SUPREME COURT COMMITTEE
ON RULES OF CIVIL PROCEDURE
MINUTES OF MEETING

September 27, 2013

The Supreme Court Civil Rules Committee was called to order by Richard W. Laugesen at 1:41 p.m. in Room 4244, Fourth Floor, Ralph L. Carr Colorado Judicial Center, 2 East 14th Avenue, Denver, Colorado.

The following members were present:

David R. DeMuro	Chief Judge Alan Loeb
Judge Ann Frick	Christopher B. Mueller
Peter A. Goldstein	Ann Rotolo
Lisa Hamilton-Fieldman	Lee Sternal
Richard P. Holme	Ben Vinci
Charles Kall	Magistrate Chris Voisinet
Judge Thomas K. Kane	Judge John R. Webb
Debra R. Knapp	J. Gregory Whitehair
Richard W. Laugesen	Chief Justice-Designate Nancy Rice by Laura McNabb
Cheryl Layne	Carol Haller
David C. Little	Jenny Moore

The following members were excused:

Judge Jerry N. Jones
Frederick B. Skillern
Judge Christopher Zenisek
Cecily Nicewicz

Approval of Minutes:

Minutes of the August 29, 2013 meeting were submitted and approved as submitted.

Information Items:

Chairman Laugesen pointed out and went through the Information Items in the Agenda packet.

New Members:

Chairman Laugesen introduced and welcomed two new Committee members present at the meeting, Debra Knapp and Magistrate Chris Voisinet.

At Chairman Laugesen's request [going around the table], members and guests introduced themselves.

C.R.C.P. 54(d)--Further Consideration on How to Deal With Increasing Large Cost Awards:

Chairman Laugesen announced that, at this meeting, the Committee would be further reviewing and considering C.R.C.P. 54(d), including further public comment on how to deal with large cost awards--that guests and members would be allowed to express their thoughts then remain available to answer questions.

Carol Haller stated that Chief Justice-Designate Rice apologized for not being able to attend the meeting, but stated that she is very interested in both the Committee members' and guests' comments. Chairman Laugesen noted that Laura McNabb was present as Justice Rice's representative.

Chairman Laugesen asked member Lee Sternal to open the discussion and introduce the several guests he invited to provide comments on the subject for the benefit of the Committee.

Mr. Sternal began, stating that he had asked colleagues to attend the meeting or to write letters. He stated that he was looking for individuals who the Committee would respect; who had had extensive civil trial experience; and who understood the day-to-day experience of those in civil litigation practice. He had looked for people on both sides of the issue, and wanted to bring those to the meeting who were intimately familiar with the *Cherry Creek No. 5 v. Voelker* [859 P.2d 805 (Colo. 1983)] decision. Mr. Sternal then introduced Christina Habas [former Denver District Court Judge and formerly a member of the Civil Rules Committee] as a person having all of his enumerated qualifications.

Ms. Habas began by observing, that as a trial judge, one knows that the jury verdict is often not the actual conclusion of the trial. Instead, it is the cost battle that follows, which can be emotional, vicious, lengthy, and can often produce wildly disparate results. Judges have little consistency with other judges on costs awards--even judges within the same judicial district. If one is on the losing end of a cost battle, he/she will have to put up a bond to appeal and that often leads to bankruptcy. The necessity of posting a large bond also discourages meaningful appellate review. There are a fair amount of district court judges that do not intervene in a case soon enough--often due to inadequate judicial recourses. She stated, that in her opinion, the costs issue has become overwhelming, but the currently proposed change to C.R.C.P. 54(d) should not be viewed as the exclusive remedy. Instead, early intervention by the district court judge; changes to C.R.C.P. 54; and simple policy changes from the Supreme Court to deal with the increasingly high cost awards, all appear to be needed.

Ms. Habas described the *Voelker* case for the Committee members and guests. She stated that she was on the defense side of the case representing Cherry Creek School District and that the case involved a minor plaintiff who had a debilitating condition that

caused her to live in a dark, closed environment. Because of the Plaintiff's medical condition, the defense traveled to depose her. The Plaintiff was easily exhausted and long breaks were necessary to accommodate her circumstances. As a result, the defense asked for travel and other costs incidental to traveling to depose the Plaintiff. Ms. Habas recalled in her oral argument before the Colorado Supreme Court, Justice Rivera asking her if she had any idea what she was doing in asking for such extraordinary expense. She stated she replied that she was doing what was best for her client.

Ms. Habas continued, stating that perhaps the Supreme Court did not have to go as far as it did in *Voelker*. In 1993, costs were not like they are today. Costs were not in the hundreds of thousands of dollars, and lawyers typically worked out costs after the jury verdict. She urged the Committee to take some action, either in developing a new amendment; forming a special working committee to study the matters; asking the Supreme Court to take other corrective action; go back to the statute's list of costs in C.R.S. § 13-16-122; or perhaps consider whether C.R.C.P. 16 is the better vehicle. Something needs to be done.

Mr. Mueller asked what Ms. Habas meant by attorneys used to work out costs between themselves after trial? Ms. Habas replied that attorneys would get together to talk and determine if they could work out the cost situation themselves. For instance, one attorney might agree to waive the right to appeal if the costs would be waived. She stated there would be a respectful discussion between the attorneys, whereas now people are held hostage for appeal. Mr. Mueller asked if there is any respectful discourse presently going on among attorneys, and if the problems now being faced in litigation are atmospheric or rule-based? Ms. Habas replied that both are problems in litigation.

Mr. Jim Crochal spoke next. He has a general, diverse practice. He represents both plaintiffs and defendants, and he sees costs from both sides of the isle. Mr. Crochal has seen the necessity of bankruptcy for both plaintiffs and defendants. He believes reform should start at least piecemeal, and understands the strain on judicial resources, but does not understand how a day or a half a day cannot be devoted to a cost award hearing. He stated he found it insulting to consumers in Colorado not to have such access. District Courts need to have more time available to hear cost disputes, and parties have to understand that if they bring a claim, they might be liable for a large costs judgment. In his experience costs are also a deterrent in commercial litigation.

Member DeMuro asked Ms. Habas, from her experience on the bench, what types of cases create higher cost awards? Ms. Habas responded stating that in her experience, professional liability and medical malpractice cases created the highest cost awards because there are usually multiple expert witnesses used for the different issues in those cases. She stated that costs now are used less as a tool than as a sword, and that more case management moving forward would be useful for control of that. Mr.DeMuro then asked Ms. Habas, if the jury verdict is not the end of the issue, in reading the language of the proposed rule change, was she concerned that one of the collateral consequences must be an increase of post-verdict litigation to ascertain the economic circumstances of the parties? Ms. Habas replied that she was, but noted that

the increasing back-end litigation has already happened. Judge Kane stated his concern was that imposing the requirement of looking at the economic circumstances of the parties was probably legislative. Ms. Habas responded, stating that the Committee's job is to draft proposed rule changes for the Supreme Court and *Voelker* is a Supreme Court case. She suggested going back and using only the statute for defined cost categories. She also suggested more case management and/or amending parts of C.R.C.P. 16. Ms. Habas stated she can see both arguments on whether a proposed rule change is a legislative function. She wondered why the legislature did nothing after *Voelker*. The case put the emphasis on reasonableness based on the circumstances of the case. In federal court the judges do not decide costs. The clerk does and the US Code delineates what costs are and are not. Judge Kane then asked Ms. Habas what would her awarded costs would have been had the Supreme Court had not ruled the way it did in *Voelker*. She replied they would have been for the deposition only, not the travel costs and nothing incidental to the deposition.

Mr. Crochal described a case of his where at the end of trial, a disabled teacher had to pay a $50,000 cost award. The other party, a school district had immunity. All of the expert witness fees were allowed, even for experts who were never called, and also an expert that was later withdrawn.

One of the guests commented that he believed that C.R.C.P. 54(d) already has a discretion feature. He noted that there is no case law on the issue and that he has never seen this issue raised in a civil trial, but thinks the court does have discretion in awarding costs and the rule could and should be looked at as it already is.

Ms. Habas stated that she has seen judges use the discretion inherent in C.R.C.P. 54(d) to reduce cost awards, but the issue evades appeal because the appellant often cannot afford the bond. She said the Offer of Settlement statute [that specifically allows "actual costs"] is also a problem. If it was her call, she would make a one dollar offer every time because of the Offer of Settlement statute. She said that if she were the defendant, that is what she would do to remove the matter from any appealable issue. Judge Frick observed that in Colorado, with *Voekler* and the Offer of settlement statute, the issue comes up in discussion of the limits on discovery, and makes costs a sword in litigated matters in this state. Medical malpractice is an example. The Federal Rules Committee has a proposed amendment to F.R.C.P. 26 to include proportionality and the economic circumstances of the party. This would be helpful in state courts because then, at the case management conference, she would have the authority to talk about the limits of discovery. Cases that fall under the Civil Access Pilot Project (CAPP) are subject to the court's case management, but in all other cases the parties are allowed to set up their own discovery plan. Often it is the litigation process that is being litigated and not the merits of the case. But, F.R.C.P. 26 won't be amended for two years, and CAPP will still be in effect. During that time many litigants will have faced the difficulty. She stated she is not sure about the proposed change to C.R.C.P. 54(d), but agrees that something needs to be done. She is concerned that C.R.C.P. 54(d) does not mention "reasonable" anywhere. She stated she was also unsure if the current proposed rule goes far enough to significantly affect the process.

Ms. Habas stated as an example: four experts being identified then, after discovery, the party deciding which one to use. She thinks early intervention would be useful, especially in medical malpractice and bad faith matters. We should not want parties to have to file bankruptcy because it creates a serious blemish on their credit and on the judicial system. A guest asked if proportionality should be considered, or if there should be some sort of proportionality assessment in reaching a costs award. Another of the guests responded stating that this is a good first step, especially in a legitimate case where the value of the case goes down due to the costs involved. All of the money that a person has been saving his whole life could be gone. Mr. Crochal stated he would be a bad lawyer if he told his client to go to trial and risk his/her life savings. Another guest suggested the approach of eventually going to the legislature, but at least starting with C.R.C.P. 54(d). Proportionality is a complex issue, but people with serious claims need to access the system. The cost issue needs to be looked at both the beginning and the end of the process which means that C.R.C.P. 16 and 26 appear to need amendment. The problem with the current C.R.C.P. 54(d) is that there is discretion, but discretion is rarely used. In the guest's view, changes at the beginning of the process would be best.

Member Goldstein stated that, to him, the first problem is the situation where both parties are acting in good faith, with both parties having legitimate points to be raised, and the only way to get the matter resolved is to wait until the jury renders a verdict. Those cases should be treated differently from C.R.C.P. 11 matters or summary judgment situations. The second problem occurs because insurance companies in Colorado do not include recovered costs in their rate structures. This either brings about a windfall or the insurer ends up giving the money away. He thinks that is wrong. If the person or entity receiving the award of costs can't keep it, it puts a middle class family into bankruptcy, and that is not right. He has called the Insurance Commissioner's office as well as spoken to lawyers on both sides of the aisle. He has learned that if the insurance company does not include awarded costs in its rate structure, it cannot keep it. The plaintiffs' bar is concerned about the middle class being bankrupted by the present system.

A Committee member asked a hypothetical question of what happens if C.R.C.P. 54(d) tells the trial judge that he/she can look at economic factors but no other, doesn't it effectively become a default situation where no cost award will be entered because of the disparity? He went on to further state if a trial judge is to consider economic circumstances only, he would be concerned about reversal. Judge Frick responded stating she would prefer inserting the word "reasonable" rather than "proportional".

An example was cited, involving a case with a middle class widow, a court reporter, four attorneys for the defense, and two experts on both the plaintiff's and defendant's sides. One has to have an expert on the standard of care and on causation. The widow is probably unable to pay any costs. If the judge had reasonable costs and proportionality discretion at the front end, he/she might look at the fees plaintiff's experts charged to value the awarded costs.

Member Little stated that the issue is much larger than can be dealt with by this Committee. We are dealing with the suggestion that people can no longer afford the process of going to Court. The cost of litigation is out of control. He noted that federal

courts use a listing of costs set forth in the US Code and do not seem to be having this problem. Since we are dealing with fundamental rights of people and their right to redress, this is something that should be addressed by the legislature comprehensively. He stated he does not know why this was not taken up by the legislature after *Voelker*. Mr. Little thanked Member Sternal for bringing up the issue. His suggestion is that the Committee ought to do whatever it can to send this to an appropriate body, which to him, is the legislature. In his view, there needs to be an orderly process of looking at the entire issue. He does not think the Committee has the capability to deal with all of that.

Mr. Holme stated he agreed with Mr. Little. He has many questions--substantial policy issues and that he too questions whether the Committee is equipped to deal with all of the difficulty. He stated he does not know if access to the Court is available to anyone who is not very wealthy. He stated he feels there should be hearings on the costs issue, and reasonableness needs to be a part of the proposed rule change. Other factors should be listed in the rule, including relative worth. Other things also need to be in the rule to help judges. The scope of *Voelker* and its progeny have unleashed a plethora of decisions that are ridiculous. How will the legislature pick from all of the costs now allowed to be on its enumerated list. How does that affect appellate rights? How do we deal with the state/state agency exemption? There are many issues and questions that arise when dealing with costs. Mr. Holme stated he was in favor of proportionality, but the Supreme Court has told us not to interfere with C.R.C.P. 16 for a year because of CAPP. That may or may not be the right decision, but the Committee has been told not to proceed while CAPP is in effect. His conclusion is that if we are to deal with this on any balanced rational basis, we need to have hearings and gather information.

A guest asked Mr. Holme if legislation was a viable solution. He said yes, and groups propose legislation all the time. He felt that we needed to do something. Mr. Kall asked if the two sides of this issue could write a policy statement together and go to the legislature together? A guest stated he does not think a joint statement would happen and that no one could have predicted what would have happened after *Voekler*. Ms. Habas interjected that inactivity by this Committee is not advisable.

Ms. Hamilton-Fieldman stated that C.R.C.P. 54(d) is not the solution. We are asking judges to look at the issue with hindsight. Case management and proportionality make sense. Front-end control is the best option, because if a judge can say when one gets to trial, do this or don't do that, or if you do this you will not be able to recover costs, it will affect how parties think about costs. She pointed out that due to CAPP the Committee has been told not to change C.R.C.P 16 & 26. She stated she was concerned that looking at one factor exclusively would be a bad plan. Her suggestion would be to consider reasonableness, examine this as a case management issue, and then be ready to move forward with suggested changes after we come out of CAPP.

Mr. Sternal asked if it were not true that judges are to take reasonableness into consideration? Ms. Habas replied that *Voelker* demands it. Mr. Sternal went on to state that if judges could talk to attorneys at the beginning of the process and tell them that the rule lets the judge look at the economic circumstances of the party at the end, he felt

that would get the attorneys' attention. He understands the issue warrants considerable debate, but because it is just a proposal, isn't it time for the Supreme Court to look at it?

Ms. Hamilton-Fieldman stated she agrees that costs are out of control, but thinks the proposed change to C.R.C.P. 54(d) is an incomplete answer because it fixes the wrong end of the process. To her, something should happen, but reasonableness is not in the rule, and even though *Voelker* demands it, if it is not in the rule many judges will not use it. She thinks the current proposal does not do what we think it will. It is not artful and would create a temptation to never award costs. There is a reason that the statute was enacted in the first place.

Member Sternal further stated that the Supreme Court can change the language. Let them consider it. Mr. Holme responded that if you give it to the Supreme Court without any direction, it will be quickly sent back to the Committee. Mr. Holme then asked what would happen if the rule provided that the only costs allowed would be those specifically listed in the statute? Mr. Sternal replied that if that happened, we would not be discussing the matter today.

Guest Crochal stated that local small business owners are being sued by big companies all the time. Some of the small business owners can pay costs, but small business owners do not have the resources and types and amounts of insurance that larger corporate entities do.

Member DeMuro stated that he also believes this to be a legislative issue, and that the Committee has never talked about economic circumstances and impact like we have throughout this debate. To him, this is a separation of powers issue. At some point in the not too distant past, a Subcommittee looked at certain federal rule changes, and thought about making those changes, but did not because of CAPP. Despite that, he has changed his view. He has tried cases under CAPP and at the end of the case received a CAPP questionnaire that all parties get. He said the questionnaire did not address any of the changes that the Committee is dealing with. He stated further that the Committee is assuming that they do not want to interfere with CAPP, but if the questionnaire represents what the CAPP people are testing, then the Committee's work is not impacting it. Judge Frick responded stating that she has never seen the questionnaire, but that a focus group just met and they did not address anything that had been discussed in the Civil Rules Committee meeting. Mr. DeMuro proposed asking Chief Justice-Designate Rice to reopen the moratorium.

A guest stated that CAPP is evidence that we are looking to reduce litigation costs. He stated he misses the C.R.C.P. 16 conferences because they simplified cases and made things less expensive.

Member Whitehair asked if what we are really discussing is expert witness fees. He speculated that 90% of costs in litigation were expert fees and the other 10% were related to depositions and other expenses. He stated that he agrees that the Committee should present a bipartisan statement to the legislature, and that unearthing the financial states of the parties could be unethical and unfair. Proportionality needs to be

focused on the size of the case and not the status of the parties. He believes what we are really talking about are expert witness fees.

Mr. Goldstein asked, in the big cost awards, when paid by the plaintiff, what percentage is being paid by the insurance company, and when the defendant wins, what percentage of money is going back to the insurance company? Ms. Habas responded that in a personal injury case it is 100%. A guest described a case he is defending where the insurance policy pays liability damages, but does not pay for the defense. In a case like that it is a hard question to answer.

Member Mueller stated that he believed the Committee should do something and that the legislature would not do a better job than the Committee. He said he feels the Committee has discretion to propose changes to the costs rules, and before we go to the trouble to set up a subcommittee, we should see how many people are going to reject such an effort because they think the Committee should not take any action.

A guest representative from COPIC stated that costs are a legitimate concern for all parties, but one should make the distinction that it is the plaintiff who chooses to go to court and that defendants often do not have a say on whether their case is tried or settled. Medical malpractice settlements must be reported and personally affect physicians and physicians' careers. He noted that pre-*Voelker*, attorneys had to prove a deposition was used at trial. Costs have dramatically changed, but what has remained the same is that defendants are often pulled into court on sometimes very thin cases. He went on to say that COPIC settles medical malpractice cases they think they will lose and that every case that does go to trial, they think they will win. He stated that costs recovered are invested in patient safety and malpractice prevention--that the best way to keep rates low is to stop patients from getting hurt and preventing malpractice. He stated that while he appreciated the empathy plaintiffs' attorneys feel for their clients, defense attorneys also feel those same things. He stated he is concerned that if economic circumstances of the parties is considered, big companies or the wealthy will never receive their fees even if they are deserved. Plaintiffs are informed of the risks they are taking before litigation begins--they too need to be accountable for their actions.

Member Vinci joined, stating that we need front-end analysis that narrows the case. The proposed language is not going to do anything. The population we are dealing with is really the people that have some net worth--where they are able to pay a cost award, but an award would either take most of their net worth or wipe out their life savings. The indigent litigant is already protected because if he has no money, he cannot pay an award. Mr. Vinci asked whether a subcommittee should be appointed to look at this issue and take into account that it is no longer a matter of being out-lawyered, but instead being out-experted. To him, a better solution would be to provide judges with more guidance in awarding costs and discussing costs at the front-end of the litigation.

Ms. Haller stated that she is very interested in the CAPP discussion; that part of the reason the Chief Justice Directive issued to extend CAPP for another year was to obtain more data. In the meantime movement can occur, with the idea that after the CAPP evaluation is completed, data will then be available to guide rule changes.

Judge Frick stated that she is disappointed in the CAPP surveys not being useful. The lawyers she has spoken to have told her the best thing about CAPP is its front-end and early case management features. In her experience, early case management is the best feature of CAPP--that it is interesting that the Committee's discussion has focused on expert witness fees because in CAPP, no expert depositions are allowed. She noted that this was the issue the medical malpractice bar and COPIC objected to and further noted that electronic discovery was also driving up the cost of litigation.

Ms. Habas stated that the Committee's voice is important, and that the Supreme Court will not do anything unless the Committee asks them to do it.

Member Knapp stated that there needs to be both front-end and back-end case management. If the winning side knows it will not recover all costs, they may be more responsible on what they spend. She stated that she is really concerned that the Committee will sacrifice the perfect for the good. She has done both plaintiff and defendant work and understands what a serious issue this is. She stated she hopes the Committee will work together to solve the problem, even if the outcome is not perfect.

Judge Webb suggested that if the separation of powers issue is an insurmountable problem, preparing a report to Chief Justice-Designate Rice asking the Supreme Court's guidance on the issue. Mr. Mueller asked if the recommendations that will come out of the CAPP survey will come to the Civil Rules Committee. Ms. Haller stated that they would--that the Court wants this Committee's assistance.

Mr. Sternal suggested taking a straw vote to see if this was a legislative issue. Chairman Laugesen repeated Mr. Sternal's suggestion asking the Committee whether it wished to take such a vote. Member Hamilton-Fieldman asked what exactly the Committee would be voting on--would Committee be voting on whether the proposed language to C.R.C.P. 54(d) is legislative, or looking at changing rules on the issue of costs?

A discussion then ensued that included various Committee members, and guests, that ended with Judge Frick moving to appoint a subcommittee to address [before the January 2014 Civil Rules Committee meeting] potential changes to various rules to deal with costs driving litigation and denying access to justice. The motion was seconded. Upon call for the vote, the motion carried 17:0.

Chairman Laugesen stated that he would endeavor to appoint a fair and well-balanced subcommittee. Member Goldstein stated that he felt the subcommittee should contain only members of the Civil Rules Committee. Ms. Habas joined suggesting that only members of the Civil Rules Committee serve on the subcommittee but seek outside advice and comment as necessary.

A motion was made to have only Civil Rules Committee members on the subcommittee. The motion was seconded. The motion carried 12:5.

Chairman Laugesen stated that he would inform the Committee of his appointments to the Subcommittee and ask that the Committee members, today's guests and all others who have expressed interest in the matter provide their thoughts and suggestions to the Subcommittee.

Adjournment

There being no further business, Chairman Laugesen declared the meeting adjourned at 4:04pm.

The next regular meeting is scheduled for **Friday, October 25, 2013 at 1:26 p.m. in the Court of Appeals En Banc Room, Third Floor, Ralph Carr, Judicial Center, 2 East 14th Avenue, Denver, Colorado**.

Respectfully submitted,

Jenny A. Moore