**The “Final” Countdown:**

**Navigating Amended Virginia Rule 1:1 and**

**How to Identify an Appealable Order**

**John O’Herron**

1. **Rule 1:1 and Appellate Jurisdiction**

~ Whether your appeal lies to the Court of Appeals or Supreme Court of Virginia, those courts generally only have appellate jurisdiction over “final” orders, judgments, or decrees. Code §§ 8.01-670, 17.1-405, 17.1-406.

~ “The finality of judgments ranks very high among the interests in our system of law.” *Akers v. Commonwealth*, 298 Va. 448, 452 (2020). “The provisions of Rule 1:1 are mandatory in order to assure the certainty and stability that the finality of judgments brings.” *Super Fresh Food Markets of Virginia, Inc. v. Ruffin*, 263 Va. 555, 563 (2002).

~ Circuit courts, in turn, only have jurisdiction over final orders for 21 days. “Grants of jurisdiction to circuit courts come with an expiration date.” *Bailey v. Commonwealth*, 73 Va. App. 250 (2021).Rule 1:1(a) provides the familiar 21-day rule defining jurisdiction of circuit courts:

1. **The 21-Day Rule**

**Rule 1:1. (a) Expiration of Court's Jurisdiction.** All final judgments, orders, and decrees, irrespective of terms of court, remain under the control of the trial court and may be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, will not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree is the date it is signed by the judge either on paper or by electronic means in accord with Rule 1:17.

~ This 21-day period “may be interrupted only by the entry, within the twenty-one day time period, of an order modifying, vacating, or suspending the final judgment order.” *Kosko v. Ramser*, 857 S.E.2d 914 (2021).

~ “To interrupt the running of the twenty-one day time period of Rule 1:1, it is not sufficient that the trial court enter an order acknowledging the filing of a post-trial or post-judgment motion within twenty-one days following the entry of a final judgment. Rather, the rule requires that the trial court enter an order that expressly modifies, vacates, or suspends the judgment. In the absence of such an express order, the twenty-one day time period is not interrupted, and the case will no longer be under the control of the trial court when the original twenty-one day time period has run.” *Super Fresh Food Markets of Virginia, Inc. v. Ruffin*, 263 Va. 555, 562 (2002).

~ Suspending the 21-days:

It appearing to the Court that Plaintiff has filed a Motion for Reconsideration of the order entered by this Court on January 25, 2021, it is therefore ORDERED that the Final Order entered in this case on January 25, 2021 be suspended until the Court has considered and ruled on Plaintiff's Motion for Reconsideration. This tolls the running of the twenty-one (21) day provision in Rule 1:1.

*Seeraj-Montague v. Friendly Ride Access, LLC*, No. CL-2015-14759, 2021 WL 3076550, at \*1 (Va. Cir. Ct. Feb. 08, 2021) (cleaned up).

~ “A judgment which has been properly vacated or suspended under Rule 1:1 does not become a *final* judgment thereafter without a subsequent order confirming it as originally entered or as modified.” *Super Fresh*, 263 Va. at 564.

1. **When is an order “final”?**

~ In 2018, the Supreme Court of Virginia amended Rule 1:1 to clarify what is and is not a final order.[[1]](#footnote-1)

**(b) General Rule: Orders Deemed Final.** Unless otherwise provided by rule or statute, a judgment, order or decree is final if it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court's judgment, order or decree.

**(c) Demurrers.** An order sustaining a demurrer or sustaining a demurrer with prejudice or without leave to amend is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue. An order sustaining a demurrer and granting leave to file an amended pleading by a specific time is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer, if the amended pleading is not filed within the specific time provided, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue.

**(d) Pleas in Bar and Motions for Summary Judgment.** An order sustaining a plea in bar or sustaining a plea in bar with prejudice or without leave to amend is sufficient to dispose of a claim(s) or cause(s) of action subject to the plea in bar, as is an order granting a motion for summary judgment, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue or enter judgment for the moving party.

**(e) Motions to Strike.** In a civil case, an order which merely grants a motion to strike, without expressly entering summary judgment or partial summary judgment or dismissing the claim(s) or cause(s) of action at issue, is insufficient to dispose of the claim(s) or cause(s) of action at issue.

~ An order is final if “it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court's judgment, order or decree.” Rule 1:1(b).

1. **Civil Cases: Does it dispose of all the claims and counterclaims asserted in the pleadings?**

*Kosko v. Ramser*, 857 S.E.2d 914 (2021): 2 days after a non-suit order, defendant filed a motion for costs under Code § 8.01-380(C). Hearing on that motion was held on Day 20 post-order. While the circuit court ruled from the bench that it was granting the motion, it did not enter an order at that time. Court instructed counsel to prepare an order, which was subsequently entered on Day 55 post-order.

*Held:* Nonsuit orders are generally final for purposes of Rule 1:1. A litigant’s entitlement to pursue costs, like any other post-trial motion, doesn’t alter the finality of an order. “The filing of ancillary motions for the recovery of costs or the filing of other post-trial motions does not suddenly transform an otherwise final order into a nonfinal order.” Even though there was “something to be done” regarding the post-trial motion, Court rejects this limitless extension of finality that would put cases on “indefinite hold.” The non-suit order disposed of the whole action and left nothing for the court to do: it disposed of all the claims in the complaint. So the circuit court had no jurisdiction to enter the order on the motion for costs outside the 21-day window and its order was void.

***Practice Tip 1:*** *When filing post-trial motions, step back and assess whether entered order is otherwise final. If you think it might be, submit a proposed order suspending the final order pending resolution of the post-trial motion. And submit it* with your post-trial motion*.*

***Practice Tip 2:*** *If you ignored tip 1, fear not:* bring an order with you to the hearing*. In fact, bring two: one that grants the relief requested, and one that suspends the final order while the court considers your post-trial motion.*

 *Jackson v. Jackson*, 298 Va. 132 (2019). Parties divorced in 2011. Final decree ratified the equitable distribution agreement and awarded Wife benefits from Husband’s military pension. Court also entered “Order Dividing Military Pension” to divide the marital property in accordance with the final decree. Neither party objected to either order. The ODMP gave Wife certain annuity from Husband’s pension. In 2017, Wife filed a motion to reopen the proceeding and amend marital property order. Circuit court ruled it would not amend the order. CAV ruled circuit court lacked jurisdiction to amend order under Rule 1:1.

*Held:* Divorce decree was final order: “unless the issue of equitable distribution is bifurcated and a circuit court expressly reserves jurisdiction to decide it later as provided by Code § 20-107.3(A), a final decree of divorce is a final decree within the meaning of Rule 1:1.” Code § 20-107.3(K)(4) gives circuit court “continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section, including the authority to” modify any order intended to affect or divide any pension plan. This permits a circuit court to modify a pension distribution order after 21 days has elapsed, but only “for the purpose of establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of the order.” It does not give the circuit court jurisdiction to change the substance of the original division of property or the pension award itself. Because Wife wanted to change the division of the pension, not to effectuate the division, circuit court lacked jurisdiction.

 *Kellogg v. Green*, 295 Va. 39, 45 (2018). “A decree that enters judgment for a party is not final if it expressly provides that the court retains jurisdiction to reconsider the judgment or to address other matters still pending in the action before it. [A] circuit court may avoid the application of the 21–day time period in Rule 1:1 by including specific language stating that the court is retaining jurisdiction to address matters still pending before the court.” (Cleaned up.)

1. **Criminal cases: does it adjudicate guilt and sentence?**

*Nelson v. Commonwealth*, 71 Va. App. 397 (2020). Defendant convicted on September 29, 2017, and conviction order was entered October 3. That order “outlined the pleas, that the case was tried by the court without a jury, and the offense for which” the defendant was convicted. It also required the filing of a presentence report. Defendant filed a motion to set aside and for new trial on January 19, 2018. Circuit court held it had no jurisdiction to consider the motion because its October 3 order had been final.

*Held:* The circuit court’s order only addressed adjudication and conviction; it did not sentence the defendant. Code § 19.2-307 requires sentencing and “a sentencing order is the final judgment in a criminal case.” The October 3 order, then, was not final under Rule 1:1. “A court's authority to reconsider lasts for twenty-one days after it imposes sentence (absent the entry of an order modifying, suspending, or vacating the judgment, thereby extending the period).”

*Bailey v. Commonwealth*, 73 Va. App. 250 (2021). Defendant convicted on January 8, 2020. Circuit court’s order adjudicated guilt and imposed sentence and a fine. On January 22, with new counsel, defendant filed motion to reconsider asserting 6th amendment violation by circuit court when it denied his motion to continue trial. Hearing on the motion to reconsider was held on January 29, and no order suspending or vacating January 8 order was entered. Circuit court denied motion from the bench at the hearing, but it did not enter an order until January 30 purporting to deny motion.

*Held:* Circuit court had jurisdiction until January 29 and lost it without entry of order vacating January 8 order. Because its order was entered without jurisdiction, it was a legal nullity. Because it was a legal nullity, there was no decision of circuit court on the 6th amendment claim to consider.

*Jefferson v. Commonwealth*, 298 Va. 473 (2020). On August 28, 2017, circuit court entered sentencing order with date noting 2018 by mistake. The order otherwise adjudicated guilt, sentenced the defendant, remanded him to custody, and was signed by the judge. Court then entered amended order on September 15: the only change was to fix the year and write the word “Amended” in. No other change was made.

*Held:* The August 28 order was final and started the appellate clock. Rule 1:1 says an order is final as of the date it is signed. The August order fit the definition of a final order in a criminal case because it adjudicated guilt, sentenced defendant, and remanded to custody. The subsequent amended order only fixed a scrivener’s error and did not otherwise state that it was replacing or superseding the August order.

***Practice tip 1:*** *Avoid gray area with amended orders, scrivener’s errors, etc. by submitting or bringing to hearing an order superseding or vacating the prior order in question (if you spot it within 21 days) or by filing a motion under Code § 8.01-428(B) to correct the mistake.*

***Practice tip 2****: Assume an order whose finality is fuzzy…is final. Appealing a non-final order is a fixable situation; missing your appellate deadline is not.*

1. **Odds and Ends on Finality**

~ A related principle when it comes to errors in orders: Code § 8.01-428(B) provides an exception to Rule 1:1 finality: “Clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party.”

A court can correct clerical mistakes at any time *nunc pro tunc*. A *nunc pro tunc* order “is appropriate if it makes the record show what actually took place.” *See Martinez v. Commonwealth*, 71 Va. App. 318 (2019) (cleaned up).While it has that authority, such corrections do not render a final order non-final.

~ Partial Final Judgment Rule: Rule 1:2(d).

(d) *Other Dispositions Adjudicating Claims Against Fewer than All Parties*. In the absence of the entry of a Partial Final Judgment order as provided in subparagraph (a) of this Rule, any order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in the action is not a final judgment.

~ What about an order entered against a dead person?

*Erhardt v. SustainedMED, LLC*, Record No. 181003 (2019) (unpublished). Between trial and entry of order, one of the defendants died. Court said Code §§ 8.01-20 and -21 didn’t apply because defendant’s death did not occur after verdict and during pendency of appeal. “The dead have passed beyond the jurisdiction of the court, and no decree or judgment of the court could be enforced against them personally…We conclude that the order appealed from was not a final order because it entered judgment against a deceased party.”

1. **Demurrers under Rule 1:1**

**(c) Demurrers.** An order sustaining a demurrer or sustaining a demurrer with prejudice or without leave to amend is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue. An order sustaining a demurrer and granting leave to file an amended pleading by a specific time is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer, if the amended pleading is not filed within the specific time provided, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue.

~ *Parker v. Carilion Clinic*, 296 Va. 319 (2018). Decided under old Rule 1:1. Circuit court entered order on October 25, 2016, sustaining demurrer. Order gave plaintiff 21 days to file amended complaint and said if she did not do so, “the case is dismissed with prejudice.” Plaintiff did not refile and filed notice of appeal on December 2, 2016.

*Held:* Court reiterates its prior holdings that if an order sustaining a demurrer provides leave to refile within a specific time period, the order becomes final when the time for amendment lapses. “Dismissal—and finality—occur only when the deadline expires without the filing of an amended complaint.” Court also made the distinction that is now gone from Rule 1:1(c): an order only sustaining a demurrer without dismissing the case is not final unless there is also a failure by the plaintiff to refile within the time allowed, or an express dismissal by the court. Rule 1:1(c) now states an order sustaining a demurrer can be final without these added conditions.

**V. Pleas in Bar and Motion for Summary Judgment under Rule 1:1**

**(d) Pleas in Bar and Motions for Summary Judgment.** An order sustaining a plea in bar or sustaining a plea in bar with prejudice or without leave to amend is sufficient to dispose of a claim(s) or cause(s) of action subject to the plea in bar, as is an order granting a motion for summary judgment, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue or enter judgment for the moving party.

~ Notably, contemporaneous with Rule 1:1 amendments, Court amended Rule 3:20 to remove the provision allowing summary judgment “upon sustaining a motion to strike the evidence.”

**VI. Motions to Strike under Rule 1:1**

**(e) Motions to Strike.** In a civil case, an order which merely grants a motion to strike, without expressly entering summary judgment or partial summary judgment or dismissing the claim(s) or cause(s) of action at issue, is insufficient to dispose of the claim(s) or cause(s) of action at issue.

~ *Cromartie v. Billings*, 298 Va. 284 (2020). Plaintiff asserted several claims, including under 42 U.S.C. § 1983. Circuit court granted defendant’s motion to strike on several of the claims, denied the motion on others. Case submitted to jury, who returned verdict for plaintiff. Court entered order styled “Final Order” and Plaintiff appealed the decision granting in part the motion to strike.

*Held:* Order was not final. Remanded to circuit court without prejudice to refile appeal upon entry of final order. Circuit court on remand entered order expressly dismissing the claims for which it had granted motion to strike.

~ Why are motions to strike different from demurrers, motions for summary judgment, and pleas in bar? A “motion to strike at the conclusion of the plaintiff's case-in-chief…tests whether his evidence is sufficient to prove [the cause of action].” *Tahboub v. Thiagarajah*, 298 Va. 366, 371 (2020).

A determination that evidence is insufficient to prove a claim ≠ disposing of the action.

 *See also* Rule 1:11: “If the court sustains a motion to strike the evidence of either party in a civil case being tried before a jury, or the evidence of the Commonwealth in a criminal case being so tried, then the court should enter summary judgment or partial summary judgment in conformity with its ruling on the motion to strike.”

1. And in 2021, it added more clarity by eliminating “shall.” [↑](#footnote-ref-1)