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Court Costs in Virginia

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Court Costs in Virginia

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.¹ 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

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.³ (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

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

5. *Orders of Publication*

All of the expenses of executing orders of publication and of the required advertising are taxable as court costs.⁶

6. *Indemnity Bonds*

Premiums for indemnifying bonds payable by judgment creditors are includable as court costs.⁷

7. *Orders of Reference*

The fees of commissioners in chancery and the expenses of orders of reference are taxable as costs.⁸

8. *Medical Malpractice Review Panels*

The expenses of conducting the review procedure are to be proportioned in the discretion of the chairman.⁹

9. *Views by Juries*

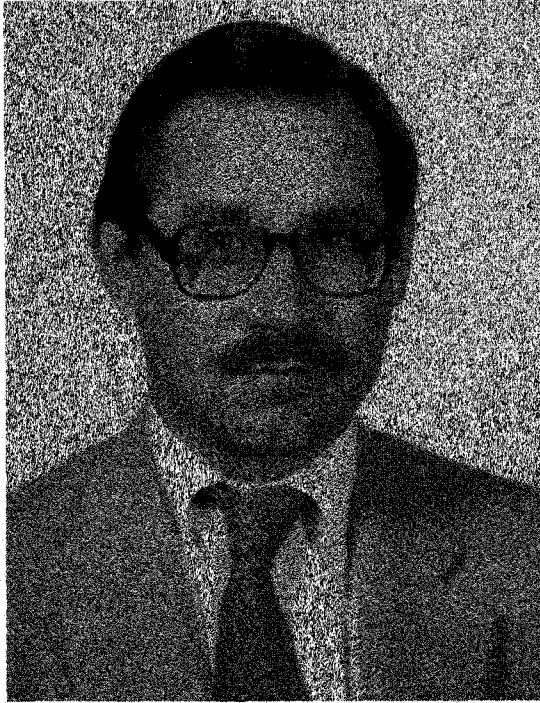
The expenses of the jury and the officers of the court in taking a view of evidence out of the courtroom are taxable as court costs.¹⁰

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

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 \$50.00.¹² 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.¹³ 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 1840.¹⁴ 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.¹⁵ Thus,



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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.¹⁶ 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.¹⁷ In 1952 the statute was amended to allow \$50.00 for appellate work;¹⁸ otherwise the nineteenth century figures remain.¹⁹ As a general rule, these statutory attorney's fees are the maximum that can be awarded as court costs.²⁰ 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.²¹ 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 tax-

able 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,²² divorce and separate maintenance,²³ to avoid a fraudulent or voluntary conveyance,²⁴ to sell land for taxes,²⁵ civil cases under the Administrative Process Act,²⁶ Freedom of Information Act,²⁷ and to enforce a lien for assessments on a condominium unit.²⁸

Numerous statutes in the areas of consumer protection and general business rapacity provide for reasonable attorney's fees as part of court costs. Note, for example, antitrust suits,²⁹ antimonopoly suits,³⁰ those for soliciting a breach of a tobacco marketing contract,³¹ suits involving insurance companies not authorized to do business in Virginia,³² litigation for violations of the Consumer Protection Act,³³ private actions under the various criminal statutes prohibiting misrepresentations in sales³⁴ and the Home Solicitation Sales Act,³⁵ and actions in state courts under the federal Magnusson-Moss Act.³⁶ Attorney's fees are also provided for in the Fair Housing Act.³⁷ Throughout the Residential Landlord and Tenant Act³⁸, 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.³⁹

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.⁴⁰ Unjustified conduct or motions relating to discovery may result in an award of compensatory attorney's fees.⁴¹

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.⁴²

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.⁴³ This

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 misbehavior, 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 prejudice 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 settlement. 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 significant sum of money. It seems only fair that the nonsuiting 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 purpose," as out of court compromises are to be encouraged, 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 depositions 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 requires;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 prevailed 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 administrator 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 *Commonwealth 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 practice⁶⁴ was not considered in that opinion. At common law and in equity in the old practice, the sovereign receives but never pays court costs. In modern times it still makes sense not to require the Commonwealth 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 appropriate 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

1. Va. Code Ann. §14.1-182; applied in *Howell v. C. & P. Tel. Co.*, 215 Va. 549, 559, 211 S.E.2d 265 (1975); *Herrick v. Quality Home Builders, Inc.*, 6 Va. Cir. 467 (1970) (the expense of the appeal record).
2. Rule 5:37 and Rule 5A:30.
3. Va. Code Ann. §§14.1-198, 14.1-189 to 14.1-195; *Wessendorf v. Wessendorf*, 9 Va. Cir. 224 (1987); *G. L. Hopkins, Inc. v. C & O Devel. Co.*, 6 Va. Cir. 546 (1978).
4. *Lee Conner Realty Corp. v. Lannon*, 9 Va. Cir. 97 (1987).
5. Va. Code Ann. §14.1-198.
6. Va. Code Ann. §14.1-198; for the special list of fees for judgments by confession, see Va. Code Ann. §14.1-178.1.
7. Va. Code Ann. §14.1-199.
8. *German Nat. Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 61 S.E. 870 (1908); Va. Code Ann. §8.01-109, §§14.1-133, 14.1-133.1.
9. Med. Mal. Rule 7(d).
10. Va. Code Ann. §8.01-376.
11. Va. Code Ann. §14.1-198.
12. Va. Code Ann. §§14.1-196, 14.1-197; these are the only attorney's fees that are taxable: *German Nat. Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 61 S.E. 870 (1908).
13. Act of March 1643, c. 61, 1 Hening's Statutes 275.
14. Va. Acts 1839-40, c. 50, §2, p. 44; *Yates v. Robertson*, 80 Va. 475 (1885).
15. Act of Oct. 1765, c. 52, 8 Hening's Statutes 184-185.
16. 1 Va. Rev. Code, c. 76, §§14-17, pp. 270-271 (1819).
17. Va. Code, c. 185, §13 (1849); see also Va. Code §3552 (1887); Va. Code §3433 (1919); Va. Code Ann. §14-193 (1950).
18. Va. Acts 1952, c. 616, p. 1068.
19. Va. Code Ann. §14.1-196.
20. *Dunlop v. McGehee*, 139 Va. 643, 651, 124 S.E. 199 (1924); *Stovall v. Hardy*, 1 Va. Dec. 342, 349 (1879).
21. Va. Code Ann. §54-69.
22. Va. Code Ann. §8.01-643.
23. Va. Code Ann. §§20-71.1, 20-79(b).
24. Va. Code Ann. §55.82.
25. Va. Code Ann. §58-1117.5.
26. Va. Code Ann. §9-6.14:21.
27. Va. Code Ann. §2.1-346; e.g. *Gibbs v. Roanoke County Supervisors*, 3 Va. Cir. 24, 26 (1981).
28. Va. Code Ann. §55-79.84(e).
29. Va. Code Ann. §§59.1-9.12(b), 59.1-9.15(b). Under this statute, an award of attorney's fees and costs may not be made to the attorney general in a suit for equitable relief only: *Commonwealth v. Winslow*, 9 Va. Cir. 130 (1987).
30. Va. Code Ann. §18.2-500.
31. Va. Code Ann. §13.1-329(e).
32. Va. Code Ann. §38.1-70.
33. Va. Code Ann. §59.1-204(B); e.g. *Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 432-433, 337 S.E.2d 291, 297-298 (1985).
34. Va. Code Ann. §§18.2-214 through 18.2-246.
35. Va. Code Ann. §59.1-68.3.
36. 15 U.S.C. sect. 2310(d) (applies to plaintiffs only). J. O. Wheeler, *Attorney's Fees in Consumer Products Litigation*, Va. Bar News, vol. 33, no. 12, pp. 30-31 (June 1985).
37. Va. Code Ann. §36-94(b).
38. Va. Code Ann. §55-248.2 et seq.
39. Va. Code Ann. §65.1-101; *Volvo White Truck Corp. v. Hedge*, 1 Va. App. 195, 200-201, 336 S.E.2d 903 (1985) (award of attorney's fees reversed); *Jensen Press v. Ale*, 1 Va. App. 153, 159-160, 336 S.E.2d 522 (1985).
40. Rule 4:5(g).
41. Rule 4:12.
42. Va. Code Ann. §8.01-266.
43. *Lee Conner Realty Corp. v. Lannon*, 9 Va. Cir. 97, 102 (1987) (for wanton and oppressive behavior).
44. *E.g. Wright v. Castle*, 3 Merivale 12, 36 Eng. Rep. 5 (Ch. 1817) (attorney filed suit without permission of the plaintiff); *Digardine v. Swift*, 1 Chan. Cas. 71, 22 Eng. Rep. 700 (Ch. 1666).
45. Va. Code Ann. §8.01-380(B).
46. Va. Code Ann. §14.1-190; Med. Mal. Rule 7(e).
47. Rule 4:1(b)(4).
48. *Herrick v. Quality Home Builders, Inc.*, 6 Va. Cir. 467 (1970). Court reporter fees for in-court hearings were awarded in *Lee Conner Realty Corp. v. Lannon*, 9 Va. Cir. 97, 102 (1987).
49. *Hernandez v. Alexandria Hospital*, 57 O.I.C. 172, 174 (1977); *Davidson v. Town of Gate City*, 53 O.I.C. 67, 68 (1971).
50. *Marcoinc, Inc. v. Williams & Co.*, 88 F.R.D. 588, 591-592 (E.D. Va. 1980).
51. Va. Code Ann. §8.01-362.
52. Va. Code Ann. §§14.1-177, 14.1-178, 14.1-181; e.g. *Walsh v. Walsh*, 177 Va. 174, 191, 12 S.E.2d 757 (1941).
53. Va. Code Ann. §14.1-177; *Dade v. Alexander* (1791), *Brown's Reports*, 11 U. Rich. L. Rev. 713.
54. *E.g. Jones v. Mason*, 26 Va. (5 Rand.) 577, 584, 596 (1827).
55. *Providence Forge Oil Co. v. C. & P. Tel. Co.*, 8 Va. Cir. 470 (1966).
56. *Hudson v. Johnson*, 1 Va. (1 Wash.) 10 (1791), *Brown's Reports*, 11 U. Rich. L. Rev. 714.
57. *Pendleton v. Vandever*, 1 Va. (1 Wash.) 381 (1794), *Brown's Reports*, 11 U. Rich. L. Rev. 731.
58. See generally Va. Code Ann. §§20-71.1, 20-79(b), 20-99(b).
59. *Jones v. Jones*, 2 Va. Cir. 328 (1970).
60. Va. Code Ann. §14.1-180.
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).
62. Va. Code Ann. §14.1-201; *Rex v. Corum*, 1 Anst. 50, 145 Eng. Rep. 797 (Ex. 1792). Note that a relator is liable for court costs: *A.G. v. Gleg*, 1 Atk., 356, 26 Eng. Rep. 227 (Ch. 1738); *A.G. v. Smart*, 1 Ves. Sen. 72, 27 Eng. Rep. 898, 899 (Ch. 1748).
63. 223 Va. 534, 546-547, 290 S.E.2d 867 (1982).
64. *Commonwealth v. Colquhoun*, 12 Va. (2 Hen. & M.) 213, 245, n. 1 (1808); *A.G. v. Earl of Ashburnham*, 1 Sim. & St. 394, 397, 57 Eng. Rep. 157, 159 (V.C. 1823).