IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34750

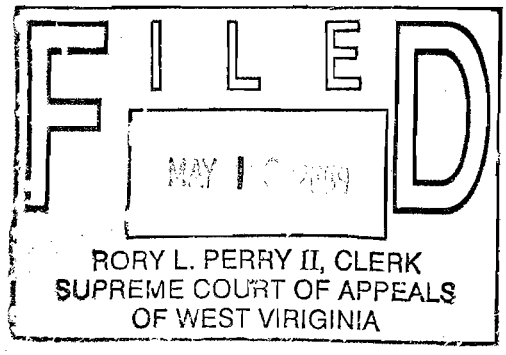
ERIC CARPER,

Appellant,

V.

CHAD WATSON and
BURKHART'S, INC.,
A West Virginia Corporation,

Appellees.



BRIEF OF APPELLEES

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I. NATURE OF PROCEEDING AND RULING BELOW

On May 6, 2008, the Circuit Court of Berkeley County, West Virginia, denied the plaintiff Eric Carper's motion for new trial and granted, in part, defendants' motion for costs pursuant to a timely-made offer of judgment under Rule 68 of the West Virginia Rules of Civil Procedure. Defendants made an offer of judgment in the amount of $35,000.00 on June 8, 2008, more than ten days before the start of trial. The plaintiff did not accept the offer and chose to continue to trial. At trial, the jury awarded plaintiff $8,297.74, consisting of $3,297.74 in past medical expenses and $5,000.00 for past pain and suffering. This amount of $8,297.74 was substantially less than the offer of judgment of $35,000.00. Upon defendants' motion for costs pursuant to the offer of judgment, the trial court awarded the defendants $7,012.07, consisting of $3,450.00 in expert costs; $326.60 for videotape and deposition costs; and $3,236.10 in court costs.

On September 5, 2008, Eric Carper filed his petition for appeal of the portion of the order awarding costs to defendants. This Court granted the petition on March 12, 2009. The Appellees Watson and Burkhart's, Inc., timely file this brief in response to the Appellant's brief.

II. STATEMENT OF FACTS

On or about September 15, 2003, Appellant Eric Carper was operating a motor vehicle owned by his employer car dealership when it was rear-ended by a vehicle owned by Appellee Burkhart's, Inc., which was being operated by Appellee Chad Watson, then an employee of Burkhart's. The personal injury lawsuit was filed two years later on September 13, 2005.

Appellant voluntarily quit his employment at the car dealership shortly after the motor vehicle accident and did not begin working at another car dealership for over two months. Throughout the litigation and at trial, he claimed significant wage loss of over $300,000.00. He also claimed medical expenses associated with not only physical therapy which began four-and-

one-half months after the accident, but also for medical treatment which began eleven months after the accident and chiropractic treatment which began nearly one-and-one-half years after the accident.

The trial court ordered the parties to go to mediation and the parties went to mediation on two occasions, but neither resulted in a settlement. Following the second mediation, Appellees made a Rule 68 offer of judgment on June 8, 2008, in the amount of $35,000.00. (Rec. 592-593). The Appellant did not accept the offer. Appellees made a final settlement offer of $45,000.00 (not in the form of an offer of judgment) two days before trial, but Appellant rejected that also. (Pg. 28-30 at Rec. 774). The Appellees stipulated to liability and the case proceeded to trial on August 16, 2007, on the issue of damages, with the Judge Gray Silver, III, presiding. At trial, Appellees vigorously contested Appellant's lost wage claim and most of his claims for medical expenses.

Ultimately, the jury examined all of the evidence presented by the Appellant and the contradictory evidence presented by the Appellees, weighed all the evidence as instructed by the trial court, and returned a verdict on August 23, 2008, awarding Appellant $3,297.74 for a portion of his past medical expenses and $5,000.00 for pain and suffering. In addition, the Judgment Order which was entered on October 9, 2007, awarded Appellant $1,298.51 for prejudgment interest; thus, he received a total of $9,596.25. (Rec. 621-623).

Subsequent to the jury's verdict, Appellees filed a motion for costs, and then followed up with a comprehensive itemization of costs and expenses for the court's review. (Rec. 598-605; 757-771). On January 7, 2008, the trial court heard the motion for costs and other post-trial motions including Appellant's motion for a new trial. After lengthy argument, the court denied Appellant's motion for a new trial and granted, in part, Appellee's motion for costs. The trial court awarded the Appellees $7,012.07, including $3,450.00 in costs for their expert witness; $326.00

for videotape and deposition costs incurred when Appellant videotaped his treating physician's testimony for trial; and $3,216.10 for court costs associated with the trial. (Pg. 65 at Rec. 774). These costs were incurred by Appellees after the offer of judgment was made.

Appellees submitted other costs to the trial court, including their lawyer's mileage, meal and hotel costs incurred during trial, and miscellaneous photocopying and postage charges. These costs for mileage, meals, hotel, photocopying and postage were either withdrawn during the hearing or disallowed by the trial court, and are not at issue here. Appellees did not ask for an award of attorney fees.

The Appellant has appealed the court's assessment against him of Appellees' expert's witness fees and the videotape and deposition costs associated with Appellant's treating doctor's trial deposition, but then argues that the court should not have awarded any costs at all.

III. STANDARD OF 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. (2004).

Further, "[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." Syllabus point 3, [in part,] *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959). Syl. Pt. 2, [215 W.Va. 171] [in part,] *Cummings v. Cummings*, 170 W.Va. 712, 296 S.E.2d 542 (1982) [(per curiam)]. Syllabus point 4, in part, *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993). Syl. pt. 3, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999).

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IV. DISCUSSION OF LAW

A. The purpose behind Rule 68 is to encourage the compromise and settlement of litigation.

The trial court properly awarded the Appellees costs which they incurred after the Rule 68 offer of judgment was made, including costs for Appellees' expert witness to appear at trial, costs associated with the videotape and deposition transcript of Appellant's expert witness for use at trial, and costs associated with the trial.

West Virginia Rule of Civil Procedure 68 provides in pertinent part:

> (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.
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> *** *** ***
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> (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 the 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, then 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.

This Court has acknowledged that "costs" in the Rule 68 context refers to costs of litigation. "The primary purpose of Rule 68 is to encourage the compromise and settlement of litigation. By encouraging compromise, Rule 68 discourages both protracted litigation and vexatious lawsuits. 'The Rule prompts both parties to a suit to evaluate the risks and **costs of**

litigation, and to balance them against the likelihood of success upon trial on the merits.'" *Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676, 694 (W.Va. 1999), citing *Mallory v. Eyrich*, 922 F.2d 1273, 1277 (6th Cir. 1991) (citations omitted) (emphasis added).

"To be sure, application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates." *Marek v. Chesny*, 473 U.S. 1, 11, 87 L.Ed. 2d 1, 105 S.Ct. 3012 (1985).

B. The trial court properly awarded expert witness costs, videotape and deposition transcript costs, and other costs to the Appellees, consistent with Rule 68 current case law, and the trend in other jurisdictions in West Virginia.

The trial court's award of costs in the instant case is consistent with previous cases from this Court. During the hearing on Appellees' motion for costs, the trial judge specifically discussed the application of Rule 68, stating that the Rule makes it mandatory to award costs which are incurred after the making of the offer of judgment "if the judgment finally obtained by the offeree is not more favorable than the offer." (Pg. 42 at Rec. 774). The trial court specifically reviewed and discussed this Court's prior case law in order to make a complete record of the issues discussed and to support his reasoning and decision, before assessing costs against the Appellant.

The trial judge first discussed how the law regarding Rule 68 has been evolving and how he thinks the trial judges in West Virginia are looking outside of the State for insight on items which they may award as costs, noting that the area of allowable costs has become broader. The trial judge said that expert fees are one of those items which have been included as costs by other courts.

He then briefly discussed the case of *King v. Ferguson,* 198 W.Va. 307, 480 S.E.2d 516 (1996) (per curiam), in which this Court noted that an award of costs is mandatory and found that jury costs are an awardable cost under Rule 68. "We have no disagreement with the trial court's

assessing jury costs pursuant to Rule 68 (c)". *Id.* at 524. Thus, the trial court's assessment of jury costs was appropriate in the instant case.

The trial court turned, then, to the case of *Shafer v. Kings Tire Service, Inc.,* 215 W.Va. 169, 597 S.E.2d 302 (2004), which he said vested the trial courts with wide discretion, "[n]ot just discretion, but wide discretion ... in determining the amount of court costs and counsel fees", noting that this Court stated that the trial court's decision will not be disturbed on appeal "unless it clearly appears that it has abused its discretion." (Pg. 42 at Rec. 774). As the trial court queried, "why would our Supreme Court in *Shafer* ... [vest us] with "wide discretion" . . . unless we were going to consider something other than just rubber stamping the Clerk's costs?". (Pg. 47 at Rec. 774).

The trial judge next discussed *State v. Myers*, 602 S.E.2d 796 (W.Va. 2004), where this Court, in affirming the assessment of jury costs against a criminal defendant, favorably cited a string of cases where various types of costs had been assessed in various contexts. In My*ers,* this Court looked at *King,* which had concluded that the trial court properly assessed jury costs against the plaintiff in a Rule 68 offer of judgment where the Rule merely refers to "costs". *Myers* at 803. Thus, it appears that this Court has acknowledged that Rule 68 encompasses various types of costs as recoverable and not simply "court" costs.

Also in *Myers*, this Court favorably cited to the Eastern District of Pennsylvania case of *General Refractories Co. v. Federal Ins. Co.*, No. CIV. A. 00-5508, 2001 WL 1580173 (E.D.Pa. Dec. 6, 2001) (unpublished opinion) for the premise that "costs" include such items as "docket fees, jury fees, photocopy costs, deposition costs, and the like." *Myers at 804.* (citations omitted). Thus, it appears that this Court has acknowledged that deposition costs may be recoverable

pursuant to Rule 68. This acknowledgement has allowed this trial court to discretely award deposition costs in this case.

Further, as the trial court noted, this Court in *Myers* cited *Weber v. Kessler*, 179 Cal.Rptr. 299, 301, 126 Cal.App.3d 1033, 1036 (1981), which found that "[c]osts include, but are not limited to, expert witness and jury fees, depositions, and expenses incurred in executing the judgment." *Myers* at 804. Thus, this Court has acknowledged that expert witness fees may be allowed as costs. This is consistent with the trial court's observation that the assessment of the types of costs being assessed under Rule 68 is evolving, and offers support for the trial court's discretionary award of expert fees in this case.

The Appellant contends that this Court has limited costs recoverable to trial costs taxable by the clerk of the court and costs specifically defined in statutes. This contention is misleading at best given the fact that neither expert witness costs nor videotape/deposition costs were at issue in the cases cited by Appellant. Appellant cites the cases of *Dodd v. Potomac Farm, Inc.,* 664 S.E.2d 184 (W.Va. 2008) and *Croft v. TBR, Inc.,* 664 S.E.2d 109 (W.Va. 2008), stating that they "limit discussion" of costs pursuant to Rule 68 to costs taxable by the circuit court and costs specifically defined by statute. The fact is that neither of these cases discussed the issue of expert fees; however, the court in *Dodd* noted that the "circuit court is vested with wide discretion in assessing costs of a proceeding", citing Syl. Pt. 3, *Shafer,* 215 W.Va. 169, 597 S.E.2d 302, and affirmed the circuit court's order regarding costs and statutory attorney's fees. *Dodd* at 193. Also, as discussed *supra* through the cases cited in *Myers,* costs other than simple "court" costs are acknowledged as allowable by this Court. Thus, this Court is not "rubber-stamping" simple awards of trial costs taxable by the clerk, but has provided direction for the trial courts' award of various types of costs, leaving it to the lower courts' discretion.

Appellant further suggests that the cases of *Miller v. Triplett,* 203 W.Va. 351, 507 S.E.2d 714 (1998) and *King v. Ferguson,* 198 W.Va. 307, 480 S.E.2d 516 (1996), limited the award of costs to court costs and jury costs respectively. Actually, expert fees were not an issue in those cases either. However, in *Miller,* where the trial court assessed *de minimus* costs to be split between the parties pursuant to two separate offers of judgment, this Court found again that the issue of costs was properly left to the discretion of the trial court and would not be disturbed on appeal unless the court abused its discretion. In *King,* this Court had no disagreement with the trial court assessing jury costs against the offeree who rejected an offer of judgment, stating that "a proper application of Rule 68(c) makes it mandatory for trial judges to impose upon plaintiffs costs incurred after a settlement offer wherein a verdict is less favorable than the settlement offer." *Id.* at 524. These cases further support the mandatory award of costs and the discretion used by the trial judge in assessing the various types of costs in the instant case.

Appellant next extrapolates from *Shafer* that unless there is a statute defining expert fees as costs, then expert fees should not be assessed against the offeree who receives a verdict less favorable than the offer of judgment. Appellate further contends that the trial court has discretion to determine only the "amount" of costs, but not the "type" of costs, suggesting that "court" costs are all that is allowable absent a statute. Appellant's theories are again flawed in light of this Court's favorable reference to *Weber,* supra, which allowed the recovery of expert fees and deposition costs. Further, this Court recognized in *King* that Rule 68 refers to "costs" and not simply court costs. Also, in *Meadows,* this Court favorably cited federal case law which spoke of Rule 68 "costs" as "costs of litigation". *Meadows v. Wal-Mart Stores, Inc.,* 530 S.E.2d 676, 684 (W.Va. 1999) citing *Mallory v. Eyrich,* 922 F.2d 173, 1277 (6th Cir. 1991). This further supports the discretion used by the trial judge in this case regarding the type of costs he allowed.

The trial judge here indicated that he is aware that judges in his and other jurisdictions are awarding costs in addition to routine jury and "court" costs, including expert fees, deposition and other items of costs, thus providing solid reasoning for his decision. For instance, he was aware of an order in which Judge Jennifer Bailey Walker in Kanawha County granted various costs pursuant to an offer of judgment. (See Order attached as Exhibit AA). A reading of the transcript from the hearing shows how thorough his review, analysis and consideration of all the factors were, prior to ruling on the issue of costs. Thus, when he assessed Appellant with Appellees' expert witness costs, videotape and deposition costs, and routine court costs, he was following the pronunciations of this Court and the trend in other jurisdictions in this State.

C. Federal case law offers support for the assessment of costs against Appellant.

Appellant contends that federal case law supports his theory that expert witness costs and videotape/deposition costs should not be assessed pursuant to Rule 68, claiming that 28 U.S.C.A 1920 is the ultimate limitation of costs absent specific federal or state statutory authority, further arguing that the standard witness fee allowed by West Virginia Code 59-1-16 should apply. Appellant cites the case of *Phillips v. Bartoo,* 161 F.R.D. 352 (N.D.Ill. 1995). In that case, a federal statute limited the amount of expert witness fees to $40. However, in *Sack v. Carnegie Mellon University,* 106 F.R.D. 561, (W.D.Pa. July 11, 1985), the United States District Court for the Western District of Pennsylvania "reviewed a number of cases where the costs of depositions and expert witness fees have been taxed as costs where said expenditures were necessary for the litigation." (citations omitted). The federal court went on to award the videotaping services fee of $400.00 and an expert witness fee of $500.00, as well as travel fees of the witnesses. Thus, there is support on the federal level to assess the type of costs which the trial court assessed here.

The *Sack* court did not award the cost of the deposition transcript, finding it was prepared for the convenience of counsel. In the instant case, however, both the videotape and the deposition transcript costs were necessary for the trial as the trial judge and counsel painstakingly reviewed the transcript in order to determine which portions of the videotaped testimony would be allowed at trial and which objections would be sustained or overruled. (See two letters dated August 7, 2007 and letter dated July 25, 2007, attached hereto as Exhibit BB). In fact, the redacted deposition transcript was then provided by Appellant's counsel to his videographer for preparation of an edited videotape which was shown at trial. Thus, here the transcript was not simply prepared for the convenience of counsel but was reviewed in detail by counsel and the trial court for trial. Further, had Appellant's expert witness attended trial in person, Appellees would not have incurred the cost of the transcript and videotape. Thus, there is federal court support for the trial court's assessing costs against the Appellant for the expert witness and the videotape and deposition costs.

D. It is mandatory for the trial court to assess costs against the Appellant.

Appellant argues not only that the trial court committed reversible error by assessing Appellees' expert witness costs and videotape and deposition costs associated with his own expert's deposition, but that it was reversible error to assess *any* costs against him, including court costs. Appellant tries to sway this Court by complaining that he paid for his own medical expenses but that it was the defendants' insurance company which actually paid the verdict. Frankly, Appellees are not sure whether or not Appellant had medical insurance; thus, they cannot comment on who actually paid his medical expenses or what the amount of those expenses actually were. However, this information is not relevant for this Court's consideration. Obviously the Appellant thinks the insurance company should bear the burden of costs, claiming it is "simply unjust" for the Appellant to be left with nothing even though the Appellees stipulated to negligence. Appellant's

assertion is inconsistent with the case law of this Court. As the Appellees explained, *supra*, "a proper application of Rule 68(c) makes it mandatory for trial judges to impose upon plaintiffs costs incurred after a settlement offer wherein a verdict is less favorable than the settlement offer." *King* at 524. Thus, it was mandatory for the trial court to assess costs against the Appellant

This Court in *King* was not impressed with plaintiff's contention, like Appellant's here, that imposing costs "would send a chilling message to citizens injured and seeking legal redress." *King* at 524. "Contrary to what the plaintiff urges, other jurisdictions have statutes or court rules that are similar to Rule 68". *King* at 524. (citations omitted). In reaching its finding in *King,* this Court looked at the case of *Gaston v. Tillery,* 900 P.2d 1012 (Okla. App. 1995) which was presented with the same argument that Appellant makes, i.e. that requiring a plaintiff to pay costs "would be an unjust punishment for exercising [his] right to a jury trial." *Gaston* at 1013. The *Gaston* Court held that the trial court had no discretion to deny costs to defendant where the plaintiff recovered less than the offer of judgment, stating: "We are not impressed. The law does not 'punish' [him] for choosing trial. [H]e is 'punished', if at all, for overvaluing [his] claim." *Id.* Here, Appellant Carper is not being punished for choosing to go to trial rather than to settle. He simply overvalued his claim.

In a further attempt to sway this Court's decision, Appellant complains that he suffered severe injuries and lost the ability to work for several months. In reality, though, he claimed a soft tissue injury for which he quit his high-paying, $17,000.00-per-month job without any doctor suggesting that he do so, and "took a period of time off to try to get [his] back under control and to look for a job that would be close to home that would substantiate [his] debtload that [he] created from when [he was] making those big wages." (See pgs. 7-8 of Exhibit F to Response to Petition for Appeal). He claims he was punished for choosing to go to trial and that afterwards he was left

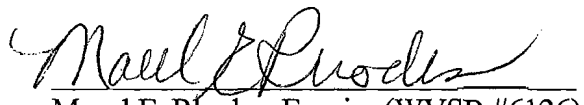
with nothing and "actually owes money." (Appellant's Br. at 23). During the litigation, the Appellant attended two mediations but was not satisfied with the offers made in either. Thus, he chose both the risks and the **costs of litigation** when he decided to proceed further. As the *Gaston* Court said, the Appellant is not punished for bringing his claim or for choosing to go to trial. However, had he more objectively valued his case in light of his expert testimony, none of which established that he was required to leave his job after the accident, and then claiming over $300,000.00 in lost wages, and had he acknowledged that a jury might not award him medical damages for treatment which he began nearly a year after the accident, then he may have more accurately valued his claim and the risks and costs of further litigation. Unfortunately for him, though, he chose not to accept the $35,000 offer of judgment and later rejected a $45,000 settlement offer made two days before trial began. He simply overvalued his claim in light of the evidence. He cannot now expect this Court to come to his rescue because he made the decision to proceed to trial rather than settle his case. Whether he proceeded to trial in "good faith" or "bad faith" is not relevant because the award of costs against the Appellant was mandatory under *King*.

In this case, the jury observed Appellant and heard all the evidence. Obviously they chose not to accept his wage loss claim and medical expenses claim when presented with contradictory evidence which they found more credible and persuasive. The jury was able to see clearly. And Judge Silver, who presided over the courtroom, observed and heard the plaintiff testify, heard all the other evidence and arguments, properly used the wide discretion with which he was vested by this Court, and then later determined the costs which should be assessed pursuant to Rule 68. In reading the transcript attached to the trial court's Order, one readily sees and understands the great deliberation which Judge Silver exercised in discussing the issues of various costs and determining whether to allow or disallow each cost presented to him.

As this Court has expressed on numerous occasions and as Judge Silver noted several times in the hearing, the trial judge is vested with "wide discretion" in determining the amount of costs and his decision will not be disturbed unless this Court finds that he clearly abused his discretion. "'[I]n general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.'" *Shafer* at 310 (citations omitted). Here, the trial judge did not ignore any material factor which deserved significant weight. He assessed the proper factors and did not rely on any improper factors. Lastly, he made no serious mistake in weighing those factors. The record clearly demonstrates that Judge Silver did not abuse the wide discretion vested in him by this Court and the record would not support disturbing his ruling.

V. Conclusion

For the reasons set forth above, the Appellees Chad Watson and Burkhart's, Inc., respectfully request that this Honorable Court affirm the trial court's assessment of costs.



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CERTIFICATE OF SERIVCE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES** was served upon counsel of record this 12th day of May 2009, by prepaid overnight mail addressed as follows:

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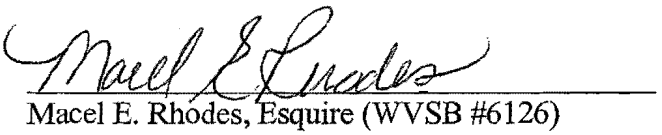

Macel E. Rhodes, Esquire (WVSB #6126)

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EXHIBITS

ON

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