

3139
196-532 June # 70

Record No. **4270**

In the
Supreme Court of Appeals of Virginia
at Richmond

DOROTHY L. POLESKY, ADM'X, &C.

v.

**NORTHERN VIRGINIA CONSTRUCTION
CO., INC.**

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.

H. G. TURNER, Clerk.

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

196VA532

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) 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 said 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

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NOTICE TO COUNSEL

This case probably will be called at the session of court to

JUN 1954
You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

H. G. Turner, Clerk.

AT RICHMOND.

Record No. 4270

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 22nd day of January, 1954.

DOROTHY L. POLESKY, ADM'X. &C., Plaintiff in Error,
against

NORTHERN VIRGINIA CONSTRUCTION CO., INC.,
Defendant in Error.

From the Circuit Court of Fairfax County.

Upon the petition of Dorothy L. Polesky, administratrix of the estate of Andre Jon Polesky, deceased, a writ of error is awarded her to an order entered by the Circuit Court of Fairfax County on the 19th day of August, 1953, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Northern Virginia Construction Company, Incorporated, was defendant; upon the petitioner or some one for her, 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

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Filed Apr. 17, 1953.

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

AMENDED MOTION FOR JUDGMENT.

Plaintiff, Dorothy L. Polesky, Administratrix of the Estate of Andrew Jon Polesky, Jr., deceased, moves the court for judgment against the Defendant in the sum of Twenty-five Thousand Dollars (\$25,000.00) and costs for, to-wit:

(1) Defendant is a duly organized corporation under the laws of the State of Virginia and owns a tract of land in Fairfax County, Virginia, upon which it maintains and operates a manufacturing plant, to-wit, a sand and gravel quarry and rectifying plant for the manufacture, sale and distribution of commercial and industrial building and structural sand and gravel.

(2) Defendant at some time prior to June 16, 1952, in its operation as a manufacturing plant, dug or caused to be dug a large pit or hole in the ground in connection with its operations and on and before said 16th day of June, 1952, had abandoned the same and left open and exposed said pit or hole in the ground and failed to fill such hole or pit with earth so that the same would not be dangerous to human beings in accordance with the statute for such cases made and provided, and, likewise, failed to fence securely the same and keep said pit or hole in the ground securely fenced in accordance with the statute for such cases made and provided.

(3) That such failure on the part of Defendant and its violation of the statute law of this State constitutes negligence.

(4) That as a direct and proximate result of said negligence Plaintiff's decedent, an infant of the age of twelve

page 8 } years, fell into said hole in the ground or pit which had become filled with water and was drowned.

Wherefore, Plaintiff brings this, her action for damages as aforesaid.

WILLIAM M. KABLER,
Attorney for Plaintiff.

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Filed Apr. 21, 1953.

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

MOTION FOR BILL OF PARTICULARS.

To the Honorable Judges of said Court:

Comes now the Defendant, Northern Virginia Construction Company, Inc., and moves the Court to require the Plaintiff to file herein a Bill of Particulars, specifying the following:

1. The size of the hole or pit which the Plaintiff alleges the Defendant dug and left open upon its premises, giving the estimated extent thereof in terms of acres.
2. The approximate date on which the Plaintiff claims the Defendant abandoned the said pit or hole.
3. Whether the Plaintiff Andre Jon Polesky, Jr., fell in the said hole or voluntarily went therein for the purpose of swimming or bathing.
4. Whether the said Plaintiff Andre Jon Polesky, Jr., had been bathing or swimming in the said hole any time prior to the date on which he was drowned.
5. Whether the said Andre Jon Polesky, Jr., was able to swim.
6. Whether the parents of the said Andre Jon Polesky, Jr., knew that he was accustomed to swimming in the said pit or hole and whether they gave him permission to swim therein.

7. What school grade the said Andre Jon Polesky, Jr., was in and whether his intelligence was equal to the average in his grade.

8. Whether the said Andre Jon Polesky, Jr., was acquainted with the "No Trespass" signs placed at various points around the said pit or hole.

NORTHERN VIRGINIA CONSTRUCTION COMPANY, INC., Defendant,
By Counsel.

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Filed Apr. 28, 1953.

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

BILL OF PARTICULARS.

To: The Honorable Judges of said Court:

Comes now the Plaintiff and for answer to the Defendant's motion for a Bill of Particulars states the following, responsive to the numbered inquiries of the Defendant's said motion:

1. Plaintiff says that she has no specific knowledge of the size of the pit which the Defendant dug and left open upon its premises and alleges that the size thereof is a matter peculiarly within the knowledge of the defendant. Plaintiff, however, would estimate in terms of acres that the size of the said pit is approximately three-quarters of an acre.

2. Plaintiff says that the date on which the defendant abandoned the said pit is not a matter upon which she has specific knowledge, but Plaintiff avers that said abandonment occurred at some date after the passage of the Act of the Virginia Legislature requiring such an abandoned pit to be filled with earth or securely fenced, and at some time prior to the drowning therein of the Plaintiff's decedent.

3. Plaintiff says that her decedent, Andre Jon Polesky, Jr., fell into the depth of the said pit after voluntarily going into

the shallow water on the edges thereof for the purpose of wading.

4. Plaintiff states that her decedent, Andre Jon Polesky, Jr., to the extent of her knowledge had not been bathing or swimming in the said pit or hole at any time prior to the date on which he was drowned.

5. Plaintiff's decedent, so far as Plaintiff knows, was not able to swim.

page 12 } 6. Plaintiff states again that her decedent was not accustomed to swimming in the said pit or hole and that neither she nor the child's father had at any time give him permission to wade in the said gravel pit or hole, swim therein, or go there for any purpose.

7. Plaintiff states that her decedent was in the seventh grade in school and that his intelligence was equal to the average in his grade.

8. Plaintiff states that her decedent did not know of any "No Trespass" signs placed around the said pit or hole, and further the Plaintiff denies that there were any such signs placed around the said pit or hole, or upon any approach or road thereto at the time her decedent went there and was drowned.

DOROTHY L. POLESKY
Plaintiff by Counsel.

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Filed May 5, 1953.

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

DEMURRER TO AMENDED MOTION FOR JUDGMENT.

To the Honorable Judges of said Court:

Comes now the Defendant and demurs to the Amended Motion for Judgment filed against it herein and for grounds of demurrer states as follows:

- 1. The said Amended Motion for Judgment does not state a case on which the Plaintiff is entitled to relief.
- 2. The said Amended Motion for Judgment is insufficient in law.
- 3. The said Amended Motion for Judgment fails to show any hidden danger in the pool which was known to the Defendant and unknown to the Plaintiff's decedent.
- 4. The said Amended Motion for Judgment fails to show any breach of duty which the Defendant owed to the Plaintiff's decedent.

NORTHERN VIRGINIA CONSTRUCTION
COMPANY, INCORPORATED

Defendant
By Counsel.

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Filed May 14, 1953.

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

MOTION TO STRIKE DEMURRER.

NOW COMES PLAINTIFF by her attorney and moves that the Demurrer filed herein be stricken from the record for the following reasons:

- 1. Defendant asked for and was furnished a Bill of Particulars by Plaintiff before filing his Demurrer and Defendant has not objected to the sufficiency of said Bill of Particulars.
- 2. The Amended Motion for Judgment alleges negligence as the basis for recovery and a demurrer is not permitted under the law to test the sufficiency of such allegation.
- 3. The Demurrer does not comply with the requirements of law in that it does not specify any valid ground—the so-called grounds being merely abstract conclusions stating in general terms that no cause of action is alleged.

WM. KABLER,
Attorney for Plaintiff.

* * * * *

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ORDER SUSTAINING DEMURRER TO AMENDED COMPLAINT.

This cause came on to be heard this 25th day of June, 1953, upon the amended motion for judgment filed herein by the Plaintiff, the demurrer thereto filed on behalf of the Defendant and the motion of the Plaintiff to strike the said demurrer, and upon argument of counsel.

UPON CONSIDERATION WHEREOF, the Court being of opinion that the said motion to strike the said demurrer should be over-ruled;

It is, therefore, ADJUDGED AND ORDERED that the Plaintiff's motion to strike the said demurrer filed by the Defendant be, and the same is hereby, over-ruled.

To the action of the Court in over-ruling the said motion the Plaintiff, by Counsel, excepted.

And the Court being of the opinion that the demurrer is well taken and should be sustained;

It is, therefore, FURTHER ADJUDGED AND ORDERED that the demurrer filed by the Defendant to the amended motion for judgment herein be, and the same is hereby, sustained and this is dismissed at the cost of the Plaintiff.

To the action of the Court in sustaining the said page 17 } demurrer and dismissing this motion for judgment the Plaintiff, by Counsel, excepted on the ground that the said amended motion for judgment alleges a statutory duty on the part of the Defendant, alleges that the Plaintiff's decedent was one of a class of persons for whose protection the statute exists and alleges neglect on the part of the Defendant to comply with the statute, resulting in the death of the Plaintiff's decedent.

And, thereupon, the Plaintiff, by Counsel, indicated her intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* herein and having moved the Court for a suspension of this judgment for a period of sixty days from the entry hereof in order to permit the Plaintiff to make such petition for a writ of error;

It is, therefore, FURTHER ADJUDGED AND ORDERED that the execution of this judgment be, and the same is hereby, suspended for a period of sixty days from the date this order is entered.

Supreme Court of Appeals of Virginia

And the Defendant having indicated that it does not desire any suspension bond, none is required.

This Judgment is final.

August 19, 1953

PAUL E. BROWN, Judge.

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Filed Oct. 6, 1953.

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

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 Plaintiff by counsel indicates her intention to petition the Supreme Court of Appeals for a writ of error, and the Plaintiff relies upon the following assignments of error:

1. That the Court erred in over-ruling the Plaintiff's motion to strike the demurrer filed by the Defendant.
2. That the Court erred in sustaining the Defendant's demurrer to the amended motion for judgment and thereupon dismissing the action.

CHARLES HENRY SMITH
WILLIAM M. KABLER
Counsel for Plaintiff.

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A Copy—Teste:

H. G. TURNER, Clerk.

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