N.C. Court of Appeals Interprets Revised Costs Statutes

Christian H. Staples, *Shumaker Loop & Kendrick LLP*

Staples

Expert witness fees are generally one of the biggest expenses that may be recovered as costs by the prevailing party at trial. This article discusses two recent appellate decisions that have interpreted the recently revised costs statutes in North Carolina.

Following a successful outcome at trial, many defense attorneys immediately turn their attention to preparing the motion for costs in an effort to recover some of their trial expenses. However, preparing the motion for costs requires an understanding of those statutes which authorize the trial courts to award costs. In *Jarrell v. The Charlotte-Mecklenburg Hosp. Auth.*, ___ N.C. App. ___, 698 S.E.2d 190 (2010), the North Carolina Court of Appeals issued an important opinion interpreting the recently revised costs statutes for the first time. Even more recently, in *Springs v. City of Charlotte*, ___ N.C. App. ___, 704 S.E.2d 319 (2011), the Court of Appeals further clarified the current status of the law surrounding expert witness fees and other costs in civil actions. Practitioners should be aware of the potential impact of these two cases on future costs hearings.

Effective August 1, 2007, the General Assembly revised § 6-20 and § 7A-305, commonly referred to as "the costs statutes." It is fair to say that these revisions have caused some confusion among practitioners and judges alike.

Revised § 6-20 now provides, in pertinent part, as follows:

> Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes.

N.C. Gen. Stat. § 6-20 (2010). Section 7A-305(d) essentially provides that certain costs enumerated therein constitute a "complete and exclusive limit on the trial court's discretion to tax costs pursuant to G.S. 6-20." N.C. Gen. Stat. § 7A-305(d) (2010). The confusion that has ensued following the revision of these two statutes is understandable, given the use of words like "discretion," "limit," and "complete and exclusive" all in the same sentence. Thankfully, our state's intermediate appellate court has recently provided some much needed clarification.

In *Jarrell v. The Charlotte-Mecklenburg Hosp. Auth.*, ___ N.C. App. ___, 698 S.E.2d 190 (2010), the Defendants had timely filed a motion for costs pursuant to N.C. Gen. Stat. §§ 6-20 and 7A-305(d) following a jury verdict in their favor at trial, seeking reimbursement of their costs for the actual time their expert witnesses spent testifying at trial, the travel expenses of their expert witnesses, and certain other costs not relevant here. The motion was essentially granted in full by the trial court. Plaintiffs only appealed that portion of the award related to the time the Defendants' experts actually spent testifying at trial under § 7A-305(d)(11).

The Plaintiffs argued that because the Defendants' out-of-state expert witnesses testified pursuant to subpoenas issued in North Carolina rather than subpoenas issued in each expert's home state, the subpoenas were ineffective and therefore the award of costs was not statutorily authorized. While § 7A-305 says nothing about subpoenas, § 7A-314(a) and (d) collectively provide that expert witness fees may be taxed as costs only when the expert is "under subpoena, bound over, or recognized." In other words, satisfying the requirements of 7A-305(d)(11) by ensuring that the experts' fees are "reasonable and necessary" does not automatically entitle the prevailing party to recover costs if the experts did not testify pursuant to a subpoena. In fact, the *Jarrell* Court cited several cases for the proposition that an award of expert witness fees as costs is reversible error where no subpoena existed.

Concluding its analysis, the *Jarrell* Court rightly held that the Plaintiffs lacked standing to challenge the validity of the North Carolina subpoenas issued to the Defendants'

Costs, *continued from page 7*

out-of-state experts. The court stated that the right to contest the validity of a subpoena "belongs not to Plaintiffs but to the nonparty witnesses whose attendance was sought." As a result, the Plaintiffs could not raise the invalidity of the subpoenas as a bar to that portion of the costs award related to the actual time the Defendants' experts actually spent testifying at trial.

Notably, the Plaintiffs failed to make other arguments that could have been raised in opposition to the award of costs. Most notably, the Plaintiffs failed to contest the Defendants' request for, and the trial court's award of, the travel expenses of the Defendants' experts. When *Jarrell* was argued and decided, it was somewhat unclear whether the trial courts retained any discretionary authority to award certain "common law" costs, such as expert witnesses' travel expenses, that were not specifically enumerated in § 7A-305(d). The "complete and exclusive" language of § 7A-305(d) seemed to foreclose the exercise of any discretionary authority by the trial court. Fortunately, this lingering issue was recently put to rest by the Court of Appeals in the *Springs* case.

Springs v. City of Charlotte, ___ N.C. App. ___, 704 S.E.2d 319 (2011), involved a claim of motor vehicle negligence where the Defendants appealed an award of costs against them following a verdict for the Plaintiff at trial. The Defendants argued on appeal that the trial court erred to the extent that the award of costs included an assessment for the Plaintiff's experts' trial preparation time and time spent waiting to testify. Following a discussion of § 6-20, § 7A-305(d), and § 7A-314, the *Springs* Court held that trial courts are *required* to assess as costs those items specifically enumerated at § 7A-305(d), including, *inter alia*, fees for the time the prevailing party's expert witnesses spent actually testifying at trial, deposition, or other proceeding. The *Springs* Court further held that trial courts have discretionary authority under § 7A-314(b) to award an expert witness' travel expenses, and that trial courts also have discretion under § 7A-314(d) to assess costs for experts' time spent in attendance at trial even when not testifying. Thus, as both *Jarrell* and *Springs* explicitly recognized, § 7A-305(d) must continue to be read in conjunction with § 7A-314 despite the statutory revisions. Notably, the *Springs* Court found no authority permitting trial courts to assess costs for an expert witness' time spent preparing for trial. This would typically include the expert's time reviewing the facts of the case, meeting with counsel, and any other preparation time leading up to trial.

In sum, *Jarrell* eliminates the need for practitioners to incur the additional time and expense of issuing "home state" subpoenas solely for the purpose of preserving the right to recover an out-of-state expert's fees for time spent actually testifying at trial; a subpoena issued in North Carolina will suffice. *Springs* is perhaps the more important decision in that it definitively holds that trial courts are now *required* to award those costs specifically enumerated at § 7A-305(d), provided that all of the statutory requirements are met. Furthermore, trial courts retain their discretionary authority to assess experts' travel expenses and "stand-by" time at trial under § 7A-314(b) and (d), respectively. However, trial courts are not authorized to assess costs for experts' trial preparation time. Finally, it should be noted that the prevailing party may not seek reimbursement for the costs of more than two experts to prove a single material fact. *See* N.C. Gen. Stat. § 7A-314(e) (2010).

Hopefully this article has provided some clarification regarding the current status of the law of costs in civil actions, particularly as it relates to the recovery of expert witness fees. The author would welcome any comments on this topic, and may be reached at *cstaples@slk-law.com*.

Christian Staples *is an associate in the litigation practice group in the Charlotte, N.C., office of Shumaker, Loop & Kendrick, LLP. His principal area of practice is medical malpractice defense.*

Diversity in the North Carolina Association of Defense Attorneys Statement of Principle

The North Carolina Association of Defense Attorneys (NCADA) is the North Carolina membership organization of lawyers involved in the defense of civil litigation. As such, NCADA expresses its strong commitment to the goal of diversity in its membership. Our member attorneys conduct business throughout North Carolina, the United States, and around the world, and NCADA values highly the perspectives and varied experiences which are found only in a diverse membership. The promotion and retention of a diverse membership is essential to the success of our organization as a whole, as well as our respective professional pursuits. Diversity brings to our organization a broader and richer environment that produces creative thinking and solutions. As such, NCADA embraces and encourages diversity in all aspects of its activities. NCADA is committed to creating and maintaining a culture that supports and promotes diversity in its organization.