

No. 33504

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

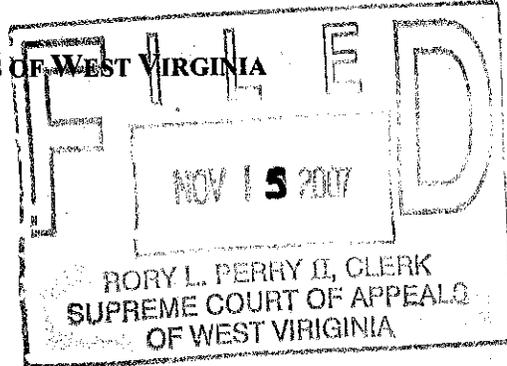
ROBIN L. CROFT, *et al.*,

Plaintiffs - Appellants,

v.

TBR, INC., D/B/A TJ'S SPORTS GARDEN AND RESTAURANT, *et al.*,

Defendants - Appellees.



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**BRIEF OF APPELLEES AND INTERVENOR  
ERIE INSURANCE PROPERTY & CASUALTY COMPANY**

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STEPTOE & JOHNSON PLLC  
Of Counsel

Amy M. Smith (W.Va. Bar No. 6454)  
Chase Tower, Sixth Floor  
P.O. Box 2190  
Clarksburg, WV 26302  
(304) 624-8000

STEPTOE & JOHNSON PLLC  
Of Counsel

Melanie Morgan Norris (W.Va. Bar No. 8581)  
1233 Main Street, Suite 3000  
P.O. Box 751  
Wheeling, WV 26003-0751  
(304) 233-0000

Counsel for Erie Insurance Property & Casualty  
Company

Dickie, McCamey, & Chilcote, L.C.  
Of Counsel

P. Joseph Craycraft (W. Va. Bar No. 7920)  
1233 Main Street, Suite 2002  
Wheeling, WV 26003  
(304) 233-1022

Counsel for TBR, Inc., d/b/a TJ's Sports Garden  
and Restaurant, and Tashe Jovanni Radevski

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## **I. INTRODUCTION**

This Court should affirm the Circuit Court of Ohio County's Judgment Order entered on December 15, 2006. The circuit court properly denied Plaintiffs' Motion for Attorney's fees and Costs, which was filed by Appellants Robin L. Croft, Jill A. Armitage and Brandy G. McCoy, because the Offers of Judgment unambiguously included attorney's fees and costs.

The Offers of Judgment made by Appellees TBR, Inc., d/b/a TJ's Sports Garden and Restaurant ("TJ's"), Tashe Jovanni Radevski and Shane Kulpa and Intervenor Erie Insurance Property & Casualty Company unambiguously referred to "all claims which have been and/or could have been asserted." In addition, the Offers of Judgment contained liability-limiting language that reinforces the conclusion that attorney's fees and costs were included. The Offers of Judgment in these actions also contained "total amount" language that indicates under the circumstances that the final judgment included attorney's fees. That the final judgment included attorney's fees and costs in these actions is further reinforced by the second paragraph of the Offers of Judgment, which provides that "should the judgment finally obtained by plaintiff against defendants not exceed Thirteen Thousand Dollars and No Cents (\$13,000.00), defendants will, pursuant to [West Virginia Rule of Civil Procedure] 68(c), seek an Order from the Court requiring plaintiff to pay all costs incurred in the defense of this case subsequent to the date of this offer." The "judgment finally obtained" referred to in this passage clearly includes attorney's fees and costs as well.

The circuit court properly denied Plaintiffs' Motion for Attorney's Fees and Costs for the additional reason that the entire circumstances of the actions, including global settlement demands made by Ms. Croft, Ms. Armitage and Ms. McCoy, and mediation, make it clear that attorney's fees and costs were included in the Offers of Judgment.

Therefore, this Court should affirm the circuit court's Judgment Order.

## **II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

Ms. Croft, Ms. Armitage and Ms. McCoy initiated three separate actions, Civil Action Nos. 03-C472, 04-C-49 and 04-C-281, respectively, against TJ's and Mr. Radevski in the Circuit Court of Ohio County. Ms. McCoy's action also named Mr. Kulpa as Defendant. The Complaints in each of the actions contain four counts, three of which are substantially similar. Count I, which is set forth in numbered paragraphs six through nineteen, claims violations of the West Virginia Human Rights Act, W. Va. Code § 5-11-1, *et seq.* Within Count I and the claim therein, numbered paragraph nineteen alleges:

The Defendants' actions violated the West Virginia Human Rights Act entitling the Plaintiff to attorney fees and costs pursuant to W. Va. Code § 5-11-13.

Counts II and III contain claims for intentional and negligent infliction of emotional distress, respectively. Count IV in Ms. Croft's and Ms. McCoy's Complaints contain claims for battery. Count IV in Ms. Armitage's Complaint contains a claim for negligence. The *ad damnum* clause in each of the Complaints contains a second demand for attorney fees and costs without citation to any authorizing statute.

On January 25, 2006, Erie filed a motion to intervene in each of the actions. Erie sought declaratory judgments regarding its duty to provide indemnifications and defenses.

Thereafter, Ms. Croft, Ms. Armitage and Ms. McCoy each made individual global settlement demands upon Appellees and upon Erie, as a potential intervener and as a defendant in a separate but related case, also filed in the Circuit Court of Ohio County, alleging violations of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4(9). The proposed terms of the global

settlement demands made it clear that Ms. Croft, Ms. Armitage and Ms. McCoy would agree to release all claims against Appellees as well as the extra contractual claims against Erie.

On March 22, 2006, the circuit court consolidated the three actions and designated Civil Action No. 03-C-472 as the lead case.

On July 19, 2006, the parties engaged in global mediation. Although its motion to intervene was still pending, Erie also participated in mediation. The parties again discussed global settlement during the mediation, and the proposed terms again made it clear that if mediation was successful Ms. Croft, Ms. Armitage and Ms. McCoy would agree to release all claims against Appellees as well as the extra contractual claims against Erie. Tr. at 12 - 13 (Filed Feb. 26, 2007).

By letter dated July 24, 2006, the mediator advised the circuit court that the actions were not resolved through mediation.

Thereafter, Appellees and Erie served Offers of Judgment on Ms. Croft, Ms. Armitage and Ms. McCoy. The Offers of Judgment reiterated the pertinent terms of a global settlement discussed during the mediation. As an example, the Offer of Judgment served on Ms. Croft stated:

Pursuant to the provisions of Rule 68 of the West Virginia Rules of Civil Procedure (2006), the defendants, TBR, Inc., d/b/a TJ's Sports Garden and Restaurant, Tashe Jovanni Radevski, and Shane Kulpa, hereby allow judgment to be taken against them by the plaintiff Robin L. Croft, *for full satisfaction and dismissal of all claims which have been and/or could have been asserted by plaintiff and any other person or entity in this civil action, including any subrogation claims/liens had by any person or entity for payments made to or on behalf of plaintiff, in the total amount of Thirteen Thousand Dollars and No Cents (\$13,000.00), to be paid on defendants' behalf by Erie Insurance Property and Casualty Company.*

This offer of judgment is made for the purposes specified in Rule 68 and is not to be construed either as an admission that the defendants are liable in this action, or that plaintiff has sustained any damages. According to Rule 68(c), if this order is not accepted within ten days after the service of the offer, it shall be deemed withdrawn. *Should plaintiff not accept defendants' offer herein within the expiration of the ten*

*day period, and should the judgment finally obtained by plaintiff against defendants not exceed Thirteen Thousand Dollars and No Cents (\$13,000.00), defendants will, pursuant to Rule 68(c), seek an Order from the Court requiring plaintiff to pay all costs incurred in the defense of this case subsequent to the date of this offer.*

Resp. to Pls.' Mot. for Att'ys Fees & Costs at Ex. E (Oct. 10, 2006) (Emphasis added.)

The letter that accompanied the Offers of Judgment stated:

Enclosed please find three Offers of Judgment issued to each of your clients. These offers are being made as a continuation of the global settlement negotiations instituted by yourself some time ago, and more recently, continued during the mediation of this matter held on July 19, 2006. Accordingly, the same stipulations placed on the offers extended by Erie Insurance Property and Casualty Insurance Company at the mediation also apply to the Offers of Judgment enclosed herein. Namely, that the \$13,000.00 offer will be applied to the underlying claims against Mr. Radevski and TJ's Sports Garden, with the understanding that the plaintiffs will voluntarily dismiss their third party bad faith claims against Erie, with prejudice.

*Id.* at Ex. D.

Within two days following the service of the Offers of Judgment, Ms. Croft, Ms. Armitage and Ms. McCoy served Notices of Acceptance.

On September 1, 2006, Appellants filed Plaintiffs' Motion for Attorney's Fees and Costs. The motion requested that a final judgment order include a monetary award to each Appellant for \$13,000.00, "*and an award for a total amount of their combined attorney's fees for \$13,000.00, and actual costs in the amount of \$2,598.33[.]*" Appellants attached contingency fees agreements to the motion, which indicate that they each agreed to pay and assign to their attorney(s) thirty-three and one-third percent of all monies and things of value, minus costs and expenses incurred, that may be awarded, collected or realized through settlement, compromise or arbitration.<sup>1</sup>

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<sup>1</sup>Significantly, the contingency fee agreements specify: "If an appeal is attempted by either party to the controversy, I agree to pay [fifty] percent of the total amount recovered, minus costs and expenses arising out of this claim or suit."

The circuit court held a hearing on the motion on October 26, 2006. During the hearing, the circuit court indicated that it would deny Plaintiffs' Motion for Attorney's Fees and Costs, announcing its reasoning as follows:

... Well, putting aside and not making any findings as to whether or not costs in this case would include attorney's fees – that's sort of a separate issue – I think, Mike, your argument will carry more weight if the offer of judgment was indeed silent and just said you take judgment in the amount. But frankly, I just don't know how I can construe you may take judgment for all claims that have been or that could be asserted to include anything other than attorney's fees when that was a claim that was asserted. The language of the offer, I think, was broad enough to include attorney's fees when it says, specifically says, "All claims that have been or could be asserted," and attorney's fees were a claim – was a claim that was asserted.

And to a lesser extent, I would note in the ruling that the agreement – or, excuse me, the offer was accepted unconditionally and not in part, as I've seen in the past. I've seen some, well, we'll accept this as part settlement, preserving another issue, which opens up another can of worms as to whether or not that's a valid acceptance or not.

But, nonetheless, I think the language of the offer was broad enough to include attorney's fees. I mean, it specifically says, "All claims that have been asserted," and my understanding is that attorney's fees was a claim that was asserted.

So I would, based on that – it's an interesting argument, but based on that, I don't see how I can rule any other way but to deny the motion.

Tr. at 26-27 .

In reaching its decision, the circuit court distinguished this Court's holding in *Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 597 S.E.2d 302 (2004), during the following colloquy:

THE COURT: What was the language of the Rule 68 utilized in *Shafer*? Did it – was it similar? Did it say "all claims?"

MR. BLASS: No. And that's – that is a very important point, your Honor. Because to accept Mr. Olejasz's argument, which is based on a faulty premise, you have to first agree that this offer of judgment is silent, and it's not silent.

...

MR. OLEJASZ: Actually, your Honor, the judgment offer in *Shafer* simply stated that they would allow judgment to be taken against them for that certain dollar amount.

THE COURT: But it didn't say for all claims that have been or could be asserted? That language isn't there:

MR. OLEJASZ: No, it did not, Your Honor. . . .

On December 15, 2006, the circuit court entered its Judgment Order. The circuit court awarded each Appellant judgment in the amount of \$13,000.00 in accordance with the terms of the Offer of Judgment along with post-judgment interest. The circuit court, however, denied Plaintiffs' Motion for Attorney's Fees and Costs for the reasons announced during the hearing on the motion, which were incorporated in the Judgment Order by reference.

Appellants filed a Petition for Appeal in the circuit court on April 12, 2007. This Court granted the Petition for Appeal by a three to two vote. Justices Maynard and Benjamin would have refused the petition.

### **III. STATEMENT OF THE ISSUE**

The circuit court properly denied Plaintiffs' Motion for Attorney's Fees and Costs, which was filed by Appellants, because the Offers of Judgment, which referred to "all claims which have been and/or could have been asserted" and to the "total amount" unambiguously included attorney's fees and costs, and because the entire circumstances of the actions make it clear that attorney's fees and costs were included in the Offers of Judgment.

#### IV. STANDARD OF DECISION AND REVIEW

This Court has held that the construction of West Virginia Rule of Civil Procedure 68 is a question of law, which is reviewed under a *de novo* standard of review. See *Shafer v. Kings Tire Serv., Inc.*, 215 W. Va. 169, 597 S.E.2d 302, Syl. Pt. 2 (2004).

This Court further observed parenthetically in *Shafer* that any disputed facts concerning the events surrounding a Rule 68 offer of judgment, however, should be reviewed under a clearly erroneous standard of review. *Id.*, 597 S.E.2d at 305 (citing Franklin D. Cleckley, Robin J. Davis, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* [hereinafter "*Litigation Handbook*"] § 68[2][c] at 1045 (1st ed.).<sup>2</sup> See, also *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 453 (5th Cir. 2003); *Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997); *Erdman v. Cochise County*, 926 F.2d 877, 879 (9th Cir. 1991).<sup>3</sup>

In addition, courts have held that it is proper to apply general contract principles to construe Rule 68 offers of judgment. See, e.g., *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 837 (6th Cir. 2005); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 369 F.3d 91, 95 (2d Cir. 2004); *Basha*, 336 F.3d at 453. See also *Litigation Handbook* § 68[h] at 1399.

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<sup>2</sup>The passage from the *Litigation Handbook* referred to in *Shafer* is located in the second edition at Section 68[h] at 1399.

<sup>3</sup>It should be noted that this Court opined in *Shafer* that it would give substantial weight to federal cases in determining the meaning and scope of Rule 68. *Shafer*, 597 S.E.2d at 307.

## V. DISCUSSION

The circuit court properly denied Appellants' motion for attorney's fees and costs because the offers of judgment, which referred to "all claims which have been and/or could have been asserted" and to the "total amount" unambiguously included attorney's fees and costs. In addition, the entire circumstances of these actions as a whole make it clear that attorney's fees and costs were included in the Offers of Judgment.

West Virginia Rule of Civil Procedure 68(a) provides in relevant part as follows:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the defending party's offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall direct entry of the judgment by the clerk.

In *Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 597 S.E.2d 302 (2004), this Court held:

Costs included under West Virginia Rule of Civil Procedure 68(a) include attorney's fees when any statute applicable to the case defines costs as including attorney's fees. However, costs under Rule 68(a) do not include attorney's fees if the statute creating the right to attorney's fees defines attorney's fees as being in addition to, or separate and distinct from, costs.

*Id.* at Syl. Pt. 4.

In reaching its holding in *Shafer*, this Court relied heavily on cases construing Federal Rule of Civil Procedure 68(a), including *Marek v. Chesny*, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985). *Shafer*, 597 S.E.2d at 306-307. In *Marek*, the Supreme Court rejected the argument that to constitute a valid offer of judgment under Rule 68 a defendant must separately recite the amount being offered to settle the substantive claim and the amount being offered to cover accrued costs. The Supreme Court reasoned as follows:

The critical feature of this portion of the Rule is that the offer be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued*. In other words, the drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants. If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion it determines to be sufficient to cover the costs. In either case, however, the offer has *allowed* judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. Accordingly, it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or, for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that judgment *not* include costs, a timely offer will be valid.

*Id.* at 6 (citation omitted) (emphasis in original).

In *Marek*, the Supreme Court noted:

Merely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence, however, that Congress in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned . . . .

Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs – along with other plaintiffs – who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants.

*Id.* at 10.

Since *Marek*, several courts have held that Rule 68 does not require invocation of the exact words “attorney’s fees” to unambiguously include such fees in an offer of judgment. For example, in *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390 (7th Cir. 1999) (Posner, C.J.), the court held that a Rule 68 offer of judgment unambiguously included attorney’s fees, rejecting what it labeled a “magic-words approach.” *Id.* at 393. In that case, the court reasoned as follows:

There is no ambiguity here. “[O]ne total sum as to all counts of the amended complaint” can only mean one amount encompassing all the relief sought in the counts. One of those counts specified attorneys’ fees as part of the relief sought. That relief was covered by the offer.

*Id.* at 392.

More recently, the Seventh Circuit relied on *Nordby* to hold that an offer of judgment unambiguously included attorney’s fees in *Pelkowski v. Highland Managed Care Group, Inc.*, No. 01-2335, 2002 WL1836509 (7th Cir. Aug. 9, 2002) (order). In *Pelkowski*, the defendant in an employment discrimination case under Title VII, 42 U.S.C. § 2000e, *et seq.*, made an offer of judgment to the plaintiff for \$30,000. The plaintiff accepted the offer, and her counsel, to whom she assigned her statutory right to attorney’s fees, subsequently moved for fees, which under Title VII are considered costs for purposes of Rule 68. The district court denied the motion for fees, and the Seventh Circuit affirmed. The court reasoned as follows:

Highland’s Rule 68 offer of judgment (which Highland acknowledges was hastily drafted) reads in relevant part: “That on the Complaint of Plaintiff, Tara Pelkowski (“Pelkowski”), Musachia [sic] shall receive judgment in his [sic] favor and against Medtronic [sic] in the amount of Thirty Thousand Dollars (\$30,000.00).” The offer also includes some liability-limiting language:

[T]he entry of the aforesaid judgment amount shall be in full and complete settlement, satisfaction, release and discharge of any and all claims which Musachia [sic] has asserted or could have asserted in connection with this action, and Pelkowski shall neither have, take nor seek to claim anything further from Highland in connection with any issue(s) whatsoever that relate in any manner to the instant

litigation. In her complaint Pelkowski specifically requested as relief “costs . . . and attorney’s fees, as provided by Title 42 § 200e-5(k).”

...  
... In *Nordby* we found that a similarly-worded offer included fees even though there was no explicit mention of fees. We observed that a prudent defendant will mention fees explicitly, but we refused to adopt the “magic-words” approach Rossiello urges on appeal. Like the offeror in *Nordby*, Highland otherwise made clear that the offer included fees. Pelkowski requested fees in her complaint, and the offer specifically provides that Pelkowski would receive judgment in the amount of \$30,000 *on the complaint*. The offer therefore covers the fees Pelkowski sought in her complaint. The liability-limiting language Highland included in the offer only reinforces this conclusion. The offer clearly states that it covers “any and all claims,” and bars Pelkowski from seeking further relief from Highland in connection with any issues whatsoever. Based on the unambiguous language of the offer, we conclude that the district court properly denied Rossiello’s motion for fees.

*Id.* at \*\*1 - \*\*2 (citations omitted) (emphasis in original).

The Middle District of Florida also held in two analogous cases that offers of judgment that did not use the “magic words” nonetheless unambiguously included attorney’s fees. First, in *Broadcast Music, Inc. v. Dano’s Restaurant Systems, Inc.*, 902 F. Supp. 224 (M.D. Fla. 1995), the plaintiffs brought a copyright infringement action against the defendants pursuant to 17 U.S.C. § 505. One of the defendants presented an offer of judgment to allow judgment to be taken against him in the “total amount” of Five Thousand Dollars (\$5,000.00). The plaintiffs filed an acceptance of the offer of judgment and then moved for attorney’s fees and costs. The court denied the motion, reasoning as follows:

Lump sum offers of judgment are proper under Fed. R. Civ. P. 68. The defendant need not itemize the respective amounts tendered for settlement. *Marek*, 473 U.S. at 6, 105 S. Ct. at 3015. To prohibit such offers would diminish the purpose of the rule. As the Supreme Court noted, “many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney’s fees in whatever amount the court might fix on motion of the plaintiff.” *Id.* at 7, 105 S. Ct. at 3016. In essence, Rule 68 merely requires the parties to refrain from

implicitly or explicitly providing that the judgment does not include costs. Silence is acceptable.

...

A review of 17 U.S.C. § 505 reveals that “costs” includes reasonable attorney fees. While Section 505 gives a court discretion in awarding attorney fees, “because the Copyright Act is intended to encourage suits to redress copyright infringement, fees are awarded to a prevailing party as a matter of course. Therefore, the Court finds that the final judgment included attorney fees, and Plaintiffs’ Motion for Award of Attorney Fees and Costs is denied.

*Id.* at 226-27 (citations omitted).

Second, in *Blumel v. Mylander*, 165 F.R.D. 113 (M.D. Fla. 1996)(order), the court held that a lump sum offer of judgment in a civil rights case under 42 U.S.C. § 1983 included attorney’s fees. The defendant made an offer of judgment “to settle all pending claims against him.” Within six days, the plaintiff accepted the offer of judgment. The court clerk taxed costs, and then the plaintiff moved for attorney’s fees. The court set aside the award of costs and denied the motion for attorney’s fees reasoning as follows:

The Court finds that the [defendant] made a valid lump sum Offer of Judgment. The [defendant’s] “all pending claims” language is functionally equivalent to the “total amount” language in *Broadcast Music*. Both phrases clearly reflect the offeror’s intent for a final and complete settlement. In addition, the large disparity between the [defendant’s] \$501.00 offer and Blumel’s \$5,162.50 requested attorney’s fee corroborates the [defendant’s] lump sum intent.

By offering to settle, the [defendant] sought finality. By accepting, Blumel made a tactical decision. Awarding Blumel attorney’s fees and costs post-settlement would result in a complete windfall to his lawyer and subject the [defendant] to unforeseen liability. More importantly, such an award would ultimately discourage settlements and, thus, highly frustrate the policy behind Rule 68. As the Supreme Court noted in *Marek*, civil rights plaintiffs such as Blumel should “think very hard” about offers and their terms before settling. Therefore, the Court denied Blumel’s motion for attorney’s fees and vacates the \$132.40 cost judgment against [the defendant].

*Id.* at 116 (citation omitted). *See also* 13 James Wm. Moore, *Moore's Federal Practice* § 68.02[4] (observing that offer of judgment need not expressly mention attorney's fees to avoid ambiguity, and that even if offer is silent as to whether it includes fees the circumstance of the case may make it clear that offer does include fees).

In this action as well, the circuit court properly denied Plaintiffs' Motion for Attorney's Fees and Costs, which was filed by Appellants. Similar to *Nordby, Pelkowski* and *Blumel*, the Offers of Judgment referred to "all claims which have been and/or could have been asserted." Moreover, within Count I of the Complaints in these actions and the claim therein, numbered paragraph nineteen specified attorney's fees as part of the relief sought, making it clear that such relief was covered by the Offers of Judgment.

In addition, similar to *Pelkowski, Broadcast Music* and *Blumel*, the Offers of Judgment contained liability-limiting language that only reinforce the conclusion that attorney's fees and costs were included. Indeed, the liability-limiting language in these actions "*for full satisfaction and dismissal of all claims which have been and/or could have been asserted by plaintiff and any other person or entity in this civil action,*" is substantially similar to the liability-limiting language approved by the court in *Pelkowski* and *Blumel*. The Offers of Judgment in these actions also contained "total amount" language similar to *Broadcast Music*, which further reflects the fact that the parties explicitly waived the recovery of attorney's fees.

That the final judgment included attorney's fees in these actions, is further reinforced by the second paragraph of the Offers of Judgment, which reads as follows:

Should plaintiff not accept defendants' offer herein within the expiration of the ten day period, and *should the judgment finally obtained by plaintiff against defendants not exceed Thirteen Thousand Dollars and No Cents (\$13,000.00)*, defendants will,

pursuant to Rule 68(c), seek an Order from the Court requiring plaintiff to pay all costs incurred in the defense of this case subsequent to the date of this offer.

The “judgment finally obtained” referred to in this passage clearly includes costs and attorney’s fees as well. Accordingly, under the unambiguous terms of the Offers of Judgment, Appellants could avoid the fee-shifting consequences of Rule 68 if the final judgment, including costs and attorney’s fees, was greater than \$13,000.00.

The circuit court properly denied Plaintiffs’ Motion for Attorney’s Fees and Costs for the additional reason that the entire circumstances of the actions make it clear that attorney’s fees and costs were included in the Offers of Judgment. The Offers of Judgment followed global settlement demands by Croft, Armitage and McCoy and mediation. In both instances, the proposed terms made it clear that Croft, Armitage and McCoy would agree to release all claims against Appellees as well as the extra contractual claims against Erie. The Offers of Judgment merely reiterated the pertinent terms of a global settlement discussed during the mediation.<sup>4</sup>

As the court explained in *Blumel*, by offering to settle Appellees sought finality. By accepting the Offers of Judgment, Appellants made a tactical decision. Awarding Appellants attorney’s fees and costs post-settlement would result in a complete windfall to their attorney and subject Appellees to unforeseen liability. More importantly, such an award would ultimately discourage settlements and frustrate the policy behind Rule 68.

Appellants’ argument seems to be that since the “magic words” were not used, the Orders of Judgment do not include attorney’s fees and costs. Appellants suggest that this Court has already

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<sup>4</sup>In *Basha v. Mitsubishi Motor Credit of America, Inc.*, 336 F.3d 451, 453 - 54 & n. 4 (5th Cir. 2003), the court held that circumstances surrounding an offer of judgment may support the view that the parties intended to settle all claims including attorney’s fees.

addressed this issue in *Shafer*. As the circuit court observed and counsel for Appellants conceded at the hearing in these actions, however, the offer of judgment in *Shafer* did not include language that covered “all claims that have been or could be asserted,” which is present in these Offers of Judgment. Tr. at 22-24.

In addition, footnote eight in *Shafer* upon which Appellants rely is merely *dicta*. The *dicta* in *Shafer* only notes that the *better* practice for a defendant is to address the question of attorney’s fees in an “explicit fashion,” but in no way requires the use of the “magic words.” *Shafer*, 215 W. Va. at 176 n. 8, 597 S.E.2d at 309 n. 8. Moreover, the Court stated as follows:

We wish to make clear that nothing in this opinion precludes defendants from making lump sum offers that explicitly include costs *and* attorney’s fees. “Defendant[s] may also provide explicitly that the amount offered [under Rule 68] includes attorneys fees.” Such lump sum offers of judgment, however, must be *explicit* in stating that the offer is inclusive of attorney’s fees if that is the defendant’s intent in making the offer of judgment.

*Id.* (citations omitted) (emphasis in original).

“*Black’s Law Dictionary* 579 (6th ed 1990), defines the term “explicit” as “not obscure or ambiguous, having no disguised meaning or reservation’ . . . .” *Matter of Estate of Saxon*, 163 Misc. 2d 439, 444, 621 N.Y.S.2d 459, 462 (1994), *rev’d in part on other grounds, and aff’d as modified*, 219 A.D.2d 85, 640 N.Y.S.2d 287 (1996). This accepted definition only requires freedom from ambiguity. Manifestly, it does not require the use of any “magic words.”

This Court has rejected a formalistic “magic words” approach in applying other West Virginia Rules of Civil Procedure. In *Durm v. Heck’s, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991), this Court refused to require adherence to the exact words in construing West Virginia Rule of Civil Procedure 54(b). In *Durm*, this Court held:

Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that “no just reason for delay” exists and “directi[ng] . . . entry of judgment” will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court’s ruling approximates a final order in its nature and effect.

*Id.* at Syl. Pt. 2.

This Court should again reject a “magic words” approach and hold that the circuit court’s finding that the Offers of Judgment unambiguously included attorney’s fees and costs is not clearly erroneous, and that therefore the denial of Appellants’ motion for attorney’s fees and costs is proper.

## VI. CONCLUSION

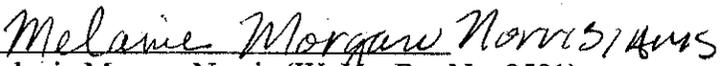
For all of the foregoing reasons, this Court should affirm the judgment of the Circuit Court of Ohio County.

Dated this 15th day of November, 2007.

STEPTOE & JOHNSON PLLC  
Of Counsel

  
\_\_\_\_\_  
Amy M. Smith ( W. Va. Bar No. 6454)  
Chase Tower, Sixth Floor  
P.O. Box 2190  
Clarksburg, WV 26302  
(304) 624-8000

STEPTOE & JOHNSON PLLC  
Of Counsel

  
\_\_\_\_\_  
Melanie Morgan Norris (W. Va. Bar No. 8581)  
1233 Main Street, Suite 3000  
P.O. Box 751  
Wheeling, WV 26003-0751  
(304) 233-0000

Counsel for Erie Insurance Property & Casualty  
Company

Dickie, McCamey, & Chilcote, L.C.  
Of Counsel

P. Joseph Craycraft, AUC  
P. Joseph Craycraft (W. Va. Bar No. 7920)  
1233 Main Street, Suite 2002  
Wheeling, WV 26003  
(304) 233-1022

Counsel for TBR, Inc., d/b/a TJ's Sports Garden and  
Restaurant, and Tashe Jovanni Radevski

**CERTIFICATE OF SERVICE**

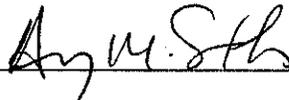
I hereby certify that on the 15th day of November, 2007, I caused to be served the foregoing Brief of Appellees and Intervenor Erie Insurance Property & Casualty Company upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Michael J. Olejasz, Esq.  
Ferro & Olejasz  
1144 Market Street, Suite 202  
Wheeling, WV 26003

Scott S. Blass, Esq.  
Bordas & Bordas, PLLC  
1358 National Road  
Wheeling, WV 26003

John Porco, Esq.  
Schrader, Byrd, & Companion, PLLC  
32 Twentieth Street, Suite 500  
Wheeling, WV 26003

Robert G. McCoid, Esq.  
McCamic, Sacco, Pizzuti, & McCoid, PLLC  
56 Fourteenth Street  
Wheeling, WV 26003

  
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