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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARGARET GODWIN, a single woman, for herself and on behalf of her minor child, NETANYA ROYCE, Plaintiffs/Appellants/Cross-Appellees, v. JOSE GUY BENAVIDEZ, Defendant/Appellee/Cross-Appellant.	2 CA-CV 2009-0021 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20072687

Honorable John F. Kelly, Judge

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

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B R A M M E R, Acting Presiding Judge.

¶1 Appellants/cross-appellees Margaret Godwin and Netanya Royce appeal the trial court's judgment granting appellee/cross-appellant Jose Benavidez sanctions pursuant to Rule 68, Ariz. R. Civ. P. Benavidez cross-appeals the judgment in his favor granting Rule 68 sanctions and those entered in favor of Godwin and Netanya, arguing the judgments in favor of Godwin and Netanya were entered for incorrect amounts and the three judgments should have been consolidated into a single judgment in his favor. We affirm in part, vacate in part, and remand the case to the trial court.

Factual and Procedural Background

¶2 In May 2007, Godwin and her children Netanya and Jaden Royce sued Jose Benavidez for injuries they sustained in a traffic accident.[1] In June 2007, Benavidez made offers of judgment to Godwin, Netanya, and Jaden for costs accrued to date and, respectively, for $2,500, $1,000, and $500 in damages. The offers were not accepted. After a three-day jury trial, the jury awarded damages of $1,300 to Godwin, $950 to Netanya, and $880 to Jaden.

¶3 The trial court ordered that, as the prevailing parties, Godwin, Netanya, and Jaden were entitled to their costs pursuant to A.R.S. § 12-341.[2] The court then granted

[1]Godwin and her children also sued Alberto Young, but the trial court dismissed that claim pursuant to a stipulation.

[2]The trial court entered judgment in favor of Jaden for $880. Nothing in the record explains why Jaden was not awarded costs. That judgment, however, is not at issue in this appeal.

Benavidez's motion for sanctions under Rule 68. It entered judgments in favor of Godwin individually for $2,500 and for $1,000 as Netanya's mother.[3] The court entered a separate judgment against Godwin in favor of Benavidez for $15,818.32—$18,038.05 for Rule 68 sanctions less Godwin's and Netanya's costs of $2,219.73. This appeal and cross-appeal followed.

Discussion

Appeal

¶4 Rule 68 was amended effective January 1, 2008, after Benavidez made his offers of judgment but before the judgments were entered in this case. The parties do not discuss which version of Rule 68 should apply here, but apparently agree we should apply the version of the rule in effect at the time Benavidez made the offers of judgment to Godwin and Netanya. And, although the trial court did not specify which version of the rule it applied in reaching its decision, the parties cited the older version of the Rule in their motions filed below. Nonetheless, we must determine which version of the Rule applies. *Cf. Drozda v. McComas*, 181 Ariz. 82, 86 n.3, 887 P.2d 612, 616 n.3 (App. 1994) ("'Parties cannot stipulate as to the law applicable to a given state of facts and bind the court.'"), *quoting Word v. Motorola, Inc.*, 135 Ariz. 517, 520, 662 P.2d 1024, 1027 (1983). The Rules of Civil Procedure govern all "further actions or proceedings . . . pending" when the rule

[3]These amounts are inconsistent with the amounts awarded by the jury for damages. As we discuss in ¶ 16 *infra*, we remand the case to the trial court for resolution of this discrepancy.

takes effect, except when application of the rule "would not be feasible or would work injustice, in which event the former procedure applies." Ariz. R. Civ. P. 81. "Thus, unless the application of the amended rule is not feasible or would work an injustice, it has retroactive application to a pending action." *Drozda*, 181 Ariz. at 86, 887 P.2d at 616.

¶5 The revisions to Rule 68 that became effective in 2008 changed the required content of an offer, the consequences of either accepting or rejecting the offer, and some of the relevant time limits. *See* Ariz. R. Civ. P. 68(b), (c), (d), (g), (h). As here, the sanctions awarded under Rule 68 may greatly exceed any damages obtained at trial. The offers here had already been made and rejected before the amended rule took effect, and the parties therefore made their decisions based on the language of the previous rule. *See Drozda*, 181 Ariz. at 86, 887 P.2d at 616 (applying previous version of Rule 68 because "litigant who considers an offer of judgment engages in a risk-benefit calculation"). Thus, given the substantial alterations made by the 2008 amendments to Rule 68, we conclude that whether sanctions were awarded properly in this case must be governed by the previous version of Rule 68.

¶6 Under that version of Rule 68(a), a party could make "an offer to allow judgment to be entered in the action in accordance with the terms and conditions specified in the offer, plus costs then accrued." If the offer was rejected and the "judgment finally obtained is equal to, or more favorable to the offeror than, the offer, the offeree must pay, as a sanction, those reasonable expert witness fees and double the taxable costs of the offeror."

Ariz. R. Civ. P. 68(d). Godwin and Netanya argue the trial court erred in awarding Benavidez Rule 68 sanctions, reasoning the term "judgment" in Rule 68 required the court to compare the amount of the entire judgment—including taxable costs awarded pursuant to A.R.S. § 12-341—not merely the amount of the jury verdict, to the amount Benavidez offered. If Godwin and Netanya are correct and their taxable costs are considered part of the judgment in determining whether Rule 68 sanctions are warranted, and assuming they have correctly allocated the total costs between them, then the judgments in their favor exceeded Benavidez's offers of judgment and the award of sanctions was erroneous.

¶7 We review de novo the trial court's award of sanctions based on its interpretation of a court rule. *See Vega v. Sullivan*, 199 Ariz. 504, ¶ 8, 19 P.3d 645, 648 (App. 2001). "In construing procedural rules promulgated by our supreme court, we employ the traditional tools of statutory construction." *Medders v. Conlogue*, 208 Ariz. 75, ¶ 9, 90 P.3d 1241, 1244 (App. 2004). We look first to the plain language of the rule. *See In re MH 2004-001987*, 211 Ariz. 255, ¶ 15, 120 P.3d 210, 213 (App. 2005). If the plain language is unambiguous, we need not employ other methods of construction. *See State v. Campoy*, 220 Ariz. 539, ¶ 11, 207 P.3d 792, 797 (App. 2009).

¶8 Godwin and Netanya's argument that the term "judgment" as used in Rule 68(d) necessarily includes any costs and attorney fees awarded is inconsistent with the language of the rule. At the time Benavidez made his offers of judgment, Rule 68(d) provided that:

> If the offer made included amounts for costs or attorneys' fees, an award of sanctions . . . shall only be made if the judgment finally obtained, *exclusive of any attorneys' fees or costs awarded and included therein*, is equal to, or more favorable to the offeror than, that portion of the offer stating the award to be made on the causes of action asserted.

(Emphasis added.) Thus, for the purpose of Rule 68, the judgment does not necessarily include costs or attorney fees. If Benavidez's offers of judgment included amounts for costs or attorney fees, the trial court was required to compare only the amount offered for damages to the amount of damages awarded to Godwin and Netanya without including costs or attorney fees in either sum.

¶9 Godwin and Netanya rely on *Vega*, in which this court discussed the meaning of the term "judgment" as used in former Rule 7(f) of the Uniform Rules of Procedure for Arbitration. *See* 199 Ariz. 504, ¶¶ 1, 10, 19 P.3d at 505, 507. Under that rule, if the judgment in a trial de novo held pursuant to an appeal of an arbitration award is not more favorable, by at least ten percent, to the appealing party than the arbitration award, the appellant must pay the appellee certain costs and reasonable attorney fees. *Id.* ¶ 5. We determined that, for the purpose of comparing the arbitration award and the judgment, the amount of the judgment included any costs assessed as part of that judgment and was not restricted to the jury verdict obtained in the trial de novo. *See id*. ¶¶ 10-12. As we pointed out in *Vega*, the arbitration rules did not "permit[] a portion of the judgment to be ignored for purposes of comparison to the arbitration award." *Id.* ¶ 11. As we discuss, however, Rule 68(d) specifically provides that attorney fees and costs included in a judgment should

not be considered for Rule 68 purposes when the offer of judgment included separate amounts for costs and attorney fees. Thus, given the plain language of Rule 68(d), *Vega*'s reasoning does not apply. For the same reason, we also find unavailing Godwin and Netanya's reliance on *Poole v. Miller*, 464 S.E.2d 409, 411-12 (N.C. 1995), in which the North Carolina Supreme Court determined that, under its version of Rule 68, the term "judgment" included any costs and attorney fees awarded. North Carolina's rule does not contain a provision similar to the one we analyze here. *See* N.C. Gen. Stat. Ann. § 1A-1, Rule 68; Ariz. R. Civ. P. 68(d).

¶10 Each of Benavidez's offers of judgment included an amount for damages "plus costs accrued to date." Godwin and Netanya assert, however, that Benavidez's offers of judgment did not include amounts for costs or attorney fees. Relying on a dictionary definition, they assert that an "'amount' is a number or a quantity," and reason that, because Benavidez's offers of judgment did not provide a "specific amount, in dollars and cents, offered as costs," the trial court was required to compare the total offer—including costs accrued as of the date of the offer—to the judgment, including the total costs awarded under § 12-341. We disagree. Benavidez offered costs in addition to the amount offered for damages. Nothing in the rule requires the offeror to specify an amount of costs in "dollars and cents." Moreover, Godwin and Netanya do not adequately explain how Benavidez as the offeror would have enough information to offer a specific amount in costs—only Godwin and Netanya as the offerees would know the amount of costs they had by then incurred. In

any event, even adopting Godwin and Netanya's proposed definition of an "amount," "costs accrued to date" is plainly a specific "quantity" sufficient for the offeree to assess the offer and decide whether to accept it.

¶11 Moreover, Godwin and Netanya's position is contrary to this court's decision in *Hales v. Humana of Ariz., Inc.*, 186 Ariz. 375, 923 P.2d 841 (App. 1996). There, the offer of judgment listed a specific sum and stated the "said sum is to include all taxable costs." *Id.* at 377, 923 P.2d at 843. On appeal, the offeror argued that, to determine whether Rule 68(d) sanctions were warranted, the trial court should have compared the damages awarded in the judgment, exclusive of costs and attorney fees awarded, to the entire amount offered. *Id.* Reasoning that Rule 68(d) "requires an 'apples to apples' comparison between the judgment and the offer," we rejected that argument, determining instead "the judgment, excluding any fees or costs, is to be measured against the portion of the offer representing damages." *Id.* at 378, 923 P.2d at 844. Because the offeror in *Hales* "expressly state[d] that the specified amount include[d] within it an unspecified amount for costs," the trial court did not err in subtracting costs accrued as of the date of the offer from the amount specified and comparing that result to the damage award. *Id.*

¶12 Adopting Godwin and Netanya's interpretation of Rule 68 would result in the sort of "'apples to oranges'" comparison of offer and judgment we rejected in *Hales*. *See id.* Thus, in considering whether an award of sanctions was warranted, the trial court correctly disregarded the costs awarded to Godwin and Netanya and instead compared the

amount of the verdicts to the amount offered for damages. Because the amount Bendavidez offered as damages exceeded the damages awarded by the jury to Godwin and Netanya, the court did not err in awarding Benavidez sanctions under former Rule 68(d).

Cross-Appeal

¶13 On cross-appeal, Benavidez first asserts the trial court erred in entering three separate judgments—one each in favor of Godwin and Netanya on their negligence claims against Benavidez, and a third awarding Benavidez Rule 68 sanctions—instead of a single judgment in favor of Benavidez. In support of his argument, Benavidez cites *Langerman Law Offices, P.A. v. Glen Eagles at the Princess Resort, LLC*, 220 Ariz. 252, 204 P.3d 1101 (App. 2009), and *Levy v. Alfaro*, 215 Ariz. 443, 160 P.3d 1201 (App. 2007). Insofar as Benavidez's argument raises a question of law, we review it de novo. *See City of Phoenix v. Johnson*, 220 Ariz. 189, ¶ 8, 204 P.3d 447, 449 (App. 2009).

¶14 *Langerman* arose out of a previous action in which the plaintiff had prevailed in a jury trial on its claim against the defendant but, because the jury had awarded the plaintiff less than the defendant had offered in settlement before trial, the trial court awarded the defendant Rule 68 sanctions. 220 Ariz. 252, ¶ 2, 204 P.3d at 1102. The court then entered a single judgment awarding the plaintiff damages and costs, and separately awarding the defendant Rule 68 sanctions. *Id.* Although the plaintiff owed the defendant more in sanctions than it had been awarded in damages and costs, the plaintiff's attorney—following the plaintiff's bankruptcy—later filed a complaint to collect those damages and costs. *Id.*

¶¶ 1, 3. On appeal following the superior court's dismissal of the attorney's complaint, Division One of this court concluded that, when a party is awarded Rule 68 sanctions in an action, the sanctions "should be applied to offset a verdict in favor of the party who rejected the settlement offer." *Id.* ¶ 15. Thus, when "the amount of those sanctions is greater than the jury's verdict plus the amount of taxable costs," the plaintiff's attorney cannot obtain a lien on the judgment, "because there is not a net judgment for the plaintiff to which it could attach." *Id.*

¶15 In *Levy*, Division One of this court merely noted in passing that, after "offset[ting] [a] judgment" in favor of the plaintiff by the defendant's award of Rule 68 sanctions, the trial court had entered a single, final judgment in favor of the defendant. 215 Ariz. 443, ¶ 4, 160 P.3d at 1202. Contrary to Benavidez's suggestion, neither *Levy* nor *Langerman* addresses what form judgments should take when one party prevails on the merits of its claim but the other is nonetheless awarded Rule 68 sanctions, let alone hold that a trial court must consolidate the judgments into a single document. And Benavidez cites, and we have found, no pertinent authority supporting his assertion. Rather, the language of Rule 68(d), which prescribes sanctions against a party who rejected a settlement offer if "the judgment finally obtained" is equally or more favorable to the offeror than the offer, appears to permit distinct judgments—one in favor of the offeree on the merits of the claim, and

another awarding sanctions to the offeror.[4] At oral argument, Benavidez urged us to adopt a rule requiring trial courts to enter a single judgment, based on "judicial economy." Any economy is at best speculative and dependent on the facts and circumstances of each case. Trial courts are typically in the best position to make those determinations. Accordingly, we cannot say the trial court erred in entering separate judgments in favor of Godwin, Netanya, and Benavidez.

¶16 Benavidez next argues the trial court erroneously entered judgment in favor of Godwin and Netanya for $2,500 and $1,000, respectively. Indeed, the jury only awarded Godwin $1,300 and Netanya $950 in damages. And, the trial court's judgments purported to include only those damages, as the court had already offset Benavidez's sanctions award by Godwin's and Netanya's costs in a separate judgment. As Benavidez notes, moreover, the amounts awarded in the judgments correspond to the offers of judgment Benavidez had made to Godwin and Netanya before trial. Because, as Godwin and Netanya conceded at oral argument, the trial court inadvertently entered judgment in their favor for incorrect amounts, we vacate those judgments and remand the matter to the trial court to enter judgments reflecting the jury awards.

[4]We find nothing in the rules, however, precluding a trial court from entering a single, consolidated judgment as the trial court did in *Levy*, and as Benavidez argued here is required.

Disposition

¶17 We affirm the trial court's judgment in favor of Benavidez against Godwin, vacate the judgments in favor of Godwin and Netanya, and remand the case to the trial court for further proceedings consistent with this decision.

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J. WILLIAM BRAMMER, JR., Acting Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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GARYE L. VÁSQUEZ, Judge