FILED
United States Court of Appeals
Tenth Circuit

January 18, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BILLY HAMILTON,

Plaintiff - Appellant,

v.

NORTHFIELD INSURANCE COMPANY,

Defendant - Appellee.

No. 17-7049
(D.C. No. 6:16-CV-00519-RAW)
(E.D. Okla.)

ORDER CERTIFYING QUESTIONS TO OKLAHOMA SUPREME COURT*

Before **TYMKOVICH**, Chief Judge, **McKAY**, and **CARSON**, Circuit Judges.

This diversity case involves an insurance policy Billy Hamilton purchased from Northfield Insurance Company in March 2015. Although multiple issues were raised in Hamilton's appeal and Northfield's cross-appeal, the sole issue for which we seek certification is the proper determination of prevailing party status for purposes of awarding costs and attorney fees under Okla. Stat. tit. 36, § 3629(B).

Because the disposition of this appeal turns on important and unsettled questions of Oklahoma law, we respectfully request the Oklahoma Supreme Court exercise its discretion to accept the following certified questions in accordance with Tenth Circuit

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* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

Rule 27.4 and Oklahoma's Revised Uniform Certification of Questions of Law Act, Okla. Stat. tit. 20, § 1601 et seq:

In determining which is the prevailing party under Okla. Stat. tit. 36, § 3629(B), should a court consider settlement offers made by the insurer outside the sixty- (formerly, ninety-) day window for making such offers pursuant to the statute?

In determining which is the prevailing party under Okla. Stat. tit. 36, § 3629(B), should a court add to the verdict costs and attorney fees incurred up until the offer of settlement for comparison with a settlement offer that contemplated costs and fees?

I.

Mr. Hamilton filed a claim with Northfield in December 2015 regarding the leaking roof of a commercial building he owned. Northfield denied Mr. Hamilton's claim in February 2016 and again in April 2016. Mr. Hamilton then filed suit against Northfield in November 2016.

In June 2017, Mr. Hamilton's attorney sent Northfield's attorneys an email including a revised draft pretrial order. In that communication, Mr. Hamilton's counsel asked Northfield's attorneys to send him "a serious settlement offer" the following week, noting that he had "almost $12k in hard costs invested in this case thus far" and was conveying that information "because that figure impacts how much of any settlement Mr. Hamilton would receive." Counsel for Northfield responded that the insurance company was "willing to offer $45,000 to settle this case," observing that they "believe[d] this [wa]s a fair offer as it [wa]s more than three times the actual damages in this case." Northfield's counsel also stated, "Based upon your out of pocket litigation expenses, this

settlement amount will allow you to recover these expenses along with some fees and should reimburse Mr. Hamilton for the entire amount of his repair costs."

Mr. Hamilton rejected Northfield's settlement offer, and the case proceeded to trial, resulting in a $10,652 jury verdict, the maximum amount of damages the judge instructed the jury it could award. Mr. Hamilton subsequently filed motions for attorney fees and statutory interest pursuant to § 3629(B). Northfield responded that Mr. Hamilton was not the prevailing party under the statute given that he had recovered less than the settlement offer. The district court agreed with Northfield, rejecting Mr. Hamilton's arguments for adding attorney fees to the verdict when determining the prevailing party. Mr. Hamilton appealed.

On appeal before this court, Mr. Hamilton asserted that, "if an offer contemplates a plaintiff's costs and fees[,] then the costs and fees incurred by the plaintiff up to the time of the offer should be included in deciding who the prevailing party is." The panel rejected Mr. Hamilton's argument, prompting him to file a petition for rehearing en banc and request to certify the question to the Oklahoma Supreme Court. The Oklahoma Association for Justice filed an amicus brief contending that Northfield's June 2017 settlement offer was not an offer of settlement within the context of § 3629(B). In light of this argument, which neither of the parties nor the district court had raised or addressed, we granted panel rehearing sua sponte and decided to certify both questions to the Oklahoma Supreme Court.

II.

Okla. Stat. tit. 36, § 3629(B) states, "It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within sixty (60) days of receipt of that proof of loss."[1] Section 3629(B) further provides that "costs and attorney fees shall be allowable to the prevailing party," which "is the insurer in those cases where judgment does not exceed written offer of settlement." "In all other judgments the insured shall be the prevailing party." *Id.*

In *Shinault v. Mid-Century Insurance Co.*, 654 P.2d 618, 619 (Okla. 1982), the Oklahoma Supreme Court considered whether "the defendant should be estopped from denying liability as a result of defendant's failure to respond to the plaintiff's Proof of Loss within ninety days." The court rejected this argument, instead agreeing with the defendant "that a lack of response within the ninety day period after receipt of the Proof of Loss is simply a waiver of the insurer's chance to receive attorney fees" under § 3629(B). *Id.* The court stated:

> The insurer is the prevailing party only when the judgment is less than any settlement offer that was tendered to the insured, or when the insure[r] rejects the claim and no judgment is awarded. The insured, on the other hand, is the prevailing party when the judgment is more than any settlement offer that was made, or when the insured receives a judgment when the insurer has rejected the claim.

Id.

[1] Prior to November 2018, the statute provided for a ninety-day window instead of sixty days, but otherwise the statute's text remains unchanged.

Subsequently, in *Oulds v. Principal Mutual Life Insurance Co.*, 6 F.3d 1431, 1445 (10th Cir. 1993), this court was asked to determine whether the plaintiff was the prevailing party under § 3629(B) where, outside the ninety-day period provided in the statute, the insurer had offered "to reinstate [plaintiff's] health insurance coverage and to pay all her health-related expenses currently pending from her effective date of coverage." (alteration in original). The court concluded that "[t]he *Shinault* court's reference to any settlement offer, and not to those made only during the ninety-day period," meant that the "insurer's failure to make an offer within ninety days, while acting to deprive the insurer of a chance to claim fees, does not make it impossible for the insurer to protect itself from a fee claim by the insured." *Id.* at 1445-46. Rather, "[t]he insurer can defend against potential liability for the insured's attorneys' fees by making an offer of judgment which turns out to be greater than the judgment actually obtained by the insured," even if the offer is made outside the ninety-day window. *Id.*

The year after *Oulds* was decided, the Oklahoma Court of Appeals cited both cases: "*Shinault* (and, by derivation, *Oulds*) . . . stand[] for the proposition that a plaintiff's status as 'prevailing party' under [§ 3629(B)] must be determined by comparing the plaintiff's ultimate recovery to each settlement offer made by an insurer, even those offers which are made beyond the ninety-day period . . . ." *Shadoan v. Liberty Mut. Fire Ins. Co.*, 894 P.2d 1140, 1144 (Okla. Civ. App. 1994). Ten years later, however, the Oklahoma Supreme Court suggested in a single sentence of dicta that the interpretation of § 3629(B) advanced in *Oulds* may have been incorrect. The court stated, "[Section] 3629(B) provides for prevailing party attorney fees where an insurer fails to

submit an offer of settlement or rejection of the claim within 90 days after proof of loss and where judgment is entered." *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 94 P.3d 25, 28 (Okla. 2004). This statement implies that an insurer that does not make an offer of settlement within the ninety-day period cannot, as *Oulds* concluded, guard itself against paying attorney fees by making a settlement offer on the eve of trial—the concern Mr. Hamilton has consistently raised throughout his appeal.

The other, related, issue Mr. Hamilton's appeal raised is whether a settlement offer that contemplates costs and attorney fees should be compared to the amount of the verdict alone or whether costs and attorney fees should be added to the verdict for comparison. In *Carson v. Specialized Concrete, Inc.*, 801 P.2d 691, 692 (Okla. 1990), the Oklahoma Supreme Court addressed "whether, under [Okla. Stat. tit. 12, § 940], the trial court must consider the amount of the costs and attorney fees when determining if a jury verdict is lesser or greater than the amount of an offer which includes costs and attorney fees." The court concluded that to compare an offer that included costs and attorney fees with the judgment alone would "thwart the legislative intent of section 940." *Id.* at 693.

The plaintiff in *Oulds* cited to *Carson* in support of her argument that "her recovery by way of the judgment exceeds the amount of the settlement offer when attorneys' fees, costs, and interest are added to the judgment." 6 F.3d at 1446. Prior to rejecting her argument "[b]ecause the settlement offer did not include her costs and fees," the *Oulds* court stated that *Carson*, "construing a statute similar to Section 3629, held that if an offer of settlement includes costs and fees, the trial court must calculate the amount of costs and fees incurred by the plaintiff up to the time of the offer in deciding who has

prevailed." *Id.* A footnote in another Tenth Circuit decision suggests that the district court had added prejudgment interest and attorney fees to the verdict when determining the prevailing party under § 3629(B), but even that amount remained below the settlement offer the plaintiff had rejected. *Driver Music Co., Inc. v. Commercial Union Ins. Cos.*, 94 F.3d 1428, 1432 & n.2 (10th Cir. 1996).

The panel decision in this case rejected Mr. Hamilton's argument that his costs and attorney fees should be added to the verdict for comparison with Northfield's settlement offer. In doing so, we declined to follow the *Oulds* dicta and distinguished *Carson* on the basis that § 940 is an offer-of-judgment statute whereas § 3629 is an offer-of-settlement statute. Specifically, under an offer-of-judgment statute, a plaintiff who accepts an offer that does not include costs and attorney fees may then use the judgment entered to petition the court for those items. No judgment is entered, however, when a settlement offer is accepted. Thus, whereas it is crucial for defendants to specify whether their offer of judgment contemplates costs and fees, the *Carson* rule could be easily avoided for offers of settlement by defendants simply not stating that the offer includes those items, thereby preventing their addition to the verdict for comparison.

Mr. Hamilton filed an impassioned petition for rehearing en banc or for certification. In that petition, Hamilton asserted, "The Oklahoma Legislature did not intend to allow insurance companies to deny claims, force their insureds to hire attorneys to file lawsuits, and then avoid paying their insured's attorney fees by making a settlement offer just $1 more than their contractual obligations on the eve of trial." (Pet. for Reh'g at 10.) Although Mr. Hamilton's petition reiterated the *Carson* argument he

had made before the panel, the Oklahoma Association for Justice filed an amicus brief contending that the panel had "applied an overly broad interpretation of one of §3629's triggering events, a 'written offer of settlement,' and failed to consider the more limiting context intended by the fee-shifting consequences of §3629." (Amicus Br. at 4.)

III.

In light of the lack of precedential decisions on point, particularly from the Oklahoma Supreme Court, and in furtherance of comity and federalism, we conclude that the Oklahoma Supreme Court should have the opportunity to answer these important questions about Okla. Stat. tit. 36, § 3629(B) in the first instance. We recognize the discretion of the Oklahoma Supreme Court to reformulate the questions posed.

The Clerk of this court is directed to transmit a copy of this certification to counsel for all parties to the proceedings in this suit. The Clerk shall also submit to the Clerk of the Oklahoma Supreme Court, under our court's official seal, a copy of this certification order, together with copies of the briefs filed in this court, and the original or a copy of the appendix in this court. We greatly appreciate the consideration of this request.

Thus, Hamilton's motion to certify is GRANTED. This appeal is ordered ABATED pending resolution of the certified questions.

Entered for the Court

Monroe G. McKay
Circuit Judge