No. 33504 *Robin L. Croft, Jill A. Armitage and Brandy G. McCoy v. TBR, Inc., et al., and Erie Insurance Property & Casualty Company*

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OF WEST VIRGINIA

Starcher, J., concurring:

I am a firm believer that cases should be resolved upon their merits, on the facts and on the law. I despise attempts to tangle the legal process with hidden traps and procedural games of "gotcha!" All participants in the legal process – judges, lawyers and litigants – should constantly strive for simplicity and clarity, and strive to say what they mean and mean what they say.

The Legislature has made a clear statement of public policy that individuals who violate the West Virginia Human Rights Act must not only pay compensatory damages to their victim, but they must also the victim's attorney fees and costs. *See W.Va. Code*, 5-11-13(c) [1998]. The Legislature's policy is a recognition of the fact that, without a fee-and-cost-shifting provision, the Act's beneficial social purposes would often be left unfulfilled. Discriminatory conduct in violation of the Act does not always cause substantial financial harm, so lawyers working on a contingent fee could not financially afford to take up the cause of enforcing the Act on behalf of those directly harmed. Accordingly, requiring violators of the Act to also pay the victim's legal fees and costs therefore not only encourages lawyers to represent victims of discrimination, it also acts as a significant financial deterrent to those individuals who might otherwise ignore the Act.

When settling a lawsuit filed under the Act, this Court said quite clearly in *Shafer v. Kings Tire Service, Inc.*, 215 W.Va. 169, 176 n.8, 597 S.E.2d 302, 309 n.8 (2004) that unless a defendant's offer of judgment under Rule 68(a) explicitly provided that the amount of the offer included costs and attorney fees, then the circuit court should proceed to assess costs and attorney fees in addition to the amount stated in the offer of judgment.

In the instant case, the defendants made an offer of judgment under Rule 68(a) that vaguely offered to resolve "all claims which have been and/or could have been asserted by plaintiff[.]" The defendants, citing to several federal court cases that preceded our decision in *Shafer*[1], contend that the plaintiffs should have been aware that the defendants implicitly intended that the term "claim" meant that the defendants intended for their offer to include attorney fees and costs, contrary to this Court's holding in *Shafer*.

In other words, the defendants are arguing for a "gotcha" situation. The defendants are asserting that the plaintiffs walked at their own peril into a procedural minefield created by the defendants, and must now suffer the consequences. This is nonsense, and to have adopted this result would have subverted the intent of the Legislature.

The majority's opinion stands for a common sense interpretation of Rule 68 offers of judgment: when a party makes an offer of judgment, the party must say what their offer means with clarity and precision. In a Human Rights Act claim, if a defendant intends

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[1]*See, e.g., Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390 (7th Cir. 1999); *Pelkowski v. Highland Managed Care Group, Inc.*, 2002 WL 1836509 (7th Cir. Aug. 9, 2002 order); *Broadcast Music, Inc. v. Dano's Restaurant Systems, Inc.*, 902 F.Supp. 224 (M.D.Fla. 1995); *Blumel v. Mylander*, 165 F.R.D. 113 (M.D. Fla. 1996).

for an offer of judgment to resolve the plaintiff's compensatory damages *and* the plaintiff's claim for attorney fees and litigation expenses, then the offer must say so with specificity.

I respectfully concur with the majority's opinion.