

# Court Clerk Error Is No Excuse For A Missed Deadline

By **Juli Porto** (April 29, 2024)

Court clerks, like everyone else, are not infallible. They can be wrong about filing deadlines, the date an order was entered or anything else.

It's important to remember this and to always do your own research when it comes to filing deadlines and requirements.

The April 16 *Sidar v. Doe*[1] decision, out of the Court of Appeals of Virginia, illustrates this point.

In *Sidar*, Jane Doe sued Cenk Sidar for several intentional torts. Sidar moved to dismiss the claims, but the trial court denied the motion and, finding that the motion was not legitimately based in either law or fact, sanctioned Sidar.

After Doe nonsuited her claims, Sidar appealed to the Supreme Court of Virginia. On Sept. 9, 2022, the court refused Sidar's petition for appeal.

Supreme Court of Virginia Rule 1:1A allows an appellee to seek attorney fees and costs where an appellate judgment is favorable to the appellee and the appellee has recovered attorney fees or costs in the trial court.

The application, however, must be filed in the trial court within 30 days after entry of the final appellate judgment. So, on Oct. 7, 2022 — within 30 days of the Supreme Court's refusal of Sidar's petition — Doe attempted to file a request for the attorney fees she incurred in responding to the appeal.

The trial court clerk's office, however, would not accept her filing because it had not yet received the Supreme Court's order. The trial court clerk eventually received a copy of the order on Oct. 24, 2022, and Doe filed a new fee application on Nov. 10, 2022 — more than 30 days after the Supreme Court refused Sidar's petition.

Sidar objected to Doe's request for attorney fees, arguing that her application was untimely as it was filed more than 30 days after the Supreme Court's Sept. 9, 2022, order. The trial court was unsympathetic to Sidar.

It agreed with Doe that she could not have filed her request for attorney fees until the trial court received the order on Oct. 24, 2022. It therefore found that Doe's application was timely and awarded her attorney fees.

Sidar appealed and the Court of Appeals reversed. It found that an application for attorney fees under Rule 1:1A must be filed within 30 days after entry of a final appellate judgment regardless of whether the appellate court has returned the case to the trial court.

Rule 1:1A defines a final appellate judgment as "the issuance of the mandate by the appellate court or, in cases in which no mandate issues, the final judgment or order of the appellate court disposing of the matter." Here, the Supreme Court's Sept. 9, 2022, order denying the petition for appeal was the final appellate judgment as it disposed of the matter.



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The Court of Appeals recognized the "substantial hardship" imposed on Doe by the trial court clerk's error in refusing to accept her first, timely filed application, but offers little in the way of comfort, stating that these "unfortunate circumstances" do not entitle Doe to relief.

So, what could have been done? The opinion does not go into detail about the circumstances surrounding the submission of the application to the trial court clerk, but based on answers given during oral argument, it does seem that there should have been a conversation with the trial court clerk about two Virginia Supreme Court rules that would have made it clear that the filing was proper and should have been accepted: Rule 1:1B and Rule 3:3.

First, Rule 1:1B. That rule governs the jurisdictional transfer between the trial and appellate courts. Under that rule, once a notice of appeal is filed, the appellate court acquires jurisdiction over the case.

But there are certain purposes for which the trial court maintains concurrent jurisdiction. According to Rule 1:1B, and as the Court of Appeals pointed out in its decision, one purpose for which the trial court maintains concurrent jurisdiction is to adjudicate actions authorized by Rule 1:1A[2] — the action for attorney fees and costs that Doe sought to apply for.

Importantly, the trial court may only adjudicate actions authorized by Rule 1:1A under its concurrent jurisdiction if the party requesting the action follows applicable deadlines. Here, that meant that Doe could file her application in the trial court whether or not the Supreme Court's order had been transferred to the trial court.

The second rule that would have made it clear that the filing should have been accepted is Rule 3:3. That rule mandates that "the clerk shall receive and file all pleadings when tendered." Even if the trial court clerk thought Doe's filing was premature, it still was required to accept and file the pleading under that rule.

Unfortunately, *Sidar v. Doe* is not the only recent case in which a trial clerk's error led to an appellant's misfortune. Not long ago, in *Hill v. Hill*,<sup>[3]</sup> another case from the Court of Appeals of Virginia, a father was unable to challenge a custody determination because a clerk mistakenly told him that the custody order had not been entered.

In *Hill*, a father was unsatisfied with a custody determination made in the juvenile court. Virginia Code Section 16.1-296(A) allows a party to appeal a juvenile court decision to the circuit court within 10 days of entry of the final juvenile court judgment.

But when the father tried to file his notice of appeal, the court clerk told him that the order had not yet been entered. Unbeknownst to the father, this was untrue: The order had already been signed. By the time the father eventually received notice of the order and filed his notice of appeal, however, it was past the 10-day deadline. So, the mother filed a motion to dismiss the father's appeal as untimely.

The circuit court, however, was sympathetic to the father. It found that he had exercised due diligence and that the clerk's office had made a clerical error when it told him that the final order had not been entered. Exercising its statutory authority to correct clerical errors, the circuit court allowed the father's appeal.

The mother appealed that decision, and the Court of Appeals sided with her. It found that a

verbal representation is not a clerical error as contemplated by the statute that allows their correction.

Despite the father's reasonable reliance on the court's representation, he was not allowed to continue his appeal. As in *Sidar*, the Court of Appeals recognized the "inequitable result" of its decision. As the court put it, "One may wonder ... how litigants are expected to fairly try their cases if court records are not currently maintained." But, it still found that it was bound by the 10-day statutory deadline.

So, what could have been done? Once again, Rule 3:3 would have made it clear that the filing should have been accepted since the clerk must file pleadings when tendered.

If the Court of Appeals of Virginia has been clear on anything, it is that a clerk's mistake is no excuse for an untimely filing. Regardless of a clerk's representations, if you have a time-sensitive deadline, insist on filing under Rule 3:3.

If the clerk is correct that a pleading is premature and you insist on filing it, the worst-case scenario is that you filed too early. You can refile later if you must.

But if the clerk is incorrect that a pleading is premature and you don't insist on filing, you might have missed a jurisdictional deadline and waived important rights.

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[1] *Sidar v. Doe*, Record No. 0837-23-4, 2024 WL 1624746 (Va. Ct. App. Apr. 16, 2024).

[2] Virginia Supreme Court Rule 1:1B(a)(1) and (a)(3)(H).

[3] *Hill v. Hill*, Record No. 1606-19-1, 2021 WL 5312386 (Va. Ct. App. Nov. 16, 2021).