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

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OF WEST VIRGINIA

Benjamin, Justice, dissenting:

The circuit court did not err in its determination that attorney fees and costs were included within the language of the offers of judgment at issue herein. As noted by the majority, the offers were made "for full satisfaction and dismissal of **all *claims* which have been and/or could have been asserted**" and each complaint specifically set forth a ***claim*** for attorneys' fees under W. Va. Code § 5-11-13 (1998), the provision of the West Virginia Human Rights Act which authorizes the recovery of attorney fees and costs by a successful complainant. (Emphasis added). Implicit in the circuit court's order denying appellants' request for attorney fees and costs in addition to the amounts set forth in the offers of judgment is the *factual* determination that the term "claims" utilized in the offers of judgment referred to those claims set forth in the underlying complaints and litigated by the parties. Those claims *included* the requested attorney fees and costs. The circuit court is best positioned to determine what claims were actually pled and litigated by the parties as it is the circuit court with first hand knowledge of the litigation. Rather than recognize the circuit court's authority to make this factual determination and review the same for clear error, the majority frames this factual inquiry as a legal question in order to invoke a *de novo* standard of review, avoiding any form of deference to the circuit court's determination.

In reaching its result in this case, the majority sidesteps the holding of *Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 597 S.E.2d 302 (2004), as set forth in the syllabus, and relies instead upon contradictory language set forth in a footnote. In *State ex rel. Medical Assurance v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003), this Court recognized:

> that ". . . [n]ew points of law . . . will be articulated through syllabus points as required by our state constitution." Syllabus Point 2, in part, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001). If this Court were to create a new exception to attorney client privilege, it would do so in a syllabus point and not in a footnote. Second, language in a footnote generally should be considered obiter dicta which, by definition, is language "unnecessary to the decision in the case and therefore not precedential." *Black's Law Dictionary* 1100 (7th ed. 1999).

Although *Recht* involved an exception to the attorney client privilege, the principle is the same whenever the Court issues a new rule of law. New rules of law are announced in syllabus points, not in footnotes. The majority avoids this principle by finding that footnote 8 in *Shafer* was necessary to address that appellee's argument regarding the inclusion of attorney fees in the offer of judgment at issue therein.[1] However, to read footnote 8 in *Shafer*

[1]I would note that in *Shafer* a motion for attorney fees' was not made until after acceptance of the offer of judgment and there is no indication in the opinion that the *Shafer* complaint contained an express claim for attorney fees as did the complaints herein. Additionally, the request for attorney fees in *Shafer* was challenged on the basis that attorney fees could not be awarded absent a finding of discriminatory practices and that acceptance of an offer of judgment precluded such a finding. *Shafer*, 215 W. Va. at 172, 597 S.E.2d at 305.

as setting forth a requirement that offers of judgment served in cases under the Human Rights Act must explicitly utilize the term "attorney fees" in order to include attorney fees in the offer renders syllabus point 5 of *Shaffer* meaningless.

Syllabus point 5 of *Shaffer* holds "[b]ecause the Human Rights Act defines costs as including attorneys fees, the costs included in a Rule 68 offer of judgment includes attorney's fees." In *Shafer* the Court explained that offers of judgment necessarily include costs incurred regardless of whether the same are specifically noted in the offer itself. As explained by this Court in *Shaffer*:

> [b]y its terms, an offer of judgment must include not only an offer of judgment on the claim raised by the plaintiff, but such offer must also include "costs then accrued." *See* Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, *Litigation Handbook* on West Virginia Rules of Civil Procedure, § 68(a), p. 1046 (2002) ("An offer under Rule 68(a) does not have to separately recite the amount the defendant is offering in settlement of the substantive claim and the amount being offered to cover costs. The critical issue concerning the contents of the offer, 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."). While the term "costs" usually does not include attorney's fees, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1982), if an applicable statute defines costs to include attorney's fees, then attorney's fees may be recovered as costs. *See generally* 20 Am.Jur.2d *Costs* § 57 (1995). The Human Rights Act's cost-shifting section defines "costs" as "including reasonable attorney fees[.]"

Shaffer, 215 W. Va. at 173, 597 S.E.2d at 306. Thus, if "costs" are included in any offer of judgment and, pursuant to syllabus point 5, attorneys fees are considered "costs" in Human Rights Act cases, there is no need to explicitly repeat that attorney fees are included in any offer of judgment if syllabus point 5 is to have meaning.

In order to avoid negating the meaning of syllabus point 5, another explanation for the inclusion of footnote 8 in *Shafer* is to clarify that where attorney fees are not included in statutory definition of costs which are recoverable, then any offer of judgment must explicitly include reference to attorney fees if the same are to be included in the offer of judgment. This alternative explanation is further supported by reference to syllabus point 4 of *Shafer*. In syllabus point 4, the Court held:

> [c]osts 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.

Thus, it is my belief that footnote 8's direction that an offer of judgment explicitly state that attorney fees are included therein is meant to clarify the procedure where the enabling statute defines attorney fees as being in addition to, or separate and distinct from, costs. Because the Human Rights Act defines costs as including attorney fees and this Court specifically

recognized, in syllabus point 5 of *Shafer*, that attorney fees are included as costs in a Rule 68 offer of judgment made in Human Rights Act cases, the circuit court did not err in finding that attorneys' fees were included in the underlying offers of judgment and in denying appellants' motion for additional fees in this Human Rights Act case. Accordingly, I respectfully dissent from the majority decision herein.