaintiffs in danger of illness, all of which is known or should be known to the defendants, and of which the plaintiffs have made known to the defendants, who continue to refuse to remedy the situation.

Wherefore, the plaintiffs pray that the herein named defendants be required by Order of this Court to Construct on the aforesaid and the adjoining premises, sufficient Sewer Disposal System or Systems that will in the operation thereof dispose of the refuse from the bath room and wash room, and thereby restore the plaintiffs' dwelling house to the purpose for which they purchased same from the defendants, and for which this specific real property was constructed by the defendants, and intended for the use of the plaintiff purchasers, or that plaintiffs be awarded a Judgment in the sum of Three Thousand Dollars (\$3,000.00) so that they may proceed to have constructed a good and sufficient Sewer Disposal Plant on the premises aforesaid.

HARRY L. BIBBER,  
ZINAIDA T. BIBBER,  
By DENIS R. AYRES,  
Counsel.

DENIS R. AYRES,  
Attorney at Law  
119 South Fairfax Street  
Alexandria, Virginia

\* \* \* \* \*

DEMURRER OF DEFENDANT,  
CURTIS E. MARTIN, INCORPORATED.

Now comes the Defendant, Curtis E. Martin, Incorporated, by its attorney, and says that the Motion for Judgment exhibited against it in this action is insufficient in law.

1. It undertakes to hold this defendant, an admitted agent for the sale of real estate of another, responsible for a breach of an implied warranty with respect to said real estate,

2. It undertakes to enforce a condition with respect to the sale of real estate admittedly not in writing,

3. It erroneously assumes implied warranties with respect to any and every feature of improved real estate upon the sale thereof, when in fact, in the absence of specific warranties, in writing, buyer buys at his own risk,

4. The Motion is defective in that it seeks relief obtainable only in equity.

Wherefore, Defendant prays whether he should be required to further answer said Notice of Motion for Judgment.

CARL BUDWESKY,  
Attorney for Defendant,  
Curtis E. Martin, Incorporated,  
Suite 612, 815 King Street,  
Alexandria, Virginia.

I hereby certify that a copy of this Demurrer was mailed to Denis R. Ayres, Attorney for Plaintiffs, at his stated address, 119 South Fairfax Street, Alexandria, Virginia.

CARL BUDWESKY.

\* \* \* \* \*

\* \* \* \* \*

DEMURRER OF DEFENDANTS,  
B. H. McCREARY AND DOLLIS E. McCREARY.

Now come the defendants, B. H. McCreary and Dollis E. McCreary, by their Attorneys, and say that the Notice of Motion

for Judgment exhibited against them is insufficient in law for the following reasons:

1. It undertakes to enforce a condition with respect to the sale of real estate admittedly not in writing.
2. It erroneously assumes implied warranties with respect to any and every feature of improved real estate upon the sale thereof, when in fact, in the absence of specific warranties, in writing, buyer *busy* at his own risk.
3. The Notice of Motion for Judgment is defective in that it seeks relief obtainable only in Equity.

JOHN BARTON PHILLIPS,  
 HENRY B. CROCKETT,  
 Attorneys for Defendants,  
 B. H. McCreary and Dollis E.  
 McCreary,  
 108 North St. Asaph Street,  
 Alexandria, Virginia.

page 9 } I hereby certify that a copy of this Demurrer was  
 mailed to Dennis R. Ayres, Attorney for Plaintiffs, at  
 his office, 119 South Fairfax Street, Alexandria, Virginia.

HENRY B. CROCKETT.

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\* \* \* \* \*

November 9, 1950.

Mr. Thomas P. Chapman, Jr.  
 Clerk of the Circuit Court of  
 Fairfax County, Virginia.

*Re:* Harry L. Bibber and Wife v. B. H. McCreary and Others.

Dear Tom:

Please enter our appearance as attorneys for the plaintiff in the case referred to above in association with Denis R. Ayres.

Yours very truly,

RICHARDSON, McCANDLISH & LILLARD,  
 By R. J. LILLARD.

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In the Circuit Court of Fairfax  
County, Virginia.  
Mar. 29, 1951.

\* \* \* \* \*

## ORDER.

This case came on to be heard upon the Demurrer to the Notice of Motion for Judgment, and the Court being of the opinion that the Demurrer is well founded and should be sustained;

In consideration whereof, it is adjudged and ordered that the Demurrer be, and it hereby is sustained, to which action of the Court the Plaintiff excepts.

ARTHUR W. SINCLAIR,  
Judge.

Seen:

R. J. LILLARD,  
Attorney for Plaintiff.

Entered in Common Law Order Book No. 27 at page 226 and Ex.

page 12 }

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## MOTION FOR LEAVE TO AMEND.

Now come the Plaintiffs, Harry L. Bibber and Zinaida T. Bibber, his wife, by Counsel, and move the Court for leave to amend the motion for judgment heretofore filed in this cause.

HARRY L. BIBBER,  
By Counsel.  
ZINAIDA T. BIBBER,  
By Counsel.

DENIS AYRES and  
RICHARDSON, McCANDLISH & LILLARD,  
By R. J. LILLARD,  
Counsel for Plaintiffs.

To: Henry Crockett, Counsel for Defendants, B. H. McCreary and Dollis E. McCreary, his wife, and Curtis E. Martin, Inc.

You are hereby notified that on the 1st day of May, 1951, at 2:00 P. M., or as soon thereafter as Counsel may be heard, Counsel will offer to the Circuit Court for the County of Fairfax, Virginia, motion set forth above.

R. J. LILLARD,  
Counsel for Plaintiffs.

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\* \* \* \* \*

**ORDER DENYING LEAVE TO AMEND.**

This action came on to be heard this 24th day of May, 1951, upon the motion of the Plaintiffs, asking leave to amend the motion for judgment heretofore filed, and upon argument of Counsel.

UPON CONSIDERATION WHEREOF, the Court is of opinion that leave to amend the motion for judgment should not be granted on the grounds that the order of March 29, 1951, sustaining the demurrer, was a final order and that the Court is without jurisdiction to enter an order granting Plaintiffs leave to amend the motion for judgment.

WHEREFORE, it is adjudged and ordered by the Court that the motion of the Plaintiffs asking leave to amend the motion for judgment be, and the same hereby is denied, to which action of the Court the Plaintiff excepted.

Enter:

ARTHUR W. SINCLAIR,  
Judge.

\* \* \* \* \*

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**NOTICE OF APPEAL AND ASSIGNMENT  
OF ERROR.**

The undersigned file this notice of appeal and assignment of error because they are aggrieved by two orders of this Court, one entered on the 29th day of March, 1951, whereby the demurrer of the Defendants was sustained, and the other entered

on the 24th day of May, 1951, whereby the motion of the Plaintiffs asking leave to amend the motion for judgment heretofore filed, was denied.

(1) The Court erred in entering said order on March 29, 1951, which sustained the demurrer of said Defendants, as the motion for judgment filed in said action presented and set forth a good cause of action.

(2) The Court erred in entering the order of May 24, 1951, denying the motion of the Plaintiffs asking leave to amend said motion for judgment, on the ground that the order of March 29, 1951, sustaining the demurrer was a final order, and that the Court was without jurisdiction to enter an order granting Plaintiffs leave to amend said motion for judgment.  
page 15 } The said order of March 29, 1951, was not final.

HARRY L. BIBBER,

By Counsel.

R. J. McC., Jr.

ZINAIDA T. BIBBER,

By Counsel.

R. J. McC., Jr.

RICHARDSON, McCANDLISH & LILLARD,  
By ROBERT J. McCANDLISH, JR.,  
Of Counsel for Plaintiff.

\* \* \* \* \*

A Copy—Teste:

M. B. WATTS, C. C.