

July 20, 2009

BY EMAIL AND REGULAR MAIL

Hon. Diane M. Strickland
809 Oakwood Drive, SW
Roanoke, Virginia 24015

**Re: Boyd-Graves Conference
Subcommittee Report on Timing of Filing of Bills of Costs**

Dear Judge Strickland:

On behalf of our other subcommittee members, (Judge Rodham Delk, Judge Donald Haddock, Robert Hagans, Thomas Lawson and Don Patten), I am pleased to provide this report to the Boyd-Graves Conference on our study of whether Virginia should adopt a rule or statute addressing the timing for filing a bill of costs with the circuit court after trial or following an appeal.

I. What Rules Govern the Timing of the Filing of a Bill of Costs with the Circuit Court?

Currently, no specific statute or rule exists in Virginia directly addressing the timing of the filing of a bill of costs in a trial court.¹ Courts have, however, adopted customary procedures for dealing with the filing of a bill of costs.

Virginia law provides for the recovery of costs by a prevailing party in litigation in Chapter 6 of Title 17.1 of the Virginia Code. As Virginia Code § 17.1-601 states, "Except when it is otherwise provided, the party for whom final judgment is given in an action or motion shall recover his costs against the opposite party. . . ."

¹ Many of the primary treatises on Virginia civil procedure provide no meaningful guidance on the timing to file a bill of costs with the circuit court. *See generally* Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 3.17 (5th ed. 2008); W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* §§ 14.01-.05 (4th ed. 2005); Charles E. Friend with Kent Sinclair, *Friend's Virginia Pleading & Practice* § 23.03[7][c] (2d ed. 2006); The Benchbook Committee, *Virginia Civil Benchbook for Judges and Lawyers* (2008-09 ed.).

II. How Have Courts Dealt with the Timing of the Filing of a Bill of Costs?

Although Code § 17.1-600, *et seq.*, provides specifics regarding the types of costs recoverable and what parties are and are not entitled to recover costs, these statutes do not provide any specifics regarding the *timing* of filing a bill of costs. Nonetheless, a number of cases illustrate common practices and pitfalls with regard to the timing of a bill of costs. These cases, and the rules that can be gleaned from them, are discussed below.

- When a court has decided a case, the Circuit Court sometimes will direct the prevailing party *sua sponte* to submit a bill of costs for inclusion in the final order. *See Powell v. Wilson*, 37 Va. Cir. 184, 186 (Clarke County 1995) (“The Plaintiff is directed to submit a bill of costs . . . to the Court for its review and approval. A blank will be left in the final order for the court to insert the costs which are awarded.”); *Young v. M-C*, 37 Va. Cir. 204, 210-11 (Shenandoah County 1995) (“Plaintiff shall recover her costs, and she is directed to submit a bill of costs for approval by the court. . .”).

- In light of Rule 1:1 of the Rules of the Supreme Court of Virginia, a motion for costs must be made and decided within twenty-one days of entry of a final order, or the trial court will lose jurisdiction to award costs. *See Vokes v. Vokes*, 28 Va. App. 349, 357-58 (1998); *Addicott Hills Corp. v. Leon*, 29 Va. Cir. 367, 368 (Fairfax County 1992).

- Parties often agree to bifurcate the trial on the merits and the hearing on costs. *See Lee v. Mulford*, 269 Va. 562, 565-66, 611 S.E.2d 349, 351 (2005) (“We are aware of many cases in which the parties, with the concurrence of the trial court, have bifurcated the fact-finding process.”); *Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 559, 587 S.E. 2d 581, 582 (2003) (“By agreement of the parties, the issue of attorney’s fees and costs . . . was reserved for determination by the trial court”); *Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 500, 362 S.E. 2d 723, 728 (1987) (“The parties agreed to submit the question of attorneys’ fees to the trial court following the verdict.”).

- Bifurcation of the trial on the merits and the hearing on costs will *not* occur absent agreement of the parties and the trial court. Thus, a party that fails to seek bifurcation loses its right to recover costs if the court does not take action on the issue within twenty-one days of the date of entry of a final order. *Lee*, 269 Va. at 568, 611 S.E.2d at 352 (“Absent agreement of the parties with the concurrence of the court, or pursuant to contract or statute with specific provisions, a litigant is not entitled to bifurcate the issues and have the matter of attorney’s fees decided by the trial court in post-verdict proceedings.”).

- The appellate court is the proper place to determine whether costs for appeal should be awarded. Va. Sup. Ct. R. 5:37 (providing for award of costs on appeal to Supreme Court); Va. Sup. Ct. R. 5A:30 (providing for award of costs on appeal to Court of Appeals); *see*

also Va. Code § 17.1-604. A trial court has no jurisdiction to award costs on appeal unless the appeals court awards such costs and orders that the case be remanded to the trial court for determination of the proper amount of such costs. See, e.g., *Smith v. Smith*, No. 2540-08-3, 2009 Va. App. LEXIS 184, at *6 (Apr. 21, 2009) (awarding costs for appeal and remanding case to trial court to determine amount of costs to award); *O'Loughlin v. O'Loughlin*, 23 Va. App. 690 (Va. Ct. App. 1996) (same).

III. What are the Common Timing Scenarios Concerning the Filing of a Bill of Costs?

Typically, a party wishing to file a bill of costs with a circuit court faces one of four timing scenarios:

- A party wins at trial and the losing party chooses not to appeal.
- A party wins at trial, the losing party appeals, and the appeals court affirms the verdict of the trial court.
- A party loses at trial and appeals the case, and the appeals court vacates or reverses the trial court's decision and remands the case to the trial court for further proceedings.
- A party loses at trial and appeals the case, and the appeals court vacates or reverses the trial court's decision and issues final judgment for the appellant.

IV. What are the Alternatives for Setting the Timing for the Filing of a Bill of Costs?

Given these four basic timing scenarios, two alternatives exist to address the timing for the filing of a bill of costs:

- *Do Nothing.* The first alternative is to do nothing and not change the current system. Should this issue not be clarified, courts and parties would continue the current system of dealing with bills of costs on a case-by-case basis by agreement, bifurcation or court order without uniform rule.
- *Adopt a Statutory or Rule Change or Amendment.* A second alternative is to adopt a statutory or rule change or amendment. Since the other provisions dealing with bill of costs are located in the Virginia Code, the most logical place to clarify the timing for filing of a bill of costs would be in Chapter 6 of Title 17.1 of the Virginia Code where most of the other costs provisions are specified.

V. Recommendation: A Proposed Statutory Change

Unquestionably, the Rules of the Supreme Court of Virginia and the Virginia Code do not expressly address the issue of when a party must file a bill of costs. A majority of our subcommittee believes that the lack of clarity on this point and potential pitfalls make this issue worthy of clarification. (A minority of our subcommittee had not experienced any particular problems with this issue and, thus, did not see a pressing reason for a change, but did agree on the suggested recommendation below should the consensus be that a clarification was appropriate.)

We believe that the handling of this issue by the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Eastern District of Virginia is the most straightforward way of dealing with it. Under Local Rule 54(D) of the Eastern District of Virginia, the party filing a bill of costs must do so within eleven days from the entry of judgment, unless the time is extended by court order. Local Rule 54(D) also specifies the time for a party from whom costs are sought to file its opposition to the bill of costs as well as the moving party's reply and how the court then handles the bill of costs. Accordingly, we recommend the adoption of a new code section – Va. Code § 17.1-630 – with the following proposed language:

§ 17.1-630. Timing of filing of bill of costs. — The party entitled to costs shall file a bill of costs as provided in this Chapter within fourteen (14) days from the entry of final judgment, unless such time is extended by order of the Court. The bill of costs shall be served on each party affected thereby. Such bill of costs shall distinctly set forth each item thereof so that the nature of the charge can be readily understood.

An itemization and documentation for requested costs in each category shall be attached to the bill of costs. Costs will be disallowed if proper documentation is not provided. A party from whom costs are sought may serve an objection to the bill of costs within fourteen (14) days after service of the bill of costs. The opposition objection shall identify each item objected to and the grounds for the objection. Within seven (7) days thereafter, the moving party may serve responses to the objections.

If no objections are filed, the Court shall promptly proceed to tax the costs and shall enter an order allowing such items specified in the bill of costs as are properly chargeable as costs. If objections are filed and the Court is unable to determine all or some of the properly chargeable costs, the application for such costs shall be referred to the judge who presided over the trial. The Court may hold a hearing prior to entering its order.

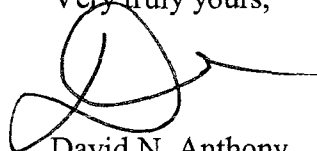
For purposes of Rule 1:1 of the Rules of the Supreme Court and appeal, an order taxing costs shall be treated as a final order separate from the final order in the underlying case.

Hon. Diane M. Strickland
July 20, 2009
Page 5

This proposed provision adds some language beyond the pure timing of the filing of the bill of costs from Local Rule 54(D) (which we have tweaked to reflect the more customary deadlines in Virginia state courts), but provides some helpful guidance to the parties and the court as to how the court should handle a bill of costs.

Please let me know if you have any questions about our report or need any further information from us.

Very truly yours,



David N. Anthony

#1849564