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Court Costs in Virginia

Court Costs are certain official expenses of litigation that the court orders the losing party to pay to the prevailing party. They are not a part of the judgment but are appurtenant to it.

A. Items Included

1. Appellate Brief and Appendix

   Court costs include the filing fee and the actual expenses of printing or reproducing appellate briefs filed in the Virginia Supreme Court, but only up to $200 can be taxed. The actual expenses of reproducing the appendix containing the record are also included. However, the Supreme Court for good cause shown may direct that a lesser sum be recovered. The party who is entitled to receive costs must file with the clerk of the appellate court an itemized and verified bill of costs within ten days after the decision of the court.

2. Witness Fees

   Taxable witness fees are limited to statutory fees only, i.e. the witnesses' daily mileage and tolls to and from court. The court may refuse to allow the fees of an unnecessary witness to be included in the costs. (This element of court costs is rarely assessed in practice.)

3. Taxes on Process

   All taxes on process are included in court costs pursuant to §14.1-198.

4. Fees of Officers

   All fees charged by officers of the court are included in court costs. However, when charges are made for copies of documents, only the cost of a single copy of any particular item can be charged to the losing party. Fifty cents may be charged for every legal notice served in the state unless some other charge therefor has been taxed.

5. Orders of Publication

   All of the expenses of executing orders of publication and of the required advertising are taxable as court costs.

6. Indemnity Bonds

   Premiums for indemnifying bonds payable by judgment creditors are includable as court costs.

7. Orders of Reference

   The fees of commissioners in chancery and the expenses of orders of reference are taxable as costs.

8. Medical Malpractice Review Panels

   The expenses of conducting the review procedure are to be proportioned in the discretion of the chairman.

9. Views by Juries

   The expenses of the jury and the officers of the court in taking a view of evidence out of the courtroom are taxable as court costs.

10. Other Matters

    The court has the discretion to tax as court costs "any other matter" and "every further sum which the court may deem reasonable and direct to be taxed for depositions taken out of the state."

11. Attorney's Fees

    The code provides a schedule of taxable attorney's fees: for a case of the Commonwealth $5.00, for a suit in equity $15.00, and for a case in the Supreme Court $50.00. The first Virginia legislation regulating the practice of law was enacted in 1643; among other things, this act established a scale of maximum fees that lawyers could legally charge their clients. Although the amounts were varied by the General Assembly from time to time during the ensuing two hundred years, the principle of maximum fees for lawyers remained in force until the freedom of contract was restored to lawyers and their clients in 1840. In colonial Virginia as in England, the attorney's fees of a prevailing litigant were included in the taxable court costs. In 1765 it was noted that it was unfair for the prevailing party to be charged a higher counsel's fee than was allowed to be taxed as costs, and an act was passed which made the two figures the same. Thus,
from 1765 until 1840, the lawyer's fee was set by statute, and it was reimbursable to the prevailing party as an item of court costs. The Act of 1840 abolished the maximum attorney's fees, but it left intact the provisions and amounts of attorney's fees that were reimbursable as court costs. In 1849 this latter schedule was amended slightly to allow, inter alia, attorney's fees of $5.00 for cases of the Commonwealth, $15.00 for trials in courts of equity, and $20.00 for cases in the Court of Appeals. In 1952 the statute was amended to allow $50.00 for appellate work, otherwise the nineteenth century figures remain. As a general rule, these statutory attorney's fees are the maximum that can be awarded as court costs. The attorney himself is to receive this statutory fee, and if the prevailing party did not employ an attorney, then no fee is to be taxed.

It is needless to say that these amounts today have no relationship whatever to the actual legal fees charged to clients, though in theory the General Assembly supports the position that attorney's fees are part of taxable court costs. In England the reasonable expenses of the prevailing party for lawyer's fees are paid by the losing party; this and the rule against contingent attorney's fees make the practicalities of litigation in England somewhat different from in Virginia.

However, there are numerous specific Virginia statutes and rules of court that allow the court to award reasonable attorney's fees as court costs in particular types of suits, for example quo warranto, divorce and separate maintenance, to avoid a fraudulent or voluntary conveyance, to sell land for taxes, civil cases under the Administrative Process Act, Freedom of Information Act, and to enforce a lien for assessments on a condominium unit.

Numerous statutes in the areas of consumer protection and general business capacita provide for reasonable attorney's fees as part of court costs. Note, for example, antitrust suits, antimonopoly suits, soliciting a breach of a tobacco marketing contract, suits involving insurance companies not authorized to do business in Virginia, litigation for violations of the Consumer Protection Act, private actions under the various criminal statutes prohibiting misrepresentations in sales and the Home Solicitation Sales Act, and actions in state courts under the federal Magnuson-Moss Act. Attorney's fees are also provided for in the Fair Housing Act. Throughout the Residential Landlord and Tenant Act, there are provisions for reasonable attorney's fees.

The Industrial Commission may assess costs, including attorney's fees, against an employer who has defended a workers' compensation case without reasonable grounds therefor. Such an assessment is in the sound judicial discretion of the Commission.

Reasonable attorney's fees may be charged against a party who has given notice of the taking of a deposition, and who then fails to appear himself or whose witnesses, not having been summoned, fail to appear. Unjustified conduct or motions relating to discovery may result in an award of compensatory attorney's fees. Attorney's fees may be granted to compensate a party for having to remove a suit to a proper forum or to defend against a frivolous motion to transfer to a convenient venue.

In 1987, the General Assembly enacted a new Section 8.01-271.1 which requires attorneys and parties not represented by counsel to certify to the court that all pleadings and motions are made in good faith and not for any improper purpose. This statute, which follows Federal Rule of Civil Procedure 11 very closely, also requires the judge, if he finds a violation, to impose appropriate sanctions including reasonable attorney's fees upon the offending lawyer or party or both.
statute goes considerably beyond Rule 1:4(a); it also
goes beyond Federal Rule 11 in that it expressly
includes oral motions. It is to be noted that this statute
applies in district courts as well as in circuit courts.
Although the practice in Virginia heretofore has been
very lenient towards erring members of the bar, in
England in cases of gross negligence or gross misbe-
vavior, attorneys have been ordered to pay court costs
including attorney’s fees out of their own pockets.44

Whether Section 8.01-271.1 applies to nonsuits is
unclear; it might be argued that a nonsuit is neither a
pleading nor a motion. A nonsuit can be used in bad
faith since it is a withdrawal of an action without prej-
dudence to sue again. If a plaintiff does not prepare for
trial hoping to settle his claim before trial, perhaps
even on the morning of the trial, he knows that if the
settlement fails to materialize, he can nonsuit the
action. However, the defendant must always prepare
for trial in the event that there is no last minute settle-
ment. If the defendant has brought in expert witnesses
from California or wherever and then the plaintiff
nonsuits, he, the defendant, is out of pocket a signifi-
cant sum of money. It seems only fair that the nonsuit-
ing plaintiff pay the expenses of the defendant’s expert
witnesses and attorney in such cases. It may well be
that such a nonsuit is not taken for an “improper pur-
pose,” as out of court compromises are to be encour-
aged, but nevertheless the cost of the nonsuit to the
defendant should be shifted to the plaintiff. If a second
nonsuit is allowed, attorney’s fees may be assessed.45

B. Items Not Included

The fees of an expert witness to attend the trial are
paid only by the party for whom he testifies.46 If, on the
other hand, pre-trial discovery of an expert who is not
going to testify at the trial is ordered, or if discovery by
means other than interrogatories is ordered, then the
party seeking the information must pay the reasonable
fees of the expert witness.47

Court costs do not include the fees of a court reporter,
the costs of a transcript, premiums on supersedeas
bonds, or discovery depositions.48 The costs of deposi-
tions are not includable as items of court cost but must
be paid by the moving party.49 (In the federal courts, if
a deposition is used at trial, the expense of taking that
deposition is taxed as a part of the court costs.50)
The fees of jurors are paid by the Commonwealth in
civil cases, but the expense of special juries of twelve
may be taxed as court costs in the court’s discretion.51

C. Paid By Whom

In general the losing party is ordered to pay the court
costs of the party substantially prevailing.52 In equity,
even though this general rule applies, the judge has the
discretion to award or apportion costs as justice re-
quires;53 thus where each party is acting in good faith
and equities lie on each side, the judge may decree that
each party pay his own costs. In cases involving novel
points of law, there should be no award of court costs.54

The defendant who has before trial paid into court
the amount of the judgment is deemed to have pre-
vailed on the issues and should recover costs.55 A
defendant is to pay the plaintiff’s costs when he pays
the plaintiff’s claim after the action has been begun
against him.56 Where the trial court committed error in
the appellant’s favor, the appellant should pay the
costs of the appellee in the Supreme Court.57

In divorce suits, the court may award court costs
including attorney’s fees to either party.58 A defendant-
wife is not entitled to have her attorney’s fees paid by
the plaintiff unless she is unable to pay them herself.59

When a person is suing for the benefit of another, if
the defendant is given his costs, they are to be paid by
the beneficiary of the litigation and not by the nominal
plaintiff.60 Court costs are thus normally paid out of a
decedent’s estate and not by the executor or admin-
istrator out of his own pocket. If the litigation was begun
by the decedent and then revived in the name of the
administrator, costs are payable out of the estate only.
If, on the other hand, the administrator initiates the
lawsuit, the estate is still liable for costs, but if the
estate cannot pay them, then the administrator may be
required to pay out of his own funds.

A party suing or defending in forma pauperis is
exempt by statute from paying fees and costs.61

The Commonwealth does not pay court costs, unless
there is a special statute permitting it.62 In Common-
wealth v. County Utilities Corp.,63 it was declared that
§14.1-201 does not apply to suits in equity and thus costs
against the Commonwealth and its subdivisions can
be awarded by a circuit court judge sitting in equity.
That such costs are not granted in the traditional
equity practice was not considered in that opinion. At
common law and in equity in the old practice, the sov-
eign receives but never pays court costs. In modern
times it still makes sense not to require the Common-
wealth to pay costs because such payments must come
out of the public treasury; such payments would thus
be a financial imposition on the already over-burdened
taxpayer. This is not a liability which can be insured
against. On the other hand, when a private citizen is
prosecuted or denied his rights by an over-zealous, or
perhaps malicious, civil servant, it would be appro-
priate for him to be compensated for the costs and
expenses of successfully maintaining his position in
court.
Conclusion

In conclusion, it is readily apparent that the recent legislative developments in the law of court costs is in the direction of awarding reasonable attorney’s fees to the prevailing party. This is fair and appropriate. Where a person is forced to resort to litigation to receive that which is justly due or has to defend himself against an ill-conceived claim, he should not suffer any expenses for it. He should be made whole by the full reimbursement of what has been paid as a necessary cost of the matter.

FOOTNOTES

13. Act of March 1643, c. 61, 1 Henin’s Statutes 275.
40. Rule 4.5(g).
42. Va. Code Ann. §8.01-266.
47. Rule 4.1(b)(4).
61. Va. Code Ann. §14.1-183. Where a plaintiff sued an indigent prisoner, even though the plaintiff prevailed on the merits, he was required to pay the fee of the prisoner’s guardian ad litem as an item of court costs: Englehart v. Green, 2 Va. Cir. 5 (1980).
63. 223 Va. 534, 546-547, 290 S.E.2d 867 (1982).