[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12556
Non-Argument Calendar

D.C. Docket No. 1:16-cv-04236-WMR

LANCE TOLAND,

Plaintiff-Appellant,

versus

THE PHOENIX INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(March 30, 2021)

Before MARTIN, BRANCH, and LAGOA, Circuit Judges.

PER CURIAM:

Lance Toland sued Phoenix Insurance Company ("Phoenix") for not including him as a payee on checks for insurance claims made out to its policyholder, restaurant group Here to Serve, Inc. ("H2S"). Toland, H2S's financial backer, asserted claims for conversion, negligence, constructive trust, attorneys' fees, and punitive damages. The district court ultimately granted summary judgment to Phoenix on all counts and Toland appealed that decision to this Court. While that appeal was pending, the district court granted Phoenix's motion for attorneys' fees due to Toland's rejection of a written settlement offer. Toland now challenges the district court's award of attorneys' fees, arguing that it was premature, that the hearing on the motion was defective, and that Phoenix's written settlement offer was defective. After careful review, we affirm the district court's decision.

I. BACKGROUND

This appeal arose from a dispute over insurance proceeds that Phoenix paid to its policy holder, H2S, without including Toland, the group's financial backer, as a payee on the checks. On May 30, 2019, Phoenix served on Toland a written settlement offer of $50,000 made pursuant to O.C.G.A. § 9-11-68.[1] Toland did not

[1] Toland initially filed suit in the Superior Court of Gwinnett County but Phoenix removed the suit to the United States District Court for the Northern District of Georgia, claiming diversity of citizenship with an amount in controversy greater than $75,000.

respond to the offer, so it was deemed rejected after 30 days. O.C.G.A. § 9-11-68(c).[2]

On February 12, 2020, the district court granted summary judgment to Phoenix on all Toland's claims. Then, on February 24, 2020, Phoenix moved for attorneys' fees and costs. After briefing by both parties, the district court scheduled a hearing on the attorneys' fees motion for March 31, 2020. Before the hearing, Toland appealed the district court's order granting summary judgment to Phoenix.

Before the district court's scheduled hearing on the attorneys' fees motion, the United States District Court for the Northern District of Georgia issued General Order 20-01, which explained that given the COVID-19 pandemic, individual judges could exercise their discretion to hold hearings in a safe manner. *See* General Order 20-01, United States District Court for the Northern District of

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[2] Any offer made under [O.C.G.A. § 9-11-68] shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree, but an offeror shall not be entitled to attorney's fees and costs under subsection (b) of this Code section to the extent an offer is not open for at least 30 days (unless it is rejected during that 30 day period). A counteroffer shall be deemed a rejection but may serve as an offer under this Code section if it is specifically denominated as an offer under [O.C.G.A. § 9-11-68]. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and costs under this Code section.

O.C.G.A. § 9-11-68(c).

Georgia, Mar. 16, 2020, http://www.gand.uscourts.gov/sites/default/files/NDGA_GeneralOrder20-01.pdf. Four days after the Northern District of Georgia issued this order, the district court cancelled the March 31 hearing and announced that it would rule on the motions based on the written pleadings, but later rescheduled the hearing to June 1, 2020, to be held via Zoom videoconference.

After the videoconference hearing, the district court granted Phoenix's motion for attorneys' fees and costs. It found that Phoenix's offer contained all the elements of a valid settlement offer under O.C.G.A. § 9-11-68(a),[3] and that

[3] O.C.G.A. § 9-11-68(a) provides:

> At any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this Code section, to settle a tort claim for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. Any offer under this Code section must:
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> (1) Be in writing and state that it is being made pursuant to this Code section;
> (2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;
> (3) Identify generally the claim or claims the proposal is attempting to resolve;
> (4) State with particularity any relevant conditions;
> (5) State the total amount of the proposal;
> (6) State with particularity the amount proposed to settle a claim for punitive damages, if any;
> (7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and
> (8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5.

because Toland rejected the offer by not responding to it and summary judgment was in Phoenix's favor on all claims, Phoenix was entitled to an award of attorneys' fees and costs pursuant to O.C.G.A. § 9-11-68(b)(1).[4] The district court also held that the motion for attorneys' fees and costs was timely despite Toland's pending appeal of the summary judgment order because the statutory text and this Court's precedent indicated that attorneys' fees motions could still be decided while an appeal was pending but could not be enforced until after the appeal's disposition. Next, the district court rejected Toland's argument that Phoenix's motion was procedurally defective because it did not delineate properly the amount of the settlement that covered punitive damages, noting that the settlement offer stated that $50,000 "[was] allocated to settle any claim by the Plaintiff Toland for punitive damages." The district court also rejected Toland's argument that the settlement offer was not made in good faith, concluding that because summary judgment was entered in favor of Phoenix on all claims, Phoenix's offer of $50,000 was reasonable to settle all claims and would have been a windfall to Toland. Finally, the district court rejected Toland's argument that Phoenix's motion was

[4] If a defendant makes an offer of settlement which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the defendant or on the defendant's behalf from the date of the rejection of the offer of settlement through the entry of judgment if the final judgment is one of no liability or the final judgment obtained by the plaintiff is less than 75 percent of such offer of settlement.

O.C.G.A. § 9-11-68(b)(1).

defective because it did not specify the amount of time billed for each claim. The district court explained that because all Toland's claims were premised on the same underlying allegation—that Phoenix did not include him as a payee on H2S's policy proceed checks—Phoenix did not need to specify which time was spent on which claim. Based on these conclusions, the district court granted Phoenix's motion but stayed enforcement pending the resolution of Toland's appeal of the summary judgment order.

II. STANDARD OF REVIEW

"We review a district court's award of attorneys' fees for abuse of discretion." *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1293 (11th Cir. 1999). The district court "has great latitude in formulating attorney's fees awards subject only to the necessity of explaining its reasoning so that we can undertake our review." *McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1184 (11th Cir. 1993) (quotation omitted). "[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment or applied the wrong legal standard." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (*en banc*).[5]

[5] Toland asserts that we should apply *de novo* review, and cites *Esfield v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1306 (11th Cir. 2002), and *Shaps v. Provident Life & Accident Ins. Co.*, 244 F.3d 876, 881 (11th Cir. 2001), as support**.** However, neither case applies *de novo* review to attorneys' fees awards. In *Esfield*, we applied *de novo* review to the question of

III. DISCUSSION

A. The attorneys' fees award was not premature.

Toland argues that the district court's award of attorneys' fees to Phoenix was premature because his appeal of the summary judgment order was still pending before this Court and O.C.G.A. § 9-11-68(d) forbids an award of attorneys' fees until all appeals are exhausted. O.C.G.A. § 9-11-68(d)(1) provides that:

> The [trial] court shall order the payment of attorney's fees and expenses of litigation upon receipt of proof that the judgment is one [in] which [the plaintiff rejected the defendant's settlement offer and the defendant obtained a final judgment of no liability or a final judgment in which plaintiff obtained a judgment 75% less than the amount of the settlement offer] or [the defendant rejected the plaintiff's settlement offer and the plaintiff recovers a final judgment greater than 125% of the settlement offer]; provided, however, that *if an appeal is taken from such judgment, the court shall order payment of such attorney's fees and expenses of litigation only upon remittitur affirming such judgment*.

(emphasis added). This section applies here because Toland rejected Phoenix's offer of settlement by not responding within 30 days and because Phoenix obtained a final judgment of no liability. The plain language prohibits a trial court from *ordering* payment until its judgment is affirmed but does not bar the parties from filing attorneys' fees motions or preclude the court from ruling on them while the

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whether state or federal *forum non conveniens* law applied in federal diversity cases. 289 F.3d at 1306. And in *Shaps*, we applied *de novo* review to a choice-of-law question. 244 F.3d at 881.

appeal from the final judgment is still pending. Thus, the district court did not abuse its discretion by deciding an attorneys' fees motion but ordering that payment would not be due until Toland's appeal was resolved.[6]

B. Toland was not denied a hearing.

Toland argues that the district court denied him the required hearing on Phoenix's motion for attorneys' fees because: (1) the hearing was conducted via videoconference, which deprived him of his right to be in the same location as the witnesses and documents;[7] and (2) the district court did not permit him to conduct discovery prior to the hearing.[8] Under Georgia law, "[a] hearing on a request for attorney fees is required 'so that the party opposing fees has an opportunity to confront and challenge whether the fees a party is entitled to under OCGA § 9-11-

[6] Toland cites three cases to support his position that the motion was premature, but none of them is controlling or on-point. Two of those cases, *Hall v. 84 Lumber Co*., No. CV409–057, 2012 WL 1058875, at *1 (S.D. Ga. Mar. 28, 2012) and *Wheatley v. Moe's Southwest Grill*, 580 F.Supp.2d 1324, 1325 (N.D. Ga. 2008), do not address the question of whether ruling on a motion for attorneys' fees under O.C.G.A. § 9-11-68 is premature if an appeal is pending. The third case, *Abdalla v. Atlanta Nephrology Referral Center*, 789 S.E.2d 288 (Ga. App. 2016), holds that an award of attorneys' fees was premature until the parties finished arbitrating a portion of their claims because "[u]ntil we know the outcome of the arbitration proceeding with a judgment certain, we do not have proof that [O.C.G.A. § 9-11-68(d)(1)] applies; thus any award at this stage is premature." *Id*. at 291. Because *Abdalla* dealt with arbitration proceedings, it does not affect the outcome here.

[7] Toland raised this issue before the district court during the hearing on the attorneys' fees and costs motion.

[8] Toland also argues that the hearing was insufficient because "the district court did not permit [Toland] to inquire in to [sic] various aspects necessary for a full examination of [Phoenix's] fee request." To the extent this is a separate argument from Toland's argument that he was denied discovery, he did not raise it below, and it is thus forfeited. *See Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1308 n.2 (11th Cir. 2007) ("We do not ordinarily consider arguments raised for the first time on appeal.") (citation omitted).

68 (b), are reasonable, and, if raised, to shoulder its burden to prove the absence of good faith.'" *Hillman v. Bord*, 820 S.E.2d 482, 489 (Ga. App. 2018) (quoting *Richardson v. Locklyn*, 793 S.E.2d 640, 644 (Ga. App. 2016)). In support of his argument that the hearing was deficient, Toland cites Federal Rule of Civil Procedure 43, which provides that:

> [a]t trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

The plain language of the rule gives the district court "discretion to allow live testimony by video for 'good cause in compelling circumstances and with appropriate safeguards.'" *Thomas v. Anderson*, 912 F.3d 971, 977 (7th Cir. 2018), *cert. denied*, 140 S. Ct. 533 (2019) (quotation omitted). Here, the district court cancelled the original, in-person hearing four days after the Northern District of Georgia issued an order giving judges permission to conduct hearings remotely due to the Covid-19 global pandemic. The district court's decision to hold the hearing via videoconference in light of the pandemic was within its discretion under Rule

43.[9] Toland has presented no evidence that the district court abused its discretion in making that decision.[10]

Toland also argues that the district court should have granted him discovery prior to the hearing. But he did not file a request for discovery, and the only time he mentioned the issue before the district court was in a single paragraph in his response brief in opposition to Phoenix's motion for attorneys' fees. The Northern District of Georgia's local rules require that "[e]very motion presented to the clerk for filing shall be accompanied by a memorandum of law which cites supporting authority." N.D. Ga. R. 7.1(A)(1). Toland did not file a motion or a supporting memorandum of law, and thus he did not properly request discovery. We also note that Toland does not explain in his response brief below or in his briefing before this Court how he was prejudiced by not receiving an opportunity to conduct

[9] Toland also cites *Ahmed v. Kifle*, 2015 WL 11182483 at *3 (N.D. Ga. June 16, 2015), where the district court held that the defendant had not established "good cause or compelling circumstances" under Rule 43 for his witnesses to testify telephonically or via videoconference. *Ahmed*, however, is inapposite. As an initial matter, we note that *Ahmed* is not binding on this Court. Further, the circumstances in *Ahmed* are distinguishable from those here. First, there was not an ongoing global pandemic in *Ahmed* that required courts to adjust hearing formats when possible to ensure the safety of court personnel and parties. Second, *Ahmed* deals with a district court finding no good cause, and thus it does not speak to our abuse-of-discretion review.

[10] We also note that at the hearing, the only witness Toland questioned was Phoenix's counsel, Karen Karabinos. And, after Toland cross-examined Karabinos, the district court asked him if there was "some question that you wanted to ask Ms. Karabinos that you couldn't ask because of Zoom?" and Toland answered "No." Toland also did not mention at the hearing that his access to the relevant documents was hampered by the format of the hearing. Thus, the record does not support Toland's assertion that he was "denied a full hearing" due to limited access to witnesses or documentary evidence.

discovery prior to the hearing on the motion for attorneys' fees. He also does not cite any authority that indicates that a district court is required to grant discovery before deciding a motion for attorneys' fees. For these reasons, Toland's argument that he was denied a proper hearing because he was not granted discovery prior to the hearing fails.

C. Neither Phoenix's offer of settlement nor its motion for attorneys' fees was procedurally defective.

Toland also argues that Phoenix's motion for attorneys' fees should have been denied because it was based on a procedurally defective settlement offer and the motion itself was procedurally defective. Specifically, he argues that the motion was based on a procedurally defective settlement offer because the offer (1) did not identify "with particularity" the amount proposed to settle Toland's punitive damages claim; and (2) was not made in good faith. Additionally, he argues that the motion for attorneys' fees was procedurally defective because it did not "delineate between non-recoverable claims as required by the statute and fails to provide information sufficient to determine if such amounts claims are 'reasonable.'" All three arguments are meritless.

Contrary to Toland's first assertion, the settlement offer stated that $50,000 "is allocated to settle any claim by [Toland] for punitive damages." Thus, Phoenix complied with O.C.G.A. 9-11-68(a)(6)'s requirement that settlement offers "state with particularity the amount proposed to settle a claim for punitive damages, if

any." *See also Chadwick v. Brazell*, 771 S.E.2d 75, 78–79 (Ga. App. 2015) (explaining that per the statute's plain language, if any settlement amount is attributable to a punitive-damages claim, the amount must be stated with particularity).[11]

Next, Toland argues that the settlement offer was not made in good faith because it was for $50,000, which Toland says was "approximately 5.8%" of his requested compensatory damages. Under Georgia law, a settlement offer is not made in good faith if, among other factors, it bears no reasonable relationship to the amount of damages or a realistic assessment of liability or there is evidence that the offeror lacked intent to settle the claim. *Richardson*, 793 S.E.2d at 643. Here, Toland has not identified any evidence that the offer was made without intent to settle, and the evidence in the record suggests that Phoenix's offer of $50,000 bore a reasonable relationship to the amount of damages, given Phoenix's assessment of liability at the time the offer was made. Phoenix argued throughout the proceedings that Toland's recovery, if any, was limited to the worth of the

[11] Toland argues that because $50,000 was offered to settle all claims, it cannot also be the specific amount articulated with particularity to settle his punitive damages claim. Essentially, Toland wants us to find that "with particularity" means we should require parties to subdivide the overall settlement amount into discrete amounts for each claim. The plain language of the statute does not require this outcome. In fact, it only requires that a settlement offer state two sums with particularity: the overall settlement offer and the amount attributable to punitive damages. O.C.G.A. § 9-11-68(a)(5); (8). Toland does not cite any case where a Georgia court has interpreted O.C.G.A. § 9-11-68(a)(8) to require a breakdown of the overall settlement amount into subtotals for each claim and we decline to do so here.

business personal property that was stolen or vandalized from the restaurants that were covered by the Phoenix insurance policy. Toland's testimony during discovery and financial documents presented to the district court during a hearing indicated that the value of the property stolen or vandalized that Toland could establish a security interest in was less than $1,000. Toland has not pointed to any evidence in his briefing to dispute that amount. Thus, the district court did not err in finding that Phoenix's offer to settle was made in good faith.

Finally, Toland argues that Phoenix's motion for attorneys' fees itself was defective because it did not explain which of Toland's claims Phoenix's attorneys were working on when they billed their time and his complaint contained both tort and non-tort claims.[12] He maintains that O.C.G.A. § 9-11-68 only permits recovery of fees for tort claims, and, therefore, Phoenix was required to specify what fees were associated with each claim.

Toland cites *Canton Plaza, Inc. v. Regions Bank, Inc.*, 749 S.E.2d 825, 826–27 (Ga. App. 2013) to support this proposition. But in that case, the Court of Appeals of Georgia found that the defendant should have separated out the time it spent pursuing its counterclaims from defending against plaintiffs' claims, not that

[12] Toland also raises two other issues with Phoenix's attorneys' timekeeping: he says they improperly included time entries for work performed by paralegals and time spent by attorneys performing duplicative work. Toland raises these arguments for the first time on appeal, so we will not consider them. *See Baldwin*, 480 F.3d at 1308 n.2 ("We do not ordinarily consider arguments raised for the first time on appeal.") (citation omitted).

the defendant should have separated out the time it spent defending against plaintiffs' tort claim and their breach-of-contract claim. *Id*. at 827–28. In fact, the court found that the defendant was not required to separate out time billed on defending against the plaintiffs' tort claims versus the non-tort claims because the claims arose from the same events and counsel was "required to perform the same tasks to prepare and present its defense at trial, irrespective of the specific claims asserted by the plaintiffs." *Id*. at 827. The same rationale applies here. Toland's claims were all based on the same underlying allegations, which meant that Phoenix's attorneys had to perform the same tasks to defend against all the claims at trial. Thus, Toland's argument that Phoenix's attorneys' fees motion was procedurally defective because it failed delineate what work was performed on specific claims is also without merit.

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For these reasons, we affirm.

AFFIRMED.