

Posted on April 30, 2009 by [David J. McMahon](#)

**Clarification Whether A Party Is Required To File
A Proposed Judgment Together With A Memorandum Of Costs
In A Voluntary Dismissal Scenario**

David J. McMahon

In *Fries v. Rite Aid Corp.*, 2009 DJDAR 5721 (April 24, 2009), the California Court of Appeal, First Appellate District clarified an issue concerning the procedure for properly filing a memorandum of costs where a plaintiff voluntarily dismisses an action. The court analyzed whether a party who seeks costs after a voluntary dismissal, is required to file a proposed judgment in addition to the memorandum of costs. The court concluded that there was no legal requirement that the party file a proposed judgment in addition to the cost memorandum. The court clarified a procedural issue that has been pending for some time. The importance of this question from an attorney fee standpoint is that when any California statute refers to the award of “costs and attorneys fees,” the fees may be recoverable as a component of the costs to be awarded. Attorneys’ fees allowable as costs may be fixed upon noticed motion, at the time a statement of decision is rendered and/or, as in this case, on a cost memorandum supported by affidavit, made concurrently with a claim for other costs.

In *Fries* plaintiff filed a complaint against Rite Aid but soon thereafter filed a request for voluntary dismissal of the action. On the day that the plaintiff dismissed the case, Rite Aid filed a memorandum of costs. The plaintiff moved to strike or tax the costs arguing that the memorandum contained procedural defects because the defendant failed to file a proposed judgment or an order of dismissal simultaneously with the cost memorandum. The trial court disagreed with the plaintiff noting that the defendant complied with California rule of court 3.1700.

Under California rule of court 3.1700 a prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of the mailing of the notice of entry of judgment or dismissal by the clerk under CCP § 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. A memorandum of costs must be verified by a statement of the party, attorney or agent that to the best of his or her knowledge the item of costs are correct and were necessarily incurred in the case.

The question framed by the Court of Appeal was whether as the plaintiff maintained, that the defendant was also required to file a proposed judgment along with their memorandum of costs. The court concluded that California Rules of Court 3.1700 does not require a party to do so. The plaintiff relied on a passage in a frequently relied on California practice guide for the proposition that “a prevailing party who claims costs shall serve and file a memorandum of costs after service of written notice of entry of judgment or dismissal.” The appellate court disagreed noting that the language in the practice guide referred to involuntary rather than voluntary dismissal because of the reference to CCP § 664.5.

Counsel should be guided by the clarification when filing a memorandum of costs seeking to recover either costs, attorneys' fees or both in a voluntary dismissal scenario.