

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**ERIC CARPER, Plaintiff Below,
Appellant,**

Vs.

Case No. 34750

**CHAD WATSON and BURKHARTS, INC., Defendants Below,
Appellees.**

**BRIEF IN SUPPORT OF PETITION FOR APPEAL
FROM THE CIRCUIT COURT OF BERKELEY COUNTY
HONORABLE GRAY SILVER III
CASE NO. 05-C-710**

**BRIEF ON BEHALF OF APPELLANT
ERIC CARPER**

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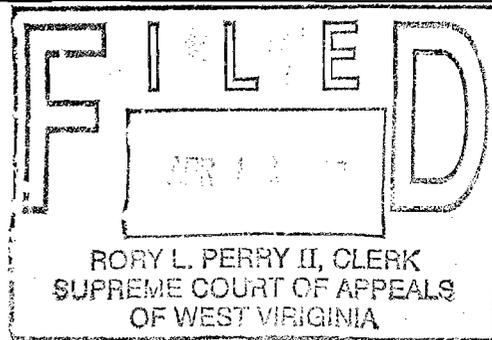


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I.

STATEMENT OF THE CASE

This is a Brief in support of Appellant's Petition for Appeal from an "Order Denying Plaintiff's Motion for New Trial and Granting, In Part, Defendant's Motion for Costs Pursuant to Offer of Judgment" entered by the Circuit Court of Berkeley County, West Virginia on May 6, 2008. Said Brief is filed in accordance with the previously Ordered briefing schedule entered on March 12, 2009.

On January 8, 2008, the Circuit Court of Berkeley County, West Virginia did hold a hearing to address Appellees' previously filed Motion for Costs Pursuant to Offer of Judgment. After hearing the evidence and argument of the parties, the Circuit Court of Berkeley County, West Virginia did grant, in part, Defendant's Motion for Costs Pursuant to Offer of Judgment and did award Appellees costs in the amount of \$7,012.07.

It is from this award of costs awarded pursuant to Rule 68 of the West Virginia Rules of Civil Procedure that Appellant respectfully appeals.

II.

STATEMENT OF FACTS

On September 13, 2005, Appellant Eric Carper did file a civil action against Appellees in the Circuit Court of Berkeley County, West Virginia. Appellant did seek recovery for damages caused by Appellees' negligent operation of an automobile. Appellant pursued said claim under the common law theory of negligence. Liability in the case was established pursuant to an agreed stipulation that acknowledged Appellees did negligently cause damage to Appellant Eric Carper when a Mack Truck did collide with the rear of Appellant's automobile.

On June 7, 2008, the Appellees did make a Rule 68 Offer of Judgment in the amount of \$35,000.00 to Appellant Eric Carper. Said \$35,000.00 Offer of Judgment was rejected by Appellant Eric Carper.

A jury trial to determine the amount of damages owed to Appellant Eric Carper was held on August 16, 2007 in the Circuit Court of Berkeley County, West Virginia. After hearing all of the evidence and argument of counsel, the jury did rule in favor of Appellant Eric Carper and did award said Appellant damages in the amount of \$8,297.74 plus pre-judgment and post-judgment interest. Specifically, the amount of \$3,297.74 was awarded to Appellant for medical expenses and the amount of \$5,000.00 was awarded to Appellant for present pain and suffering. A Judgment Order setting forth the award of damages was entered in the Office of the Circuit Clerk of Berkeley County, West Virginia on October 9, 2007.

On September 5, 2007, Appellees did file a Motion for Costs Pursuant to Offer of Judgment. On December 14, 2007, Appellees did submit Defendants' Comprehensive

Itemization of Costs Pursuant to Rule 68 Offer of Judgment. Pursuant to said Itemization of Costs, Appellees did seek recovery for certain expenses allegedly incurred after the June 8, 2007 Offer of Judgment was rejected.

On January 7, 2008, a hearing was held in the Circuit Court of Berkeley County, West Virginia to address several post trial issues. At said hearing, the Circuit Court of Berkeley County, West Virginia did address Defendant's Motion for Costs Pursuant to Offer of Judgment and the several response and reply motions filed after said motion.

After hearing the parties' respective arguments, the Circuit Court of Berkeley County, West Virginia did grant, in part, Defendant's Motion for Costs Pursuant to Offer of Judgment and did enter a final order addressing the award of costs on May 6, 2008. Pursuant to said Order, Appellants' costs were awarded in the amount of \$7,012.07.¹

The Circuit Court of Berkeley County, West Virginia did reach said monetary figure by awarding compensation for the following alleged costs:

- a. \$3,450.00 Appellees' Expert Witness Fees Incurred after June 8, 2007 Offer of Judgment²
- b. \$326.60 Appellees' Transcript Fees for Video Deposition of Appellant's Physician
- c. \$3,216.10 Court Costs

On September 5, 2008, Appellant did file a Petition for Appeal seeking a reversal of the Circuit Court of Berkeley County's award of Appellees' costs. On March 12,

¹ Appellant respectfully contends that the \$7,012.07 figure comprising the amount of costs awarded is incorrect. As noted in said May 6, 2008 Order, the Court adopted and incorporated the specific itemization of costs as set forth in the transcript of the January 7, 2008 hearing. (Transcript January 7, 2008 Hearing, page 65) Appellant contends that the actual amount of costs awarded should be \$6,992.70.

² Said \$3,450.00 fee was comprised of the following alleged expenses: \$200.00 fee for expert's June 19, 2007 meeting with Appellees' attorney; \$350.00 fee for expert's July 23, 2007 telephone conference with Appellees' attorney; \$600.00 for expert's August 17, 2007 telephone conference with Appellees' attorney; and \$2,300.00 for expert's trial fee and conference with Appellees' attorney.

2009, this Supreme Court of Appeals of West Virginia did enter an Order awarded granting Appellant's Petition for Appeal and setting forth a briefing schedule.

III.

STATEMENT OF THE ISSUES

1. Pursuant to Rule 68 of the West Virginia Rules of Civil Procedure, are expert witness fees costs that can be awarded to a party if a judgment obtained by an offeree is not more favorable than a previously rejected Offer of Judgment?
2. Pursuant to Rule 68 of the West Virginia Rules of Civil Procedure, are fees for obtaining the transcript of a video deposition of Appellant's treating physician costs that can be awarded to a party if a judgment obtained by an offeree is not more favorable than a previously rejected Offer of Judgment?
3. Did the Circuit Court of Berkeley County, West Virginia abuse its discretion by awarding Appellees any amount of costs pursuant to Rule 68 of the West Virginia Rules of Civil Procedure?

IV. POINTS AND AUTHORITIES

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V.

STANDARD OF REVIEW

Where the issue on appeal from a Circuit Court Final Order is clearly a question of law or involving an interpretation of a statute, the Court applies a *de novo* standard of review. *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

[T]he trial [court] ... is vested with a wide discretion in determining the amount of ... court costs and counsel fees, and the trial [court's] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion. Syl. Pt. 3, *Dodd v. Potomac Farm Inc.*, 222 W.Va. 299, 664 S.E.2d 184 (2008).

VI.
ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DETERMINING THAT APPELLEES' EXPERT WITNESS FEES WERE COSTS THAT COULD BE ASSESSED AGAINST APPELLANT ERIC CARPER PURSUANT TO AN OFFER OF JUDGMENT MADE IN ACCORDANCE WITH RULE 68 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE

In its May 6, 2008 Order Denying Plaintiff's Motion for New Trial and Granting, In Part, Defendants' Motion for Costs Pursuant to Offer of Judgment, the Circuit Court of Berkeley County, West Virginia committed reversible error when it improperly found that Appellees' expert witness fees were costs that could be assessed against Appellant after said Appellant failed to obtain a judgment more favorable than the previously rejected Offer of Judgment.

The pertinent sections of Rule 68 of the West Virginia Rules of Civil Procedure state as follows:

(a) Offer of Judgment. 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.

....

(c) Offer Not Accepted. An offer under subdivision (a) or (b) above not accepted in full satisfaction shall be deemed withdrawn, i.e., shall not be disclosed to the jury, and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but

not accepted, or accepted only as part payment, does not preclude a subsequent offer.

(d) Amount or Extent of Liability. When the liability of one party to another has been determined by verdict or order of judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

As noted above, Appellees did timely make an Offer of Judgment on June 8, 2007 in the amount of \$35,000.00 with costs then accrued. Appellant did reject said \$35,000.00 Offer of Judgment. At trial, the jury did find in favor of Appellant and did award Appellant damages in the amount of \$8,297.74, plus pre-judgment and post-judgment interest.

Pursuant to Rule 68(c) of the West Virginia Rules of Civil Procedure, if an Offer of Judgment is not accepted by an offeree and the judgment ultimately obtained is not more favorable, the offeree must pay the costs incurred after making the offer. Clearly, the Judgment ultimately obtained in this case was less favorable than the Offer of Judgment made prior to trial. However, the Circuit Court of Berkeley County, West Virginia did commit reversible error when it determined that the “costs” to be awarded to Appellant included Appellees’ expert witness fees incurred after the June 8, 2007 Offer of Judgment.

When assessing costs pursuant to a Rule 68 Offer of Judgment, this Honorable Court has upheld the theory that trial courts have “wide discretion” in determining the amount of court costs and counsel fees to be awarded. Syl. Pt. 3, *Dodd v. Potomac Farm Inc.*, 664 S.E.2d 184 (2008)(emphasis added). Pursuant to W. Va. R. CIV. P. 68,

Appellant contends, absent a statutory provision, only costs incurred by the Trial Court can be assessed against an offeree party and the Circuit Court of Berkeley County, West Virginia committed reversible error by awarding Appellees' expert witness fees in the amount of \$3,450.00. (Pp. 65. *Transcript of January 8, 2008 Hearing*).

A. West Virginia case law supports contention that a defending party's expert witness fees cannot be awarded after an offeree party fails to obtain a judgment more favorable than a previously rejected Offer of Judgment made pursuant to Rule 68 of the West Virginia Rules of Civil Procedure

The Circuit Clerk of Berkeley County, West Virginia incurred the total amount of \$3,236.10 for costs associated with this proceeding. In this case, any award of costs pursuant to Rule 68(c) should have been limited to the amount of costs taxable by the Circuit Clerk of Berkeley County, West Virginia. As noted above, Appellant recovered damages by asserting a theory of common law negligence. At no time during this proceeding did any statutory provision specifically define costs for parties bringing claims under a common law negligence theory as including expert witness fees. As such, Appellant affirmatively states that the Trial Court did commit reversible error by awarding Appellees their expert witness fees when Appellant failed to obtain a judgment more favorable than Appellees' June 8, 2007 Offer of Judgment.

It is undisputed that costs included under Rule 68 of West Virginia Rules of Civil Procedure do not include attorney's fees unless an applicable statute specifically defines costs as including attorney's fees. Syl Pt. 4. *Shafer v. Kings Tire Service, Inc.*, 215 W.Va. 169, 597 S.E.2d 302 (2004). The parties to this case and the Honorable Circuit Court of Berkeley County, West Virginia did recognize and did adhere to this principle. (Pp. 34-38. *Transcript of January 8, 2008 Hearing*). Further, the United States Supreme

Court similarly concurred on this theory in *Marek v. Chesney*, 473 U.S. 1, 105 S.Ct. 3012 (1985). However, the Trial Court improperly declined to apply this theory and exclude an award for expert witness fees pursuant to Rule 68.

Appellant Eric Carper affirmatively states that Appellees' expert witness fees incurred after the Offer of Judgment was made should *not* have been assessed as costs pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. The cause of action asserted in this case was common law negligence. Because the case involved a common law negligence cause of action, only court costs taxable by the Clerk could be assessed against Appellants.

West Virginia Opinions specifically addressing W. Va. R. CIV. P. 68

This Honorable Court has specifically addressed several issues regarding Rule 68 of the West Virginia Rules of Civil Procedure but has never provided a specific explanation as to what costs can be assessed against a declining offeree party.³ All opinions of this Honorable Court which address said rule, limit costs recoverable to actual trial costs that can be taxed by a Clerk of the Circuit Court or costs specifically defined as costs in a statutory provision.

After assessing all relevant West Virginia case law, it becomes apparent that, absent a specific statutory provision, a party's expert witness fees cannot be considered costs that can be assessed against a party pursuant to Rule 68 of the West Virginia Rules of Civil Procedure.

³ See *Meadows v. Wal-Mart Stores, Inc.* 207 W. Va. 203, 530 S.E.2d 676 (1999) (Offer of Judgment must specifically address issues of liability and collateral estoppel to have preclusive effect); *Perdomo v. Stevens*, 197 W. Va. 552, 476 S.E.2d 223 (1996); *Jarrett v. E.L. Harper & Son, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977) (If a defendant's offer of judgment only partially satisfies the plaintiff's claim for damages and plaintiff either rejects the tender or accepts it as part payment only, the court must consider the offer withdrawn and submit the case to the jury where one has been demanded).

In 2008, this Honorable Court did address Rule 68 of the West Virginia Rules of Civil Procedure in two separate opinions. *See Dodd v. Potomac Farm Inc.*, 664 S.E.2d 184 (2008); *Croft v. TBR, Inc.*, 664 S.E.2d 109 (2008). Although these two opinions do not specifically address or define what costs can be assessed against an offeree party, said opinions do limit discussion of the applicable costs awarded pursuant to said rule to costs taxable by the Circuit Clerk and costs specifically defined by statute.⁴

The two remaining decisions that further address costs awarded pursuant to Rule 68 limit the award of costs to trial costs taxable by the Circuit Clerk. *See Miller v. Triplett*, 203 W. Va. 351, 507 S.E.2d 714 (1998)(assessing only court costs pursuant to W. Va. R. Civ. P. 68); *King v. Ferguson*, 198 W. Va. 307, 480 S.E.2d 516 (1996)(assessing only jury costs pursuant to W. Va. R. Civ. P. 68).

After analyzing the relevant West Virginia case law and Rule 68 of the West Virginia Rules of Civil Procedure, it is a logical conclusion that, absent a statutory provision defining expert witness fees as costs, expert witness fees should not be considered costs awardable when an offeree party fails to obtain a judgment more favorable than a previously rejected Offer of Judgment. The most directly analogous West Virginia Opinion which support Appellant's theory is *Shafer v. Kings Tire Service, Inc.* 215 W.Va. 169, 597 S.E.2d 302 (2004). As noted above, the Court in *Shafer* found that costs included under Rule 68(a) of the West Virginia Rules of Civil Procedure include attorney's fees only when an applicable statute defines costs as including

⁴ *See Dodd v. Potomac Farm Inc.*, 664 S.E.2d 184 (2008)(Trial Court did not abuse its discretion by assessing costs for court appointed special commissioner against corporation pursuant to former statute W. Va. Code §31-1-123(e) instead of assessing costs against party which made Offer of Judgment pursuant to Rule 68); *Croft v. TBR, Inc.*, 664 S.E.2d 109 (2008) (Trial Court abused its discretion by not awarding attorneys fees in a case involving a specific fee shifting statute when Offer of Judgment did not specifically denote that offer included attorneys fees).

attorney's fees. Syl Pt. 4. *Shafer v. Kings Tire Service, Inc.* Further, the Court in *Shafer* noted that costs under Rule 68(a) would 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. Syl Pt. 4. *Shafer v. Kings Tire Service, Inc.*

The theory propounded in *Shafer* is absolutely correct and should be applied to cases in which the cause of action has no applicable statute defining expert witness fees as costs. Clearly, the same theory set forth in *Shafer* precludes an award of expert witness fees in the instant proceeding as no applicable statute defined expert witness fees as costs that can be recovered in Appellant's common law negligence claim.

Further, Appellant respectfully contends that the Appellees have improperly interpreted the "wide discretion" a Trial Court has to determine the *amount* of court costs to improperly enlarge the Trial Court's power to determine the *type* of costs that can be awarded. See Syl. Pt. 3, *Dodd v. Potomac Farm Inc.*, 222 W.Va. 299, 664 S.E.2d 184 (2008); Syl Pt. 3, *Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 597 S.E.2d 302 (2004). Under Appellees' theory, parties entitled to costs pursuant to Rule 68 would be entitled to fees not normally assessed against a prevailing party in a common law negligence proceeding; this theory is simply not supported by any of this Honorable Court's Opinions which address or discuss Rule 68 of the West Virginia Rules of Civil Procedure.

West Virginia Opinions generally addressing assessment of costs

Although not directly on point, further support for Appellant's contention can be found by reviewing West Virginia case law generally addressing assessment and responsibility of costs. It is well established that West Virginia follows the "American"

rule; said American rule requires each litigant to bear their own attorneys fees and costs. See *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 51-52, 365 S.E.2d 246, 249-250 (1986); *Verba v. Gaphery*, 210 W.Va. 30, 36, 552 S.E. 2d 406, 412 (2001). As previously noted by this Honorable Court, a party should not be “penalized for merely prosecuting or defending a lawsuit, as litigation is at best uncertain.” *Sally-Mike Properties*, 179 W.Va. at 51-52, 365 S.E.2d at 51-52. The Trial Court failed to adhere to the principles propounded by the American Rule when it assessed the expert witness fees incurred by Appellees in unsuccessfully defending the claims asserted by Appellant.

Appellant Eric Carper contends that the Opinion of the Supreme Court of Appeals of West Virginia which lends great support to Appellants’ theory is *Geary Land Co. v. Adam M. Conley*, 175 W. Va. 809, 338 S.E.2d 410 (1985). In *Geary Land Co.*, Appellant Geary Land Co. (hereinafter, Appellant Geary), filed a civil action in the Circuit Court of Kanawha County seeking to fix a boundary line dispute. *Geary Land Co.*, 175 W.Va. at 810, 338 S.E.2d at 410. Appellant Geary did request that the Trial Court appoint a surveyor in order conduct a survey of the land at issue. *Id.* at 812, 413. The Trial Court did refuse to grant or deny said request. *Id.* at 812, 413. Appellant Geary did hire a surveyor on his own to perform a survey of the land at issue and the jury did adopt the results of said survey. *Id.* After obtaining a favorable verdict, Appellant Geary did request that the expenses incurred in surveying said land be taxed as costs against the losing party. *Id.* The Trial Court did specifically decline Appellant Geary’s request and the Supreme Court of Appeals of West Virginia did affirm said decision. *Id.*

In *Geary Land Co.*, this Honorable Court did determine that an award of costs is “not recoverable in the absence of a provision for their allowance in a statute or court

rule.” *Id.* at 813, 414. In making said decision, this Honorable Court examined the West Virginia Code and the West Virginia Rules of Civil Procedure. *Id.* The Court specifically focused on West Virginia Code § 59-2-14, West Virginia Code § 59-2-15, and Rule 54(d) of the West Virginia Rules of Civil Procedure; said statutes and rule sets forth the costs which can be assessed against a losing party in absence of an additional specific statutory provision. *Id.* at 813-814, 414-415. Even though Appellant Geary requested that the Court appoint a surveyor and the surveyor’s findings were integral in the jury reaching its verdict, this Honorable Court refused to award Appellant Geary any costs expended in for said expert witness fee as no statute provided for said fees to be costs awardable to the prevailing party.

After considering this Honorable Court’s continued adherence to the American Rule and the theories propounded in *Geary Land Co.*, it is apparent that West Virginia legal precedent supports the Appellant’s contention that expert witness fees are not costs that should be assessed against an offeree pursuant to Rule 68 of the West Virginia Rules of Civil Procedure.

As discussed below, it is the contention of the Appellant that the Trial Court should not have awarded *any* costs to Appellees, but in the alternative, said Trial Court should have been limited to awarding actual taxable court costs instead of the expert witness fees incurred after the Offer of Judgment was made.

West Virginia law supports Appellant’s contention that the Trial Court committed reversible error when it awarded Appellees’ their expert witness fees incurred after Appellees’ June 8, 2007 Offer of Judgment.

B. Federal precedent supports contention that a defending party's expert witness fees cannot be awarded after an offeree party fails to obtain a judgment more favorable than a previously rejected offer of judgment made pursuant to Rule 68 of the West Virginia Rules of Civil Procedure

It is has long been recognized that the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules of Civil Procedure. *Williams v. Precision Oil Co., Inc.* 194 W. Va. 52, 59, 359 S.E.2d 329, 336 (1995). It is further well established that this Honorable Court gives substantial weight to federal cases, especially those of the United States Supreme Court, in determining the meaning and scope of our rules. *Id.*

In this case, the relevant portions of Rule 68 of the Federal Rules of Civil Procedure are practically identical to the relevant portions of Rule 68 of the West Virginia Rules of Civil Procedure. *See Shafer v. Kings Tire Service, Inc.* 215 W.Va. 169, 174, 597 S.E.2d 302, 307 (2004). The relevant portions of Rule 68 of the Federal Rules of Civil Procedure state as follows:

(a) Making an Offer; Judgment on an Accepted Offer. More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

.....

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

After reviewing the relevant portions of both rules, it clear that Federal precedent should be looked to as persuasive authority for making a determination regarding what costs should be assessed pursuant to Rule 68 of the West Virginia Rules of Civil Procedure.

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, absent specific federal or state statutory authority, Fed. R. Civ. P. 68 “costs” are limited to the definition of costs as set forth in 28 U.S.C.A. §1920; specifically, only the six types of costs set forth in §1920 are taxable costs which can be recovered pursuant to Fed. R. Civ. P. 68. *See Phillips v. Bartoo*, 161 F.R.D. 352 (1995). The six taxable costs set forth in 28 U.S.C.A. §1920 are set forth as follows:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree

The six taxable costs set forth in 28 U.S.C.A. §1920 are similar to the costs recoverable under similar West Virginia statutes and rules setting forth taxable costs. *See West*

Virginia Code § 59-2-14; West Virginia Code § 59-2-15; and Rule 54(d) of the West Virginia Rules of Civil Procedure.

Since W. Va. R. Civ. P. 68 and Fed. R. Civ. P. 68 are practically identical, great weight should be given to the way Fed. R. Civ. P. 68 has been interpreted. A Federal case interpreting Fed. R. Civ. P. 68 which is directly on point with the facts of this case is *Phillips v. Bartoo*, 199 F.R.D. 617.

In *Phillips*, Plaintiff Phillips sustained physical injuries as the result of a collision between his automobile and an automobile driven by Defendant Bartoo. *Id.* at 353. Plaintiff Phillips sought to recover damages by asserting a common law theory of negligence. *Id.* at 353-354. Prior to trial, Defendant properly submitted an Offer of Judgment of \$5,000.00. *Id.* at 353-354. Plaintiffs did reject said Offer of Judgment and obtained a jury verdict in their favor for \$833.25. *Id.* at 354. After trial, Defendant filed a motion for costs incurred after submitting the FRCP 68 Offer of Judgment. *Id.* at 354. As part of the motion for costs, Defendant Bartoo requested \$2,414.20 for Defendant's retained expert witness fees incurred in preparing and testifying at trial. *Id.* at 354.

In *Phillips*, the United States District Court Northern District of Illinois, found that it could not award Defendant Bartoo's expert witness fees because no statute existed to allow recovery for expert witness fees as costs and that Defendant Bartoo was limited to recover the standard \$40.00 per day attendance fee allowed by 28 U.S.C.A. §1821. *Id.* at 354-355.

As discussed below, although Appellant contends that Appellees should be awarded no costs, Appellant believes that Appellees should be limited to the standard witness fees allowed by West Virginia Code § 59-1-16; specifically, if any costs are

shifted to Appellant, Appellant asserts that any fees for said witnesses should be limited between ten to twenty dollars for each days attendance and fifteen cents per mile for travel costs.

Persuasive federal authority supports Appellant's contention that the Circuit Court of Berkeley County, West Virginia committed reversible error when it awarded Appellees' expert witness fees incurred after Appellees' June 8, 2007 Offer of Judgment.

In conclusion, Appellant Eric Carper respectfully asserts that the great weight of the law supports a reversal of the Trial Court's ruling regarding its assessment of Appellees' expert witness fees against Appellant.

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DETERMINING THAT APPELLEES' FEES FOR OBTAINING THE TRANSCRIPT OF THE VIDEO DEPOSITION OF APPELLANT'S TREATING PHSYCIAN WERE COSTS PURSUANT TO AN OFFER OF JUDGMENT MADE IN ACCORDANCE WITH RULE 68 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE

In its May 6, 2008 Order Denying Plaintiff's Motion for New Trial and Granting, In Part, Defendants' Motion for Costs Pursuant to Offer of Judgment, the Circuit Court of Berkeley County, West Virginia committed reversible error when it improperly found that the Appellees' fees in obtaining a transcript of the video deposition of Appellant's treating physician were costs that could be assessed against Appellant after said Appellant failed to obtain a judgment more favorable than the previously rejected Offer of Judgment.

As previously noted, the Trial Court did award Appellees the amount of \$326.60 for the transcript of the video deposition of plaintiff's treating physician, Dr. John Phillips. The Trial Court recognized that the video deposition of Dr. John Phillips was presented as evidence to the jury. However, for the reasons set forth in the preceding

section, Appellant contends that fees for obtaining transcripts that the *Appellees* used for preparation of trial are not costs that be awarded pursuant to Rule 68 of the West Virginia Rules of Civil Procedure as there is no applicable statutory authority which requires that said fees be considered costs.

Further, Appellees presented no evidence at the January 8, 2008 hearing which proved that said transcripts could be considered taxable costs that could be awarded to a prevailing party pursuant to West Virginia Code § 59-2-15 as said transcripts were prepared for benefit of Appellees and not the benefit of the Trial Court.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION BY AWARDING APPELLEES ANY COSTS AFTER APPELLANT ERIC CARPER FAILED TO OBTAIN A VERDICT GREATER THAN APPELLEES' JUNE 8, 2007 OFFER OF JUDGMENT

The Circuit Court abused its discretion by assessing any costs against Appellant Eric Carper pursuant to Rule 68 of the West Virginia Rules of Civil Procedure. As noted above, liability against Appellees was stipulated and established prior to trial. The sole issue at trial was damages.

Appellant Eric Carper did suffer severe injuries and did lose the ability to work for several months. Appellant Eric Carper did pay for his own medical expenses. Appellant Eric Carper did his best to limit his damages and did attempt to work after suffering from the injuries caused as a result of the negligent actions of Appellees.

After trial, the damages awarded by the jury were paid for by the insurance company that provided coverage for the Appellees. Said insurance company did pay Appellant Eric Carper the total amount of \$9,806.42; representing the judgment amount plus accrued interest. However, Appellant Eric Carper was ultimately Ordered to pay the amount of \$7,012.07 as a result of the costs awarded pursuant to Appellees' Offer of

Judgment. After assessing Appellant's own fees and costs, Appellant Eric Carper was left with nothing except a monetary judgment entered against him. This is simply unjust.

[T]he trial [court] ... is vested with a wide discretion in determining the amount of ... court costs and counsel fees, and the trial [court's] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.

Syl. Pt. 3, *Dodd v. Potomac Farm Inc.*, 664 S.E.2d 184 (2008).

As argued above, the Trial Court in this case should have only ruled on the *amount* of costs to be awarded against Appellant. Instead, said Trial Court committed reversible error when it improperly enlarged said Trial Court's authority to award costs not authorized by statute. The Trial Court abused its discretion when it awarded *any* amount of costs against Appellant Eric Carper.

Appellant Eric Carper, in good faith, sought to have a jury decide the issue of damages instead of accepting an unsatisfactory offer to be paid by Appellees. For whatever reason, the jury did not agree with the arguments set forth on behalf of Appellant and did render a verdict for less than was previously offered to Appellant. Based on the ruling of the Trial Court, Appellant Eric Carper is left with nothing for his injuries and actually owes money in a case where liability was established by admission.

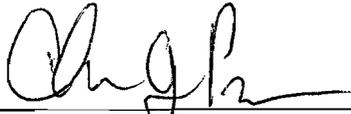
At no point was any evidence presented at trial or at any subsequent hearing which set forth any bad faith on the part of the Appellant. However, the end result in this case is punitive in nature. It is Appellant's contention that the Trial Court should have properly exercised its "wide discretion" in determining an amount of costs and should have refused to award *any* costs pursuant to said Rule 68 of the West Virginia Rules of Civil Procedure.

VII.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Appellant respectfully requests the judgment of the Circuit Court of Berkeley County be reversed.

Respectfully submitted,
Eric Carper
Appellant



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**ERIC CARPER, Plaintiff Below,
Appellant,**

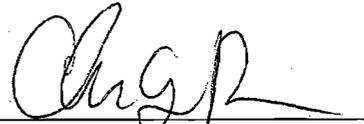
Vs.

Case No. 34750

**CHAD WATSON and BURKHARTS, INC., Defendants Below,
Appellees.**

CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Appellant, do hereby certify that I have served a true and accurate copy of the foregoing BRIEF OF APPELLANT, upon Macel E. Rhodes, Esq. by First class mail, postage prepaid, at her address of Zimmer Kunz, PLLC, 206 Spruce Street, Morgantown, West Virginia 25606, on this 13th day of April, 2009.



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