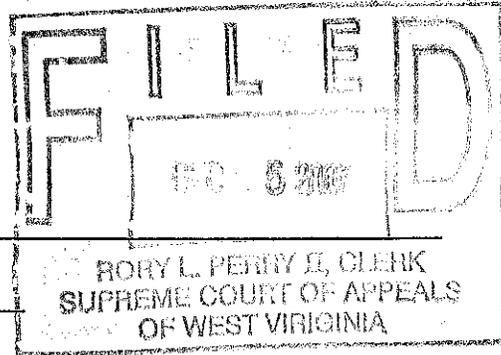


No. 33504



IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBIN L. CROFT, JILL A. ARMITAGE, and BRANDY G. MCCOY,

Appellants,

v.

TBR, INC., d/b/a/ TJ'S SPORTS GARDEN AND RESTAURANT,
TASHE JOVANNI RADEVSKI, SHANE KULPA, and ERIE INSURANCE
PROPERTY & CASUALTY COMPANY,

Appellees,

On Appeal From
The Circuit Court of Ohio County, West Virginia,
Hon. James P. Mazzone, Judge

APPELLANTS' REPLY

ROBIN L. CROFT, JILL A. ARMITAGE,
AND BRANDY G. MCCOY, Appellants,

Submitted by Counsel for the Appellants:

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Introduction

The Appellees' Response Brief urges this Court not to adopt what it calls the "magic words" requirement in interpreting a Rule 68(a) Offer of Judgment. However, the Appellants maintain that this hyperbole is merely a "sleight of hand" that Erie Insurance is using to take advantage of otherwise missing, or, at best, general language to decrease its liability in the subject Offers of Judgment that were accepted in due course. Erie took the gamble by drafting the Offers as such: if no motion is brought under the new law of *Shafer*, then it saves money; if a motion for attorney's fees and costs is brought, then they oppose the motion citing to their general language and their own unwritten "intentions" in the drafting and effectively ignore the Plaintiffs' inducement when said Offers are properly construed under West Virginia law by their counsel.

Unfortunately for Erie, it ignored the guidance of this Court. While no ambiguous language was present that needed to be interpreted in the *Shafer* Offer, this Court took great pains to instruct the bench and bar as to the legal requirements of a properly drafted Rule 68(a) Offer of Judgment in a case brought under the West Virginia Human Rights Act. While the subject Offers are more verbose than the *Shafer* Offer, they are still silent as to attorney's fees and costs, as was the Offer in *Shafer*. While magic may not be required, sufficient legal terms of art surely must be present. Why did Erie not use explicit language? West Virginia law requires attorney's fees to be expressly waived. Attorney's fees are not a "claim" to be tried to a jury. Syllabus Point 5 of *Shafer* tells us that attorney's fees are a cost to be included in a Rule 68 offer of Judgment in a case brought under the West Virginia Human Rights Act.

Erie further makes the bare assertion that the Appellants' lawyer would receive a "windfall" if fees and costs were awarded. This is entirely disingenuous. Erie has already paid Thirteen Thousand Dollars (\$13,000.00) to each of the Plaintiffs, knowing full well that this Appeal is only relevant to attorney's fees and costs. That agreement was written into the three (3) executed Satisfactions of Judgment that Erie did not choose to file with the Circuit Court, though it should be noted that Erie did not attempt to raise the Satisfactions as a procedural bar. The undersigned counsel does not seek a windfall, only compensation for yet unpaid fees and costs that will ultimately be paid by Erie on behalf of its insureds. Erie paid, without argument, post judgment interest to the Plaintiffs, though under its current argument, that payment could also have been barred by its Offers' "all claims language". See, *Judgment Order*. Defense counsel expressed during the subject hearing that he believed that "court costs" should be recoverable. *Transcript* at p. 18, lines 1-10. It seems that they only stand by their arguments when the dollar amounts become significant. The Appellees have now successfully developed a legal counterpart to moral relativism, and in doing so have eviscerated their own argument against paying the Appellants' attorney's fees.

Argument

The *Shafer* decision cited to cases which already effectively announced our Court's adoption of the "magic words" requirement. "The recovery of reasonable attorney's fees must be explicitly waived by the parties to bar the court from awarding such fees in those types of cases where reasonable attorney's fees are otherwise recoverable." Jordan v. National Grange Mutual Insurance Co., 183 W.Va. 9, 13 n. 3, 393 S.E.2d 647, 651 n. 4 (1990). It defies common sense that a party would go through

such pains to leave out the phrase “attorney’s fees” when drafting an Offer that it “specifically contemplated” would include such a recovery. However, we need not call these “magic words”. Drafters simply need to say what they mean and mean what they say.

The *Shafer* Court did not cite to the federal decisions on the subject that the Appellees do in their Response, though those foreign decisions from far-flung Districts and Circuits were in existence when *Shafer* was decided. In fact, the federal case specifically cited for the “magic word” premise was Rohrer v. Slatile Roofing & Sheet Metal Co., 655 F.Supp. 736 (S.D.Ind.1987). “While a plaintiff can, in a settlement agreement, waive his statutory right to seek an award of costs and attorney fees, waiver ordinarily will be found only when it is expressly provided in the terms of the settlement or in the offer of judgment.” Rohrer, at 737 (citing *United States Supreme Court, Third Circuit and D.C. Circuit cases not included in the Appellees’ Response*). The term “expressly”, as defined by *Black’s*, means: “In an express manner; in direct or unmistakable terms; explicitly; definitely; directly. The opposite of impliedly.” *Black’s Law Dictionary, Abridged Sixth Edition*, p.403. The term “express” as defined by *Black’s Law Dictionary*, means: “Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with ‘implied’.” Id., at 402.

What the Appellees “specifically intended” is of no consequence. They drafted the Offers of Judgment. We need not read into “all claims” and “total amount” to strain

to find the inclusion of “attorney’s fees and costs”. “All claims” and “total amount” can only be read to plainly mean to be inclusive of and referring to the multiple causes of action brought by each Plaintiff. *Rohrer* further explained that the drafters are responsible for the wording of the Offers. “The focus, then is not whether the parties’ minds have met on each component of the judgment, but rather whether the defendant offered to have judgment entered against it and whether the plaintiffs have accepted the offer of entry of judgment. Unless a defendant’s offer expressly provides that the amount includes all costs, the court should determine costs under Rule 68.” *Rohrer*, at 738. There exists no reason for this Court to now abandon its prior reasoning on the subject and its approval of the West Virginia specific learned treatise on the Rule. *See, Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Litigation Handbook on West Virginia Rules of Civil Procedure, § 68(a) (2002). See also, Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure, Second Edition, § 68(a) (2006).*

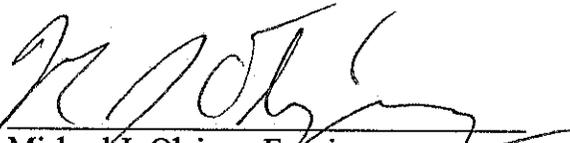
Erie presents to this Court the red herring of a cover letter. The Offers were accepted, not a cover letter, for purposes of this Court’s Rule 68(a) evaluation. However, the letter in question also fails to explicitly state that the lump sum offers are inclusive of attorney’s fees and costs, but “namely” recites that the Plaintiffs would agree to the dismissal of their companion bad faith cases against Erie. It was understood all along that action would be voluntarily dismissed if the underlying actions were settled. The *Shafer* lump sum Offer was also argued to have been in consideration of attorney’s fees, and we know how this Court dealt with that unsubstantiated allegation.

The Rule 54(b) argument by analogy in reference to Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991), hardly merits a reply. A court's lack of recital as to the contents of a Rule of Procedure is in no way analogous to the omission of explicit terminology, which must be expressly included in a formal Offer of Judgment.

Conclusion

WHEREFORE, the Appellants pray for the Supreme Court of Appeals of West Virginia to REVERSE the lower court's denial of costs, including reasonable attorney's fees and costs, and REMAND the case to the lower court with direction to conduct a hearing to determine an award for the Consolidated Plaintiffs' costs, including reasonable attorney's fees and costs.

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AND BRANDY G. MCCOY, Appellants,
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing "APPELLANTS' REPLY" was had upon the following by sending true and accurate copies thereof via first class U.S. Mail, postage prepaid, on December 3, 2007, to the addresses listed below:

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