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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TAMULA S. BOGARD, a single woman,) No. 1 CA-CV 10-0542
)
Plaintiff/Appellant/) DEPARTMENT A
Cross-Appellee,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
CANNON & WENDT ELECTRIC CO.,) Rule 28, Arizona Rules of
INC., an Arizona corporation,) Civil Appellate Procedure)
)
Defendant/Appellee/)
Cross-Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2000-021785

The Honorable Robert Budoff, Judge (Ret'd)

AFFIRMED IN PART; VACATED AND REMANDED IN PART WITH INSTRUCTIONS

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J O H N S E N, Judge

¶1 Tamula S. Bogard appeals from the superior court's post-remand orders sanctioning her under Arizona Rule of Civil Procedure ("Rule") 68 and failing to award her additional attorney's fees. Cannon & Wendt Electric Company, Inc. ("C&W") cross-appeals the superior court's refusal to reduce Bogard's fee award in light of this court's previous opinion reducing Bogard's damages. We affirm the orders from which Bogard appeals but vacate and remand the order denying C&W's motion to modify Bogard's fee award.

FACTS AND PROCEDURAL BACKGROUND

¶2 This is Bogard's third appeal in her case against C&W, her former employer. *See Bogard v. Cannon & Wendt Electric Co.*, 1 CA-CV 04-0489 (Ariz. App. Mar. 24, 2005) (mem. decision); *Bogard v. Cannon & Wendt Electric Co.*, 221 Ariz. 325, 212 P.3d 17 (App. 2009).

¶3 Bogard filed a complaint on December 8, 2000 alleging gender discrimination and retaliation in violation of federal and state law. She sought damages for lost wages and mental pain and suffering, punitive damages and attorney's fees and costs. On April 16, 2001, C&W served an offer of judgment pursuant to Rule 68 in the amount of \$5,000 (the "Offer"). On a line denominated "Attorney fee award" was written "none." Bogard did not accept the Offer.

¶14 C&W successfully moved for summary judgment. Bogard appealed, and this court reversed and remanded for further proceedings. The case went to trial, and the jury returned a verdict in favor of Bogard, awarding her \$395,000 in compensatory damages and \$10,000 in lost earnings.¹ The superior court subsequently reduced the compensatory damage award to \$300,000 pursuant to 42 U.S.C. § 1981a(b)(3) (2000) and awarded Bogard her attorney's fees in the amount of \$221,075.

¶15 C&W appealed, and this court vacated the portion of the judgment awarding Bogard damages for mental pain and suffering and modified her lost wages award to \$3,539.59. C&W then moved for reconsideration. It argued the reduction in Bogard's damage award required that C&W be awarded double costs pursuant to Rule 68 and also argued that the attorney's fees award in Bogard's favor was no longer supportable. C&W argued Bogard's fee award should be reconsidered, citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and asserted that she was not entitled to recover any fees incurred after the Offer. This court granted C&W's motion and remanded to the superior court to consider the issues the motion raised. After briefing and argument, the superior court denied C&W's motion to modify

¹ C&W prevailed on its motion for a directed verdict on Bogard's punitive damage claim.

Bogard's fee award but concluded C&W was entitled under Rule 68 to \$91,352.70, double the costs it incurred after the Offer.

¶16 We have jurisdiction over the appeal and cross-appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. Bogard's Appeal.

1. Rule 68 sanctions.

¶17 We review *de novo* a superior court's imposition of Rule 68 sanctions. *Greenwald v. Ford Motor Co.*, 196 Ariz. 123, 124, ¶ 4, 993 P.2d 1087, 1088 (App. 1999).

¶18 Rule 68 generally permits a party to offer entry of judgment in a certain amount. Ariz. R. Civ. P. 68(a). If the offeree does not accept and the judgment subsequently entered is equal to or more favorable to the offeror, the offeree must pay a sanction of double the costs the offeror incurs after the offer. Ariz. R. Civ. P. 68(g). Specifically, the 2001 version of Rule 68 provided, in relevant part:

If an award of attorneys' fees has been sought in the action, any offer made pursuant to this Rule shall set forth separately, as a specific sum, (i) the amount of any monetary award to be made on the causes of action asserted, and (ii) the amount of attorneys' fees to be awarded if the offer is accepted.

* * *

If the offer made included amounts for costs or attorneys' fees, an award of sanctions under this Rule 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.

Ariz. R. Civ. P. 68(c)(1), (d) (2001) (emphasis added).

Further, the notes to Rule 68's 1992 amendments instruct:

To insure comparability, in cases where attorneys' fees are sought, in determining whether an award under Rule 68 is warranted, the court should exclude attorneys' fees from the comparison, and compare the result obtained on the underlying claims with that portion of the offer stating the amount that will be accepted with respect to those claims.

Ariz. R. Civ. P. 68 state bar committee's note to 1992 amends.

¶19 Bogard first argues she was not subject to Rule 68 sanctions because she was awarded attorney's fees in an amount much greater than the \$5,000 Offer. We disagree. The Rule and the note make clear that, as the note provides, "in determining whether an award under Rule 68 is warranted, the court should exclude attorneys' fees from the comparison, and compare the result obtained on the underlying claims with that portion of the offer stating the amount that will be accepted" on the claims. *Id.* The superior court properly did not include Bogard's fee award in determining that the amount of the

judgment she finally obtained was less than the Offer's \$5,000 amount of judgment.

¶10 Bogard next argues that the Offer was "not enforceable" because it excluded attorney's fees. She argues that under *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981), an offer of judgment in a Title VII case that expressly excludes attorney's fees is unreasonable and therefore unenforceable.² But Bogard relies on Justice Powell's concurrence in that case, while the majority opinion noted the lower court unnecessarily had "read a reasonableness requirement into the Rule." *Delta Airlines, Inc.*, 450 U.S. at 355.

¶11 Finally, Bogard contends Rule 68 sanctions are not allowable because when prejudgment interest is added to her damage award of \$3,539.59, the resulting amount exceeds the \$5,000 Offer. She argues that the final judgment in her favor entered on June 11, 2010 provided for prejudgment interest since August 15, 2001, the date both parties agree the wage claim became liquidated. C&W's Offer, however, was made on April 16, 2001, four months prior to the date the wage claim became liquidated. If Bogard had accepted the Offer and judgment had been entered thereon, she would not have been entitled to prejudgment interest. Put differently, as of April 15, 2001, no

² Bogard's complaint alleged C&W had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e (2000) to 2000e-17 (2000).

prejudgment interest was due to her. Under these circumstances, a party may not avoid Rule 68 sanctions by virtue of the accrual of prejudgment interest after the date of the offer.

2. Attorney's fee award.

¶12 Bogard also argues the superior court erred in not awarding her the attorneys' fees she incurred on remand after this court's most recent decision. She did not request her fees, however, until after the superior court ruled on remand; her first request was contained in a motion to reconsider. "Generally, we do not consider arguments raised for the first time in a motion for reconsideration," *Ramsey v. Yavapai Family Advocacy Center*, 225 Ariz. 132, 137, ¶ 18, 235 P.3d 285, 290 (App. 2010), and under the circumstances we decline to do so here.

B. C&W's Cross-Appeal.

¶13 C&W argues the superior court erred in denying its motion to modify the \$221,075 fee award to Bogard. C&W contends Rule 68 and federal case law prohibit an award to Bogard of fees she incurred after the Offer because she ultimately obtained a judgment less than the \$5,000 contained in the Offer. C&W also challenges the reasonableness of the \$221,075 fee award in light of this court's reduction of Bogard's damage award from \$310,000 to \$3,539.59.

¶14 In denying C&W's motion, the superior court stated, "the Court of Appeals affirmed the Superior Court's award of attorneys' fees and did not remand the attorneys' fees award to the Superior Court for modification." Although this remark correctly summarizes our resolution of the attorney's fee issue in the second appeal, after we issued that decision we granted C&W's motion for partial reconsideration and directed the superior court to address this issue.

¶15 The superior court nevertheless went on to remark:

[T]his Court independently determines that the mere fact that the Court of Appeals reduced the amount of Plaintiff's judgment significantly, reduction does not, in and of itself, require a reduction in the amount of attorneys' fees previously awarded in the Superior Court and affirmed in the Court of Appeals as reasonable.

¶16 The court also rejected C&W's argument that Bogard was not entitled to fees incurred after the Offer:

The Court also finds, however, that since the offer of judgment does not offer any amount for attorneys' fees and since attorneys' fees were awarded, that Plaintiff prevailed on this issue and therefore Plaintiff's attorneys' fees are not limited as a result of the offer of judgment.

¶17 We review the court's order regarding attorney's fees for an abuse of discretion. *See Hensley*, 461 U.S. at 436-37.³

³ Although *Hensley* addressed the provision for attorney fee awards in 42 U.S.C. § 1988 (2000), the Court explained that the

¶18 We first address the court's conclusion that Bogard "prevailed" on attorney's fees because the offer of judgment did not include any amount for fees. As noted *supra* ¶ 8, Rule 68 required an offer of judgment to separately state the amount of any monetary award and the amount of attorney's fees to be awarded if the offer is accepted. Ariz. R. Civ. P. 68(c)(1) (2001). The Offer complied with the Rule by proposing \$5,000 for a compensatory damages award and "none" in attorney's fees. The superior court erred when it concluded that Bogard's fee award should not be reduced because, pursuant to Rule 68, Bogard "prevailed" on the "attorneys' fee issue" because the Offer contained a zero amount of awardable fees and Bogard was awarded \$221,000 in fees. Contrary to Bogard's argument in the superior court and on appeal, Rule 68 does not provide that the fees component in an offer be compared with the amount of fees awarded at the conclusion of the case for purposes of determining a "prevailing party" on fees.

¶19 By the same token, however, the language of the Rule does not support C&W's contention that, having declined an offer of judgment for an amount of compensatory damages greater than the judgment actually obtained, the Rule bars Bogard from receiving attorney's fees she incurred after the Offer was made.

same standards apply to Title VII cases. *Hensley*, 461 U.S. at 433, n.7.

The law allows the court to award "reasonable" attorney's fees to a civil rights plaintiff who prevails at trial. See, e.g., 42 U.S.C. § 1988 (2000). As counsel for C&W necessarily conceded during oral argument, while Rule 68 expressly requires the court to impose a sanction of double costs against a plaintiff who declines an offer and then fails to recover more at trial, it omits any reference to an additional mandatory attorney's fees sanction. Nor does C&W direct our attention to any case or other authority that requires a plaintiff in such a situation be deprived of attorney's fees to which he or she otherwise would be entitled in the exercise of the superior court's discretion.

¶20 C&W cites *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985), for the proposition that a plaintiff in a federal civil rights case who rejects an offer more favorable than recovered at trial may not receive attorney's fees incurred after the date of the offer. But given the difference between Federal Rule of Civil Procedure 68 and our own Rule 68, particularly in that C&W's Offer expressly contained nothing in the way of attorney's fees, that case is not dispositive.

¶21 Nevertheless, we conclude that under the circumstances, in re-assessing the attorney's fees award in Bogard's favor on remand, the superior court should have considered the Offer, Bogard's decision to decline the Offer,

and the relative portion of her overall attorney's fees that were incurred after the Offer. See *Hensley*, 461 U.S. at 433-34 (describing factors that bear on calculation of reasonable attorney's fees).

¶122 In the decision we issued just prior to C&W's motion for reconsideration, we affirmed the superior court's exercise of discretion in awarding fees in Bogard's favor. The issue of whether the fee award was reasonable in light of our decision to reduce the damages award was not before us. We understand from the superior court's minute entry that it considered that issue on remand and in its discretion concluded it would not modify the fee award based on the reduction in the damages award. But we cannot discern whether, in performing the analysis required by *Hensley*, 461 U.S. at 433-34, the court also considered whether and to what extent the circumstances surrounding the Offer should affect Bogard's fee award. See *Timmons v. City of Tucson*, 171 Ariz. 350, 357, 830 P.2d 871, 878 (App. 1991). Accordingly, we vacate the portion of the court's judgment awarding Bogard her attorney's fees and remand so that the superior court may perform that analysis. By this decision, we do not mean to imply any view of the outcome of that review.

CONCLUSION

¶123 We affirm the superior court's orders in all respects except that we vacate its denial of C&W's motion to modify the

fee award and the court's subsequent award of \$221,075 in attorney's fees to Bogard. Bogard requests her attorney's fees incurred on appeal pursuant to 42 U.S.C. § 2000e-5(k) (2000) and A.R.S. § 41-1481(J) (2004). We deny this request because she is not the prevailing party on appeal

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
JON W. THOMPSON, Judge