

210 First St SW Suite 300
Roanoke VA 24011

Post Office Box 2200
Roanoke VA 24009

www.jamlaw.net
P 540.767.2000
F 540.982.1552

JOHNSON AYERS & MATTHEWS

COUNSELORS AT LAW

August 9, 2010

Mr. Roger Mullins, PLLC
Attorney & Counselor at Law
P. O. Box 647
Tazewell, VA 24651-0647

Re: Report of Boyd-Graves Committee on Recovery
of Specific Costs and Attorney's Fees on Appeal

Dear Roger:

This Committee was formed to explore the following two issues:

- 1) Should the premium paid for a supersedeas bond be a recoverable taxable cost on appeal?; and
- 2) Should Rule 1:1A be amended to allow for the recovery of attorney's fees in a situation where a petition for appeal is granted, but the appellee substantially prevails?

ISSUE 1

The Committee agrees that the premium paid for a supersedeas bond should be a recoverable taxable cost on appeal.

Virginia Supreme Court Rules 5:37 and 5A:30, as well as Virginia Code Sections 17.1-604, 17.1-605, 17.1-624, and 17.1-128 all address recovering the costs of appeal as well as the types of costs that can be recovered, including attorney's fees, copies, publication of briefs, and transcripts of the record as recoverable costs. Section 8.01-676.1(A) and (B) of the Virginia Code requires all appellants to file an appeal bond of at least \$500, conditioned on the payment

David B. Carson 540.767.2037 dcarson@jamlaw.net

of all damages, costs, and fees incurred in the appellate court. Additionally, Section 8.01-676(C) requires that an appellant who seeks to suspend operation of the judgment or award from which the appeal is taken obtain an appeal bond (also known as a supersedeas bond) or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred. Nowhere does a rule or the Virginia Code address the recovery of bond premiums.

The Court in Herrick v. Quality Home Builders of Norfolk, Inc., 6 Va.Cir. 467 (1970), provides a helpful discussion regarding the recovery of costs not addressed by rule or statute. The Court pointed out that where a statute specifies costs that are recoverable, the prevailing party is entitled to those costs. Id. at 468. Where a statute does not contemplate that a specific cost is recoverable, then its recovery is largely left to the Court's discretion. Id. at 469. Section 17.1-626 of the Virginia Code states that a Court can tax costs "for any other matter." The Herrick Court interpreted this phrase to mean that the Court can tax non-specified costs only in a "difficult and extraordinary case." Id. at 472. The Court then specifically denied the inclusion of supersedeas bond premiums in allowable costs to the party in the case before it because there was no specific statutory authority allowing it to do so. Id. at 471-2.

A brief review of surrounding jurisdictions shows that Maryland, the District of Columbia, South Carolina, and West Virginia all contemplate the inclusion of premiums for supersedeas bonds as recoverable costs, either through court rules or statutes. It is the conclusion of this committee that Virginia should specifically include supersedeas bond costs as a cost which a prevailing party is entitled to recover on appeal either in the Virginia Code, the Supreme Court Rules, or both. The Committee would like its study on this issue to continue for an additional year so that it can make a specific recommendation regarding proposed rule and/or statutory changes.

ISSUE 2

The Committee agrees that Rule 1:1A should be amended to allow for the recovery of attorney's fees in a situation where a petition for appeal is granted, but the appellee substantially prevails.

Rule 1:1A of the Rules of the Virginia Supreme Court sets forth a procedure for the recovery of attorney fees in a situation where a petition for appeal is denied and the appellee had recovered attorney's fees from the circuit court. The provisions in this rule were recommended by a Committee of the 2003 Boyd-Graves Conference and subsequently adopted. The 2003 Committee declined to recommend a provision for recovery of attorney's fees after disposition of a case by the Supreme Court where a petition for appeal is granted, stating that "if an appeal is granted by the Supreme Court of Virginia, that Court can determine the issue of attorney fees incurred on appeal, and can either decide the issue itself or remand to the circuit court . . ."

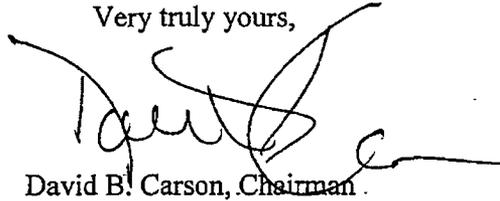
Roger Mullins, Esquire Letter
August 9, 2010
Page 3

Our committee has concluded that the rules should in fact be amended to explicitly authorize the recovery of attorney fees after disposition of a case by the Supreme Court where a petition for appeal is granted. Absent explicit authorization, the recovery of attorney's fees is questionable for several reasons. One, as presently drafted, the Rule contemplates the recovery of attorney's fees in the limited situation where a petition for appeal is denied. By not authorizing the recovery of attorney's fees in cases where a petition for appeal is granted, but the appellee substantially prevails on appeal, the current Rule implies that attorney's fees are not recoverable in the latter situation.

If it is Virginia's policy to allow attorney's fees to a party substantially prevailing on appeal, who had recovered them in circuit court pursuant to a contract, statute, or other applicable law, then that policy should be made explicit. Further, in the interest of judicial economy, such policies should explicitly allow such fees to be determined summarily on remand, rather than necessitating the filing of a separate suit. Therefore, the committee recommends that Rule 1:1A be amended. Attached to this letter are suggested changes to Rules 1:1A and 5:37.

We trust that these recommendations accurately respond to the inquiries put to us.

Very truly yours,



David B. Carson, Chairman
The Honorable James F. Almand
Paul M. Black
Cindra M. Dowd
Laurie E. Forbes
Stephen C. Price

DBC/klv
Enclosures

Rule 1:1A

Recovery of Appellate Attorney's Fees in Circuit Court.

a) Notwithstanding any provision of Rule 1:1, in any civil action in which an appeal lies from the circuit court to the Supreme Court and either: (1) a petition for appeal is denied by the Supreme Court (and, if a petition for rehearing has been filed pursuant to Rule 5:20, such petition has been denied), an appellee who has recovered attorneys' fees, costs or both in the circuit court pursuant to a contract, statute or other applicable law may make application in the circuit court in which judgment was entered for attorneys' fees, costs or both incurred on appeal; or (2)) a petition for appeal is granted and a decision rendered by the Supreme Court, a party who has recovered attorneys' fees in the circuit court pursuant to a contract, statute or other applicable law may make application in the circuit court in which judgment was entered for attorneys' fees incurred on appeal. The application must be filed within thirty (30) days after denial of the petition for appeal or of any petition for rehearing, whichever is later, or when an appeal is granted, within thirty (30) days after issuance of the final order or mandate. ~~and~~ Such application may be made in the same case from which the appeal was taken, which case shall be reinstated on the circuit court docket upon the filing of the application.

b) ~~The appellee~~party seeking appellate attorney's fees shall not be required to file a separate suit or action to recover the fees and costs incurred on appeal, and the circuit court shall have continuing jurisdiction of the case for the purpose of adjudicating the application. The circuit court's order granting or refusing the application, in whole or in part, shall be a final order for purposes of Rule 1:1.

b) Nothing in this Rule shall restrict or prohibit the exercise of any other right or remedy for the recovery of attorneys' fees or costs, by separate suit or action, or otherwise.

Rule 5:37

Costs and Attorney's Fees

(a) To Whom Costs are Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by this Court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part or reversed in part, or is vacated, costs shall be allowed as ordered by this Court.

(b) Taxable Costs. Costs, including the filing fee and costs incurred in the printing or producing of necessary copies of briefs, appendices, and petitions for rehearing, shall be taxable in this Court.

(c) Award of Costs. Counsel for a party who desires costs to be taxed shall itemize them in a verified bill of costs, which shall be filed with the clerk of this Court within 10 days after the date of the decision in the case. Objections to the bill of costs must be filed with the clerk of this Court within 14 days after the date of filing the bill of costs. The clerk of this Court shall prepare and certify an itemized statement of costs taxed in such Court for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate on request by the clerk of this Court to the clerk of the tribunal in which the case originated.

(d) After this Court renders a decision, any party who has received attorneys' fees and costs in the circuit court and substantially prevailed in this Court, may make application in the circuit court for additional fees and costs incurred on appeal pursuant to Rule 1:1A.