

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROANOKE

COUNTY OF ROANOKE, VIRGINIA	)	
PLAINTIFF,	)	
	)	
	)	CASE: CL22-303
v.	)	
	)	
	)	
ALAN HAROLD MOORE	)	
DEBORAH RUTH KUSHNER	)	
BRIDGET SUE KELLEY-DEARING	)	
DEFENDANTS.	)	

DEMURRER

COMES NOW the Defendants Alan Moore, Deborah Kushner, and Bridget Kelley-Dearing, by their counsel, Hyatt Shirkey, Esquire, demurrers the complaint as failing to state a claim upon which relief can be granted.

1. Pursuant to § 8.01-273 of the Code of Virginia, 1950, as amended, and any and all other applicable authority, Defendants demur to the Complain on the ground that it is not sufficient at law, does not state a cause of action, and fails to state a claim and/or facts upon which the relief demanded can be granted by reason of the following.
  - a. In violation of Rule 1:4 of the Rules of the Supreme Court of Virginia and other applicable authority, Plaintiff has failed to state in the Complain essential facts supporting Plaintiff's contentions, and the allegations in the complain are conclusory, rather than statements of sufficient specificity,

particularly, and/or definiteness to enable the Court and/or trier of fact to find a legal basis for the relief sought by the Plaintiff.

#### COUNT 1

2. Plaintiff fails to state a claim upon which relief may be granted under Virginia Code § 46.2-888 because the conditions precedent to duty or liability under the statute were not alleged, specifically:
  - a. The driver must be capable of safely moving the vehicle from the roadway to prevent obstructing the regular flow of traffic;
  - b. The vehicle is movable from the roadway to prevent obstructing the regular flow of traffic; and
  - c. There are no injuries or deaths.
3. Plaintiff does not allege whether the driver was capable of safely moving vehicle.
4. Plaintiff does not allege whether the vehicle was movable.
  - d. Plaintiff alleges the opposite in paragraph 1 and again in paragraph 16 of the complaint which states “representatives of the Roanoke County Police Department observed an immobilized vehicle with deflated tires,” as well as paragraphs 19, 22, and 29 all acknowledge the vehicle was immobile.
  - e. The Complaint implicitly acknowledges in paragraph 20 that the condition precedent to liability that the vehicle was movable was not the case.
5. Plaintiff does not allege there were no injuries or deaths.
6. Plaintiff merely concludes without pleading particular, sufficient facts that the vehicle created a hazzard.

7. In the absence of any or all of those three conditions precedent, Plaintiff has failed to state a claim upon which relief may be granted.

## COUNT 2

8. Count 2 is based on and alleged violation of Roanoke County Code § 13-13(A).
9. Roanoke County Code § 13-13(B) states:

In the event a person violating this section is known to the county administrator or his designee shall give the violator ten (10) days' written notice, by certified mail, to clean up and remove such rubbish, tin cans, trash, garbage or other waste substance or material. Should the violator not take appropriate action within such ten-day period, the county administrator or his designee shall, by use of county employees or by employing an agent of the county, have the rubbish, trash, garbage, litter or other waste substance or material removed. The violator shall be liable for the charges and costs of such removal.

10. Subsection B therefore creates a condition precedent to liability that “county administrator or his designee shall give the violator ten (10) days' written notice”, which is not alleged in the complaint.
11. Additionally, the Complaint fails to state a claim upon which relief can be granted because it is not alleged that “the violator [did] not take appropriate action within such ten-day period.”
12. In the absence of any allegations of either conditions precedent required by Roanoke County Code § 13-13, relief cannot be granted as to Count 2.

Wherefore, Defendants each respectfully request that both Count 1 and Count 2 of the complaint be dismissed with prejudice.

Respectfully Submitted,



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Hyatt Browning Shirkey, Esq. (VSB # 80926)  
333 Church Ave. S.W.  
Roanoke, VA 25016-5007  
\*Office:\* (540) 324-9288  
\*Fax:\* (540) 986-2199  
\*E-Mail:\* Hyatt@hbsesqfirm.com  
Counsel for the Defendants  
ALAN HAROLD MOORE  
DEBORAH RUTH KUSHNER  
BRIDGET SUE KELLEY-DEARING

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2022, the foregoing was transmitted to Rachel W. Lower, Esq., Assistant County Attorney for the County of Roanoke via email to RLOWER@roanokecountyva.gov.



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Hyatt Browning Shirkey, Esq.