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Rule 3:18[d]: What Does It Mean?

> Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense. An allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence. On motion made promptly, a bill or particulars may be ordered to amplify any pleading that does not, in the opinion of the court, comply with this Rule. A bill of particulars that fails to inform the opposite party fairly of the true nature of the claim or defense may, on motion made promptly, be stricken and an amended bill of particulars ordered. If the amended bill of particulars fails to inform the opposite party fairly of the true nature of the claim or defense, the pleading not so amplified and the bills of particulars may be stricken.
>
> Every order requiring a bill or amended bill of particulars shall fix the time within which it is to be filed. Va. Rules of Court 3:18(d).

Since the Virginia Rules of Court became effective in 1950 there have been few cases which mention Rule 3:18(d) or interpret it in any way. Even those cases that have made mention of the Rule are of little help in determining its correct interpretation or the way in which the courts will apply it in the future. Therefore, in attempting to arrive at the correct meaning of the Rule we must depend on (1) the law as it existed prior to the adoption of the Rules; (2) the meaning given to certain expressions or phrases contained in the Rule when those expressions or phrases have been used elsewhere by the Court; (3) the grammatical construction of the Rule; and (4) the intent of the Court in adopting the Rules.

The difficulty arises when one attempts to find in the Rule a test to be applied by the trial courts to determine whether a bill of particulars will be ordered to supplement or amplify a pleading when such bill is requested.

The Rule states:

> Every pleading shall state the facts on which the party relies in numbered paragraphs . . .

There seems to be no ambiguity in this statement nor any confusion as to its meaning or purpose. The Judicial Council for Virginia in commenting in 1949 on the then proposed Rules said, "The paragraphs of pleading should be numbered so that they can be more easily referred to."[1]

The Rule continues:

> . . . and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense. . . .

The difficulty in interpretation and application begins here. In view of the fact that this sub-paragraph deals with bills of particulars, it appears that this is the test to be applied by the court to determine whether a bill of particulars will be ordered when one is requested. The Judicial Council commented, "If a pleading 'clearly informs the opposite party of the true nature of the claim or defense' the court ought not to order a bill of particulars."[2]

However, it will be noted that the test here is stated in the same words as the test which has been applied, both before and after the adoption of the Rules, to determine the sufficiency of a pleading when the opposing party has demurred to such pleading. In *Mankin* v. *Aldridge*,[3] decided in 1919, the Supreme Court of Appeals said in deciding whether a demurrer should have been sustained by the trial court:

> The tendency of modern times is to simplify matters of mere procedure, and for this reason the procedure by motion is looked upon with great indulgence, and notices are upheld as sufficient, however informal, where they contain *sufficient in substance to fairly apprise the defendant of the nature of the demand made upon him,* and state sufficient facts to enable the court to say that if the facts stated are proved, the plaintiff is entitled to recover. . . . The notice must, in substance, comply with these requirements, else it is bad on demurrer.[4] (Emphasis added)

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[1] The Judicial Council for Virginia, *Proposed Modifications of Practice and Procedure* 27 (1949) (hereinafter cited as *Proposed Modifications*).
[2] *Ibid.*
[3] 127 Va. 761, 105 S.E. 459 (1919).
[4] *Id.* at 765, 105 S.E. 459, 460.

In *Alexander* v. *Kuykendall*,[5] decided in 1951, the Supreme Court of Appeals said:

> The substance of this and other decisions of this court is that even though a declaration or motion for judgment may be imperfect, *if it is so drafted that the defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer,* and *if the defendant desires more definite information,* or a more specific statement of the grounds of the complaint, *he should request* the court to require plaintiff to file *a bill of particulars.*[6] (Emphasis added)

This statement is also quoted by the court in *Greenbrier Farms* v. *Clarke*,[7] decided in 1952.

It will be noted that in each of these cases the Court makes statements that indicate that a good cause of action must be stated. In *Mankin* v. *Aldridge* the Court says that the pleading must "state sufficient facts to enable the court to say that if the facts stated are proved, the plaintiff is entitled to recover."[8]

In *Alexander* v. *Kuykendall* it is said:

> The plaintiff does not expressly allege that she believed or relied on the representations, but she does allege that, "by virtue of said representation to * * * plaintiff that said marriage was valid * * * plaintiff married the defendant." The words "by virtue of," are used in the sense of "because" or "relied upon."[9]

In *Greenbrier Farms* v. *Clarke* it is stated:

> The object of a motion for judgment or declaration is to set forth the facts which constitute the cause of action so that they may be understood by the defendant who is to answer them, by the jury who are to ascertain whether such facts exist, and by the court which is to give judgment.[10]

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[5] 192 Va. 8, 63 S.E.2d 746 (1951).
[6] *Id.* at 14, 63 S.E.2d 746, 749.
[7] 193 Va. 891, 894, 71 S.E.2d 167, 169 (1952).
[8] 127 Va. 761, 765, 105 S.E. 459, 460 (1919).
[9] 192 Va. 8, 14, 63 S.E.2d 746, 749 (1951).
[10] 193 Va. 891, 894, 71 S.E.2d 167, 169 (1952).

Two sections of the Virginia Code also deal with the matter of sufficiency of pleadings on demurrer.[11] In different words they state the same guiding principle as the cases quoted above.

Without deciding which interpretation should be given to the first sentence of this sub-paragraph, let us consider the second sentence for some possible enlightenment:

> An allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence.

This sentence was originally proposed as a separate sub-paragraph of the Rule,[12] and in its comments on the proposed rules the Judicial Council said:

> It should not be necessary to specify the particulars of negligence unless the court orders a bill of particulars, and the court should not order a bill of particulars unless satisfied that the moving party does not know the grounds of the claim *in sufficient detail to prepare his defense.* In most cases the defendant or his agent was present at the accident and is present in court.[13] (Emphasis added)

Considering this sentence alone, and in view of the above comment, it seems clear that it means that the pleading is sufficient against demurrer. That would have appeared to be the intent, at least so long as it remained a separate sub-paragraph. Since the comment says it should not be necessary to specify the particulars of negligence "unless the court orders a bill of particulars," the sentence certainly cannot mean that a bill of particulars will not be ordered in any case but will be ordered under appropriate circumstances. This interpretation seems correct in view of Section 8-109, Virginia Code of 1950, which read at the time of the adoption of the Rules: ". . . nor shall a demurrer be sustained to a declaration alleging negligence of the defendant because the particlars of the negligence are not stated, but such particulars may be demanded by the defendant under Section 8-111." The General Assembly seems to have interpreted

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[11] Va. Code §8-102, §8-109 (1950).
[12] See *Proposed Modifications* at 22.
[13] *Id.* at 28.

this sentence in its present form and context to mean sufficient against demurrer. At the 1954 session the above quoted sentence was deleted from Section 8-109 of the Code and the annotation to the Section in the 1954 cumulative supplement to the Code states: "The 1954 amendment . . . deleted the former second sentence *covering matters rendered obsolete by Rule* 3:18." (Emphasis added)

Now if one attempts to read the two sentences together, assuming that "sufficient" means the same in both, the argument seems stronger that the correct meaning is *sufficient against demurrer.* In order to make the second sentence mean anything other than *sufficient against demurrer,* it is necessary to (1) decide that the first sentence does not mean *sufficient against demurrer,* but rather that it means *sufficient that a bill of particulars will not be ordered;* and (2) read the second sentence with the stated test added, i.e., "An allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence if it clearly informs the opposite party of the true nature of the claim or defense."

The third sentence of the Rule states:

> On motion made promptly, a bill of particulars may be ordered to amplify any pleading that does not, in the opinion of the court, comply with this Rule.

This sentence should clear up any doubts as to the proper meaning of the preceding sentences. The phrase "any pleading that does not . . . comply with this Rule" must mean any pleading that is insufficient when tested according to the preceding sentences.

If the first sentence means *sufficient against demurrer,* then the third sentence says that a bill of particulars will be ordered to amplify any pleading that would be considered insufficient on demurrer. If the second sentence means *sufficient against demurrer,* it renders the third sentence meaningless as regards a pleading that alleges negligence because any pleading that alleges negligence *does comply* with this Rule without specifying the particulars of the negligence. With this interpretation, a party

would have a choice of demurring or requesting a bill of particulars. It is hardly likely that a bill of particulars would be requested when the party might win his case by demurring. This would also mean that a court, having overruled a demurrer would not order a bill of particulars. This clearly is not the correct meaning of the Rule. This is contrary to established law. The Court has repeatedly said, after deciding that a demurrer should have been overruled, that the party could request a bill of particulars.

It seems clear now that the first two sentences do not mean *sufficient against demurrer,* but spell out a test to be applied by the courts to determine whether a bill of particulars will be ordered. The test stated in the first sentence must be added to the second sentence as indicated above. With this meaning, the third sentence now says that a bill of particulars may be ordered to amplify any pleading that does not clearly inform the opposite party of the true nature of the claim or defense.

It has been correctly stated in a recent article:

> Since one of the tests for purposes of demurrer is whether the party is informed of the true nature of the claim or defense, it is clear that this cannot also be the test of whether a bill of particulars should be ordered. . . . In commenting upon the necessity of a bill of particulars in a negligence action, the committee has stated that the test is whether the moving party knows the grounds of the claim *in sufficient detail* to prepare his defense.[14] (Emphasis *sic*)

The test indicated here, then, cannot be, and is not, the same test which the court has applied when considering a demurrer despite the fact that the same words have been used in both instances to describe the test. The test here goes further and requires for sufficiency that the pleading apprise the opposite party of the true nature of the claim or defense *in sufficient detail that he can prepare his defense* (or reply).

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[14] Phelps, *The Bill of Particulars in Virginia,* 39 Va.L.Rev. 989, 991 (1953). The committee to which Professor Phelps refers is the Judicial Council for Virginia. The statement to which he refers is quoted in part on page 116 *supra.*

In *Bryant* v. *Fox's Adm'r*,[15] decided in 1923, a declaration was held good on demurrer which alleged that the defendant's employee "did negligently and recklessly run into and collide with one John A. Fox, now deceased, who was riding a motorcycle on the overhead bridge on Washington Street extended," and a bill of particulars was ordered. The pleading *did* inform the defendant of the true nature of the claim so that the demurrer was overruled, but it did not inform him in sufficient detail that he could prepare his defense, so a bill of particulars was ordered.

In *Miller* v. *Grier S. Johnson, Inc.*,[16] decided in 1951, the plaintiff alleged in its motion for judgment that defendant was indebted to it in certain amounts "upon an open account as is shown by the itemized statement of said account and the affidavit hereto attached and filed herewith." No itemized account was attached or filed. An affidavit was attached and made a part of the motion that defendant was "truly and justly indebted" to the plaintiff "in the aggregate principal sum of . . . $3,100.00" with interest "for work and labor done and for materials furnished on instructions of the said Louise H. Miller, and pursuant to verbal agreements with her made." The defendant demurred to the pleadings claiming that the failure to file the itemized account violated Code Section 8-270. The demurrer was overruled and a bill of particulars was ordered and filed. The Supreme Court of Appeals said:

> Plaintiff, in its motion for judgment, its affidavits and its bill of particulars, stated a good cause of action, and stated it in such a way that defendant could not reasonably have mistaken the nature of the action upon which plaintiff predicated its claim.
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> . . . If she thought that the bill of particulars did not give her the necessary information to prepare her defense, she could have moved for an amended bill of particulars.[17]

The above quotations from *Alexander* v. *Kuykendall*[18] and from *Greenbrier Farms* v. *Clarke*[19] indicate that a bill of par-

[15] 135 Va. 296, 303, 116 S.E. 459, 461 (1923).
[16] 191 Va. 768, 776, 62 S.E.2d 870, 874 (1951).
[17] *Id.* at 778, 62 S.E.2d 870, 875.
[18] See p. 115 *supra*.
[19] *Ibid.*

ticulars will be ordered to amplify a pleading that does inform the opposite party of the true nature of the claim but not in sufficient detail that the party can prepare his defense.

The decision whether to order a bill of particulars or not is within the sound discretion of the court, but is subject to review. The rule stated in *City of Portsmouth* v. *Weiss*,[20] decided in 1926, is still applicable:

> The granting or refusing of a bill of particulars lies in the sound judicial discretion of the trial court but its action is subject to review by this court, and will be reversed where the failure to require such bill, upon a request, was plainly prejudicial to the adverse party. The object of the statute was to enable the adverse party to prepare his case for trial and to prevent surprise. We have repeatedly said that every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense. The object of litigation is to do justice between the parties, and this cannot be done unless each one is given reasonable notice of the claims or defense of the other, and is afforded a fair opportunity to controvert them. If the pleadings do not give the information necessary to enable the adverse party to intelligently concert his reply, then he is entitled to a bill of particulars giving such information, and it is error to refuse it.[21]

The remainder of the Rule states a remedy available to a party when the opposing party has been ordered to file a bill of of particulars but, when filed, the pleadings still do not inform the party fairly of the true nature of the claim or defense *in sufficient detail that a defense may be prepared.* The Judicial Council commented regarding a declaration alleging negligence:

> If a bill of particulars is ordered, the party should not be deemed to have complied with the order if he pleads: "the defendant violated each and every clause, section, and paragraph of the Motor Vehicle Code." Since a bill of particulars should be ordered only when clarification is necessary, real clarification should be insisted on.[22]

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[20] 145 Va. 94, 133 S.E. 781 (1926).
[21] *Id.* at 111, 133 S.E. 781, 786.
[22] *Proposed Modifications* at 28.

The quotation from *Miller* v. *Grier S. Johnson, Inc.*,[23] indicates that the test to be applied to a bill of particulars, under the second half of the Rule, is also whether the opposing party is informed of the true nature of the claim or defense *in sufficient detail to prepare his defense.*

The Judicial Council commented:

> The provision in Rule 1 that the established practice and procedure are continued in matters not covered by the rules is inserted to make it clear that all existing statutes and judicial decisions are unaffected except insofar as express changes are made. For example, *the body of case law holding that the facts in a notice of motion for judgment may be stated simply and informally will continue to govern* . . .[24] (Emphasis added)

In view of this comment, it is submitted that neither the Council nor the Supreme Court of Appeals ever intended that Rule 3:18(d) should apply when a demurrer is being considered.

In *Montgomery Ward & Co.* v. *Young*,[25] decided in 1952, the Court said:

> Defendant's first contention is that the trial court committed reversible error in overruling its demurrer to plaintiff's motion and bill of particulars. . . . we think the motion and bill of particulars fully complied with Rule of Court 3:18(d) in that they fairly informed defendant of the true nature of plaintiff's claim.[26]

From this statement it might be inferred that the Court was applying the test in Rule 3:18(d) when considering a demurrer and that therefore the Supreme Court of Appeals has interpreted the Rule to be applicable when a pleading is tested by demurrer. It would seem, however, that the Court merely looked at the demurrer for what it actually was, or considered it for what it should have been under the Rule, i.e., a motion to strike the pleadings. Then, having decided that the motion and bill of

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[23] See p. 119 *supra.*
[24] *Proposed Modifications* at 23.
[25] 195 Va. 671, 79 S.E.2d 858 (1952).
[26] *Id.* at 672, 79 S.E.2d 858, 859.

particulars met the test stated in the Rule, a motion to strike should have been overruled.

The following conclusions are submitted by way of summary:

(1) It was the intention of the Supreme Court of Appeals, in adopting the Rule, to state a test to be applied by the trial courts to determine whether a bill of particulars should be ordered when one has been requested.

(2) The Rule is not well drafted in that it does not clearly and completely state the Rule as it was intended.

(3) The test as to whether a bill of particulars will be ordered is the same under this Rule as that which has been used in the past, and that test is: Does the pleading inform the opposing party of the true nature of the claim or defense in sufficient detail that he can prepare his defense?

(4) The confusion that this Rule has caused is the result of having used the same expression here to describe a certain test as the expression used elsewhere to describe a different test.

(5) The General Assembly interpreted this Rule to apply to sufficiency of a pleading against demurrer and as a result of this interpretation repealed a portion of Code Section 8-109 which related to demurrer.

(6) Sufficiency of a pleading against demurrer will still be tested under Code Sections 8-102 and 8-109 and the body of case law that has dealt with that question.

(7) The following paraphrased version of Rule 3:18(d) will convey the intended meaning of the Rule:

> Every pleading shall state the facts on which the party relies in numbered paragraphs. On motion made promptly, a bill of particulars may be ordered to amplify any pleading that does not, in the opinion of the court, clearly inform the opposite party of the true nature of the claim or defense in sufficient detail that he may prepare his defense. Bills of particulars shall not be required to amplify any pleading that alleges negligence or contributory negligence, if, in

the opinion of the court, the opposing party knows the true nature of the claim or defense in sufficient detail to prepare his defense. A bill of particulars that fails to inform the opposite party fairly of the true nature of the claim or defense in sufficient detail may, on motion made promptly, be stricken and an amended bill of particulars ordered. If the amended bill of particulars fails to properly clarify the pleadings, so that, in the opinion of the court, the opposing party cannot reasonably be able to prepare his defense, the pleading not so amplified and the bills of particulars may be stricken.

Every order requiring a bill or amended bill of particulars shall fix the time within which it is to be filed.

(8) Code Section 8-111 is still effective and a party may still proceed under that Section to exclude evidence on any matter not sufficiently described in the pleadings.

However, in view of the statement of the court in *Montgomery Ward & Co.* v. *Young*[27] and the action of the General Assembly in repealing part of Code Section 8-109, it seems that there is a definite possibility that the Rule will be interpreted to apply to the sufficiency of pleadings against demurrer. As has been stated, the grammatical construction of the Rule belies this interpretation, but no greater change in its construction would be necessary to clearly give it this meaning than would be necessary to clarify the Rule according to the meaning advanced above. Neither of the first two sentences would need any change at all. The remainder of the Rule could be changed to state the test to be applied to determine whether a bill of particulars will be ordered and to state the remedy of the moving party when a pleading is not then adequately particularized. The Rule might then read as follows:

Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense. An allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence. On motion made promptly, a bill

[27] See p. 121 *supra*.

of particulars may be ordered to amplify any pleading that does not, in the opinion of the court, give the opposing party sufficient details that he can prepare his defense. A bill of particulars that fails to inform the opposite party fairly of the true nature of the claim or defense in sufficient detail that he can prepare his defense may, on motion made promptly, be stricken and an amended bill of particulars ordered. If the amended bill of particulars fails to inform the opposite party fairly of the true nature of the claim or defense in sufficient detail that he may prepare his defense, the pleading not so amplified and the bills of particulars may be stricken.

Every order requiring a bill or amended bill of particulars shall fix the time within which it is to be filed.

This version of the Rule would leave the first two sentences to be interpreted in the light of past usage of the phrases therein. Since those phrases have never been used other than in the present Rule as applicable to anything other than a demurrer, they would necessarily apply only to sufficiency against demurrer. With this construction and interpretation the Rule *would* render obsolete that part of the Code Section 8-109 which was repealed, it would state *clearly* when a bill of particulars would be ordered, and it would distinguish between "sufficient against demurrer" and "sufficient that a bill of particulars will not be ordered."

Finally, it is submitted that whichever meaning is to be given to Rule 3:18(d) the Rule is in need of revision so that the meaning intended will be clear.

T. H. Spainhour