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Rule 68 - Should Costs Incurred after the Offer of Judgment be Included in Calculating the "Judgment Finally Obtained" - The So-Called Novel Issue in *Roberts v. Swain*

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NOTES

RULE 68¹—SHOULD COSTS INCURRED AFTER THE OFFER OF JUDGMENT BE INCLUDED IN CALCULATING THE “JUDGMENT FINALLY OBTAINED”²—THE SO-CALLED NOVEL ISSUE IN *ROBERTS V. SWAIN*³

I. INTRODUCTION

Rule 68(a) of the North Carolina Rules of Civil Procedure furnishes a procedure by which a defendant can make a formal settlement offer in the form of a judgment to be entered against him.⁴ A plaintiff who rejects a defendant’s offer of judgment must bear the costs incurred after the offer of judgment if the “judgment finally obtained” is less favorable than the offer of judgment.⁵ “The offer operates to save the defendant the costs from the time of [his] offer if the plaintiff ultimately obtains a judgment for less than the sum offered.”⁶ The plaintiff must obtain a judgment greater than the amount of the offer

1. N.C. R. Civ. P. 68 provides, in pertinent part:

(a) *Offer of Judgment.* - At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within ten days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

N.C. Gen. Stat. § 1A-1, Rule 68 (2000).

2. *Roberts v. Swain*, 135 N.C. App. 613, 616, 521 S.E.2d 493, 495 (1999), *rev'd*, 353 N.C. 246, 538 S.E.2d 566 (2000).

3. 353 N.C. 246, 538 S.E.2d 566 (2000).

4. G. Gray Wilson, *NORTH CAROLINA CIVIL PROCEDURE* § 68-1 (2d ed. 1995).

5. *Roberts*, 135 N.C. App. at 616, 521 S.E.2d at 495.

6. *Scallon v. Hooper*, 58 N.C. App. 551, 554, 293 S.E.2d 843, 844 (1982).

to avoid paying costs accrued from the date of an unaccepted offer.⁷ “An offer must be unconditional and include ‘costs then accrued.’”⁸ Under Rule 68, attorney fees are not mentioned as a portion of such costs, but when a statute includes attorney fees as part of the costs, the court may also tax those fees as costs.⁹

In 1999, the North Carolina Court of Appeals addressed in *Roberts v. Swain*¹⁰ what the court called a novel issue to North Carolina law: “Should costs incurred after the offer of judgment be included in calculating the ‘judgment finally obtained’ under Rule 68.”¹¹ The court determined that no North Carolina case directly addressed this issue and relied on federal case law for guidance.¹² In its unanimous decision, the court concluded that North Carolina courts should not include any costs incurred after the offer of judgment in calculating the “judgment finally obtained.”¹³ The *Roberts* Court held that the “judgment finally obtained,” for purposes of Rule 68 of the North Carolina Rules of Civil Procedure, included the jury verdict and costs awarded by the trial court for the period that preceded defendant’s offer of judgment—not costs incurred after defendant’s offer of judgment.¹⁴

In 2000, the North Carolina Supreme Court reversed the court of appeals’ decision in *Roberts* and adopted a more liberal methodology to calculate the “judgment finally obtained” for purposes of Rule 68.¹⁵ In its decision, the court noted that the phrase “judgment finally obtained,” as defined by the North Carolina Supreme Court in *Poole v. Miller*,¹⁶ meant “the amount ultimately entered as representing the final judgment, i.e., the jury’s verdict as modified by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury’s verdict.”¹⁷ The *Roberts* court determined that the court in *Poole* approved calculations performed by the

7. Wilson, *supra* note 4, at § 68-2.

8. *Id.*

9. Tyler v. Meola, 113 F.R.D. 184 (N.D. Ohio 1986); Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973); Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496 (1981). See also Marek v. Chesny, 473 U.S. 1, 5 (1985).

10. 135 N.C. App. 613, 521 S.E.2d 493 (1999).

11. *Id.* at 616, 521 S.E.2d at 495.

12. *Id.*

13. *Id.* at 617, 521 S.E.2d at 496.

14. *Id.* at 617, 521 S.E.2d at 495-96 (citing *Marryshow v. Flynn*, 986 F.2d 689 (1993)).

15. *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000).

16. 342 N.C. 349, 464 S.E.2d 409 (1995).

17. *Id.* at 353, 464 S.E.2d at 411.

trial court where the trial court included post-offer costs in calculating the "judgment finally obtained."¹⁸ The court ruled that it was unnecessary for the court of appeals to look to federal case law for guidance because of the binding precedent set forth in *Poole*.¹⁹ The supreme court held that costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the "judgment finally obtained," even where a federal statute awards attorney fees.²⁰ Today, the *Roberts* decision stands for the principle that the federal approach used to calculate the "judgment finally obtained" under federal Rule 68 does not apply in North Carolina under the North Carolina Rules of Civil Procedure. As a result, North Carolina courts must include all costs incurred prior to the entry of judgment in calculating the "judgment finally obtained" for purposes of Rule 68.

This note will examine the North Carolina Supreme Court's decision in *Roberts v. Swain*. Part II of the note presents the factual background and issues raised in the *Swain* decision and examines the opinions handed down by the North Carolina Court of Appeals and the North Carolina Supreme Court. Part III analyzes the inherent weaknesses in *Poole v. Miller*, the leading precedent to the North Carolina Supreme Court's decision in *Roberts v. Swain*. This note concludes that North Carolina courts should follow the federal approach and not include costs incurred after the offer of judgment when calculating the "judgment finally obtained" for purposes of Rule 68.

II. ROBERTS V. SWAIN

A. Factual Background

On the evening of January 18, 1995, Douglas D. Roberts stood on the sidewalk outside the Dean E. Smith Center in Chapel Hill, North Carolina and attempted to sell two basketball tickets to that night's contest between the University of North Carolina Tar Heels and the University of Virginia Cavaliers.²¹ Lieutenant Carroll E. Swain, Jr. of the University of North Carolina at Chapel Hill Police Department observed Roberts' activities and arrested him for solicitation to sell basketball tickets.²² Although Roberts protested that he was doing nothing wrong, Lieutenant Swain handcuffed Roberts, patted him down, and transported him to the University of North Carolina at

18. *Roberts*, 353 N.C. at 250, 538 S.E.2d at 568.

19. *Id.* at 250, 538 S.E.2d at 569.

20. *Id.* at 250-51, 538 S.E.2d at 569.

21. *Roberts v. Swain*, 126 N.C. App. 712, 715, 487 S.E.2d 760, 763 (1997).

22. *Id.*

Chapel Hill Police Department for questioning.²³ At the Chapel Hill Police Department, Roberts maintained that he was innocent and refused to respond to two separate requests by Swain for his social security number.²⁴ Lieutenant Swain and Lieutenant J.B. McCracken, who was present at the police department, informed Roberts that he would be taken before a magistrate if he did not provide them with the requisite information they needed.²⁵ Lieutenant Swain attempted to handcuff Roberts again because of Roberts' continued defiance, and a scuffle ensued.²⁶ Lieutenant Swain pushed Roberts back against a table, and Roberts grabbed Lieutenant Swain by the throat.²⁷ Lieutenant McCracken intervened, and both officers managed to restrain Roberts by pinning him down on the floor and spraying him in the face with pepper spray.²⁸ The amount of force used by these two trained police officers was enough to injure Roberts' shoulder.²⁹

After Lieutenant Swain and Lieutenant McCracken physically subdued Roberts, they handcuffed him and took him to a magistrate who issued arrest warrants for solicitation; resisting, delaying, and obstructing an officer; and assault on a police officer.³⁰ Roberts was

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 716, 487 S.E.2d at 763.

28. *Id.*

29. Plaintiff-Appellant's New Brief to the N.C. Supreme Court at 3, *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99).

30. *Roberts*, 126 N.C. App. at 716, 487 S.E.2d at 764. More specifically, the magistrate issued arrest warrants for: (1) solicitation in violation of Chapel Hill Ordinance § 13-2; (2) resisting, delaying, and obstructing an officer under N.C. Gen. Stat. § 14-223; and (3) assault on a police officer under N.C. Gen. Stat. § 14-33. *Id.*

Chapel Hill Ordinance § 13-2 provides:

§ 13-2. Permit required.

No person shall for commercial purposes sell, or solicit orders for, goods and services by going from door to door or from place to place without prior appointments with the residents or occupants thereof, without first having obtained a permit therefore from the town manager or manager's designee.

(Chapel Hill, NC Ordinance No. 0-84-77, § 1, November 24, 1984); *Roberts* at 720, 487 S.E.2d at 766.

N.C. Gen. Stat. § 14-223 provides:

§14-223. Resisting officers.

If any person shall willfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 Misdemeanor.

N.C. Gen. Stat. § 14-223 (2000).

N.C. Gen. Stat. § 14-33(b) provides, in pertinent part:

then released from police custody.³¹ The detention was later deemed unlawful and all three charges against Roberts were subsequently dismissed.³²

On July 3, 1995, Roberts filed a civil rights action, alleging causes of action against Lieutenant Swain and Lieutenant McCracken in their individual and official capacities, against Alana M. Ennis individually and in her official capacity as Public Safety Director and Chief of the University of North Carolina at Chapel Hill Police Department, and against the University of North Carolina.³³ Roberts' complaint alleged numerous claims against the named defendants, including: unlawful battery, false imprisonment, malicious prosecution, negligent supervision, intentional deprivation of Roberts' Fourth and Fourteenth Amendment rights, violation of 42 U.S.C. § 1983,³⁴ unreasonable use of force, and intentional infliction of emotional distress.³⁵ In his complaint, Roberts sought compensatory and punitive damages pursuant to the common law of North Carolina, Article I, Section 18 of the

(b) . . . any person who commits any assault, assault and battery, or affray is guilty of a Class 1 misdemeanor if, in the course of the assault, assault and battery, or affray, he:

* * *

(8) Assaults an officer . . . when the officer . . . is discharging or attempting to discharge his official duties.

N.C. Gen. Stat. § 14-33(b)(8) (1993); *Roberts*, 126 N.C. App. at 725, 487 S.E.2d at 769.

31. *Roberts*, 126 N.C. App. at 716, 487 S.E.2d at 763.

32. *Roberts v. Swain*, 353 N.C. 246, 248, 538 S.E.2d 566, 567 (2000).

33. Plaintiff-Appellant's New Brief to the N.C. Supreme Court at 2, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99).

34. 42 U.S.C. 1983 provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994).

35. Plaintiff-Appellant's New Brief to the N.C. Supreme Court at 2, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99).

North Carolina Constitution, and 42 U.S.C. § 1983, as well as attorney fees and costs pursuant to 42 U.S.C. § 1988.³⁶

On September 6, 1995, defendants Swain, McCracken, and Ennis answered Roberts' complaint.³⁷ On March 13, 1996, defendants moved to amend their answer and moved for summary judgment on the basis that their claims were barred by sovereign immunity and qualified immunity.³⁸ The trial court denied defendants' motions.³⁹

Following the court of appeals' ruling that affirmed the decision of the trial court,⁴⁰ Roberts filed a motion for partial summary judgment.⁴¹ The partial summary judgment granted by the trial court established defendants' liability on some of Roberts' claims, including those claims under 42 U.S.C. § 1983.⁴² On November 20, 1997, defendants served on Roberts an offer of judgment, pursuant to Rule 68 of the North Carolina Rules of Civil Procedure, for the total sum of \$50,000, which included all costs and attorney fees accrued at the time the offer was filed.⁴³ Roberts rejected defendants' offer of judgment.⁴⁴

36. *Id.* 42 U.S.C. § 1988(b) provides:

(b) Attorney's fees.

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 U.S.C.S. 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b) (Supp. 1998).

37. *Roberts*, 126 N.C. App. at 715, 487 S.E.2d at 763.

38. *Roberts v. Swain*, 135 N.C. App. 613, 614, 521 S.E.2d 493, 494 (1999).

39. *Id.*

40. *See Roberts v. Swain*, 126 N.C. App. 712, 487 S.E.2d 760 (1997).

41. Plaintiff-Appellant's Reply Brief to the N.C. Supreme Court at 2, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99).

42. *Id.*

43. Defendant-Appellee's New Brief to the N.C. Supreme Court at 4, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99).

44. *Id.*

Over a period of two weeks, from April 27, 1998 to May 8, 1998, the case was tried and a jury decided the remaining causes of action.⁴⁵ Counsel from the North Carolina Attorney General's Office represented each individual defendant separately.⁴⁶ During the trial, experts in fields ranging from police training and procedures to medicine testified for each party.⁴⁷ The jury returned a verdict awarding Roberts a total of \$18,100 in damages.⁴⁸ To determine the "judgment finally obtained" for purposes of Rule 68, the trial court added Roberts' attorney fees incurred before defendants' offer (\$21,810) and his costs before defendants' offer (\$757.10) to his attorney fees incurred after defendants' offer (\$36,945) and his costs incurred after defendant's offer (\$9,722.59), for a total sum of \$87,332.69.⁴⁹ The trial court specifically applied the law as stated by the North Carolina Supreme Court in *Poole v. Miller* and determined that the "judgment finally obtained" by Roberts was more favorable than defendants' offer of judgment for purposes of Rule 68.⁵⁰ Since Roberts' "judgment finally obtained" exceeded defendants' \$50,000 offer of judgment, the trial court awarded Roberts all costs, including attorney fees pursuant to 42 U.S.C. § 1988. On October 6, 1998, the trial court filed a judgment directing Swain, McCracken, and Ennis to pay Roberts the jury verdict of \$18,100, attorney fees of \$58,755, and costs of \$10,479.69.⁵¹ Swain, McCracken, and Ennis promptly appealed.

B. The North Carolina Court of Appeals' Decision

On November 16, 1999, the North Carolina Court of Appeals addressed whether the trial court abused its discretion in calculating the "judgment finally obtained" under Rule 68 by including those

45. Plaintiff-Appellant's Reply Brief to the N.C. Supreme Court at 2, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99). The following causes of action were tried by the jury: assault and battery; false imprisonment; malicious prosecution; and 42 U.S.C. § 1983 claims for excessive force and unreasonable search and seizure by defendants Swain, Ennis, and McCracken in their individual capacities. *Id.*

46. Plaintiff-Appellant's New Brief to the N.C. Supreme Court at 4, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99).

47. *Id.*

48. *Roberts v. Swain*, 135 N.C. App. 613, 615, 521 S.E.2d 493, 494 (1999). The jury's verdict in this case awarded a total of \$10,100 in compensatory damages against Swain, McCracken, and Ennis, and \$8,000 punitive damages against Swain. Plaintiff-Appellant's Reply Brief to the N.C. Supreme Court at 2-3, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99).

49. *Roberts*, 135 N.C. App. at 615, 521 S.E.2d at 494.

50. Plaintiff-Appellant's New Brief to the N.C. Supreme Court at 4-5, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99).

51. *Id.* at 3.

costs incurred by Roberts after defendants' offer of judgment in addition to those costs incurred by Roberts prior to defendants' offer of judgment.⁵² The court reversed the trial court's decision that the "judgment finally obtained" by Roberts was more favorable than the offer of judgment made by defendants.⁵³ The *Roberts* court held that the "judgment finally obtained," for purposes of Rule 68 of the North Carolina Rules of Civil Procedure, included the jury verdict and costs awarded by the trial court for the period that preceded defendant's offer of judgment—not costs incurred after defendant's offer of judgment.⁵⁴

In its analysis, the court disagreed with the trial court's interpretation and application of *Poole v. Miller* to mean that the "judgment finally obtained" for purposes of Rule 68 encompassed all costs incurred after the offer of judgment.⁵⁵ The *Roberts* court read the *Poole* decision narrowly and determined that the court in *Poole* addressed the sole issue of whether the "judgment finally obtained" under Rule 68 equaled the jury verdict.⁵⁶ The court of appeals concluded that the *Poole* decision did not specifically address the issue of whether the "judgment finally obtained" includes costs incurred after the offer of judgment under Rule 68, and thus did not compel the trial court to include costs incurred after the offer of judgment in that calculation.⁵⁷

52. *Roberts*, 135 N.C. App. at 615, 521 S.E.2d at 494-95. Under this standard of review, North Carolina case law "is clear that to overturn the trial judge's determination, the defendant must show an abuse of discretion." *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999) (quoting *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982)). Abuse of discretion results where the court's ruling "is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.* "The scope of appellate review . . . is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

53. *Roberts*, 135 N.C. App. at 617, 521 S.E.2d at 496.

54. *Id.* at 617, 521 S.E.2d at 495-96 (citing *Marryshow v. Flynn*, 986 F.2d 689 (1993)).

55. *Id.* at 615, 521 S.E.2d at 495.

56. *Roberts*, 135 N.C. App. at 615, 521 S.E.2d at 495. The Court of Appeals went on to say that the Supreme Court in *Poole* merely held that "judgment finally obtained" is calculated by using the jury verdict along with costs. *Id.* at 616, 521 S.E.2d at 495.

57. *Id.* at 616, 521 S.E.2d at 495.

The court of appeals determined that no other North Carolina appellate court decision specifically addressed the issue of whether costs incurred after the offer of judgment should be included in calculating the “judgment finally obtained” under Rule 68.⁵⁸ Therefore, the court looked to federal case law for guidance.⁵⁹ The *Roberts* court stated that the purpose of Rule 68 of the Federal Rules of Civil Procedure,⁶⁰ as well as Rule 68(a) of the North Carolina Rules of Civil Procedure,⁶¹ is to encourage settlement.⁶² The court relied on the Fourth Circuit’s decision in *Marryshow v. Flynn*,⁶³ a case with facts strikingly similar to the facts in *Roberts*. In *Marryshow*, the Fourth Circuit held that “judgment finally obtained” for purposes of Rule 68 of the Federal Rules of Civil Procedure included the jury verdict and also pre-offer

58. *Id.*

59. *Id.*

60. Fed. R. Civ. P. 68 provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and the evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order of judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Fed. R. Civ. P. 68 (1994).

61. *Roberts*, 135 N.C. App. at 616, 521 S.E.2d at 495. See also *Poole v. Miller*, 342 N.C. 349, 464 S.E.2d 409 (1995) (Parker, J., dissenting); *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (stating that “the North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules. Decisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina Rules.”); *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

62. *Roberts*, 135 N.C. App. at 616, 521 S.E.2d at 495. See also *Scallon v. Hooper*, 58 N.C. App. 551, 554, 293 S.E.2d 843, 844 (1982) (“[t]he purpose of Rule 68 is to encourage settlement and avoid protracted litigation.”).

63. 986 F.2d 689 (4th Cir. 1993).

costs awarded by the trial court—not post-offer costs.⁶⁴ The court reasoned that according to the Fourth Circuit’s holding in *Marryshow*, the trial court erroneously included all costs and attorney fees incurred before and after the offer of judgment in calculating the “judgment finally obtained” by Roberts.⁶⁵ Using the formula announced in *Marryshow*, the court determined that the trial court should have added Roberts’ pre-offer of judgment costs (\$757.10), plus Roberts’ pre-offer of judgment attorney fees (\$21,810), plus the jury verdict (\$18,100) to calculate Roberts’ judgment finally obtained in the amount of \$40,667.10—an amount clearly less favorable than defendants’ offer of judgment for \$50,000.⁶⁶ Roberts petitioned the North Carolina Supreme Court for discretionary review pursuant to North Carolina General Statute § 7A-31.⁶⁷

C. The North Carolina Supreme Court’s Opinion

On December 21, 2000, the North Carolina Supreme Court granted Roberts discretionary review and reversed the court of appeals’ decision.⁶⁸ The court determined that the “judgment finally obtained” by Roberts was indeed more favorable than the offer of judgment made by defendants.⁶⁹ The supreme court held that “costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the ‘judgment finally obtained,’ even where [attorney] fees are awarded under a federal statute.”⁷⁰

In its opinion, the supreme court determined that the court of appeals incorrectly followed the reasoning of the dissent in *Poole v. Miller*, which advocated excluding post-offer costs in calculating the “judgment finally obtained.”⁷¹ The *Roberts* court read *Poole* to say that

64. *Roberts*, 135 N.C. App. at 617, 521 S.E.2d at 495-96.

65. *Id.* at 617, 521 S.E.2d at 496.

66. *Id.*

67. Plaintiff-Appellant’s New Brief to the N.C. Supreme Court at 3, *Roberts*, 353 N.C. 246, 538 S.E.2d 566 (2000) (No. 572PA99). Under N.C. Gen. Stat. § 7A-31, the North Carolina Supreme Court is to review only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by the supreme court. *Peaseley v. Virginia Iron, Coal, and Coke Co.*, 282 N.C. 585, 194 S.E.2d 133 (1973).

68. *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000).

69. *Roberts*, 353 N.C. at 247, 538 S.E.2d at 567.

70. *Id.* at 250-51, 538 S.E.2d at 569.

71. *Roberts*, 353 N.C. at 250, 538 S.E.2d at 568. See also *Poole v. Miller*, 342 N.C. 349, 355, 464 S.E.2d 409, 413 (1995) (Parker, J., dissenting). Interestingly enough, Justice Parker concurred with the majority in *Roberts*, stating that the doctrine of *stare decisis* required that she concur with the majority even though she still believed the

the legislature's choice of the phrase "judgment finally obtained" indicated that the legislature intended for the amount ultimately and *finally* obtained by the plaintiff from the court to serve as the measuring stick when applying Rule 68.⁷² The *Roberts* court then recited a portion of the majority decision in *Poole*, which appears to support the proposition that the trial court must include both pre-offer and post-offer costs in calculating the "judgment finally obtained" for purposes of Rule 68:

Defendant tendered a valid offer of judgment pursuant to Rule 68 for \$6,000, together with costs accrued, which offer plaintiff failed to accept. The case proceeded to trial, and the jury returned a verdict in favor of plaintiff for \$5,721.73. The trial court granted plaintiff's motion for recovery of reasonable attorney's fees in the amount of \$2,000 and additionally taxed as costs against defendant filing and service fees, expert witness fees and interest from the date of filing. Final judgment was then entered in the plaintiff's favor for the sum of \$9,058.21, *portions of which reflect costs accrued after the offer of judgment*. The "judgment finally obtained" then, in this case, is the final judgment of \$9,058.21 entered by the trial court. It is this sum, pursuant to the dictates of Rule 68, which must be compared to the amount of the offer of judgment to determine whether plaintiff is required to pay the costs incurred after the date the offer of judgment was tendered.⁷³

In light of the *Poole* precedent, the supreme court determined that "it was unnecessary for the Court of Appeals to look to federal case law for guidance,"⁷⁴ and the court of appeals' reliance on the Fourth Circuit was misplaced. The court concluded that North Carolina courts should not apply the federal approach to calculating the "judgment finally obtained" under Rule 68 of the North Carolina Rules of Civil

reasoning of her dissent in *Poole* was correct. *Roberts*, 353 N.C. at 250, 538 S.E.2d at 568 (Parker, J., concurring).

72. *Roberts*, 353 N.C. at 249, 538 S.E.2d at 568 (citing *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995)). The court in *Poole* went on to conclude that, "within the confines of Rule 68, 'judgment finally obtained' means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury's verdict." *Poole*, 342 N.C. at 353, 464 S.E.2d at 411.

73. *Roberts*, 353 N.C. at 249-50, 538 S.E.2d at 568 (citing *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995)). The supreme court in *Roberts* went on to interpret this passage to mean that the court in *Poole* approved the calculations performed by the trial court where the trial court had included post-offer costs in calculating the "judgment finally obtained." *Roberts*, 353 N.C. at 250, 538 S.E.2d at 568.

74. *Roberts*, 353 N.C. at 250, 538 S.E.2d at 569.

Procedure merely because a federal statute authorizes the award of attorney fees.⁷⁵ Accordingly, the court ruled that the trial court properly calculated the “judgment finally obtained” and awarded Roberts all costs including attorney fees awarded under 42 U.S.C. § 1988.

III. ANALYSIS

Poole v. Miller narrowly held that the phrase “judgment finally obtained” means the jury verdict as modified by any applicable costs; however, much of the supreme court’s opinion is flawed. By relying on the *Poole* court’s erroneous interpretation of Rule 68, the North Carolina Supreme Court in *Roberts v. Swain* consequently erred in concluding that pre-offer and post-offer costs must be included by the trial court when calculating the “judgment finally obtained.” The court of appeals properly adopted a narrow reading of the *Poole* decision and relied on strong federal case law to support its holding that costs incurred after the defendant’s offer of judgment must not be included with pre-offer costs when calculating the “judgment finally obtained” for purposes of Rule 68.

A. *Why Poole v. Miller Should Be Limited to the Narrow Holding Adopted by the Court of Appeals in Roberts v. Swain*

The *Poole* case arose out of an automobile accident that occurred on August 28, 1990.⁷⁶ On April 13, 1992, defendant tendered an offer of judgment in the amount of “\$6,000 together with costs then accrued,” pursuant to the provisions of Rule 68 of the North Carolina Rules of Civil Procedure.⁷⁷ Plaintiff failed to accept defendant’s offer.⁷⁸ The case went to trial, and the jury returned a verdict in favor of plaintiff in the amount of \$5,721.73.⁷⁹ Prior to the entry of judgment, plaintiff filed motions for attorney fees and costs, portions of which were incurred after defendant tendered her offer of judgment.⁸⁰ The trial court concluded as a matter of law that the “judgment finally obtained” under Rule 68 meant the final judgment obtained by plaintiff, not the amount of the jury verdict.⁸¹ The trial court entered a

75. *Id.*

76. Plaintiff-Appellant’s Petition for Discretionary Review Under G.S. 7A-31 to the N.C. Supreme Court at 1, *Poole v. Miller*, 342 N.C. 349, 464 S.E.2d 409 (1995) (No. 525PA94).

77. *Poole*, 342 N.C. at 350, 464 S.E.2d at 409.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

judgment for a total amount of \$9,058.21 against defendant.⁸² This judgment included \$3,336.48 in total costs and interest— \$420.03 incurred in pre-judgment interest and \$401.40 in pre-offer costs, for a total of \$821.43 in pre-offer costs then accrued.⁸³ Thereafter, defendant successfully appealed to the North Carolina Court of Appeals.⁸⁴

On December 8, 1995, the North Carolina Supreme Court addressed the specific issue of whether the "judgment finally obtained" is equivalent to the jury verdict.⁸⁵ The court interpreted the phrase "judgment finally obtained" in Rule 68 to mean the amount ultimately entered as representing the final judgment or the jury verdict as modified by any applicable adjustments and not simply the amount of the jury verdict.⁸⁶ The *Poole* court took considerable care to adhere to principles of statutory construction and case precedent to define the word "judgment" in the phrase "judgment finally obtained" by using the word's plain and ordinary meaning.⁸⁷ The court cited various authorities in its analysis to conclude that the "judgment finally obtained" did not mean the same thing as the jury verdict.⁸⁸

82. Defendant-Appellee's New Brief to the N.C. Supreme Court at 2-3, *Poole*, 342 N.C. 349, 464 S.E.2d 409 (1995) (No. 525PA94).

83. *Poole*, 342 N.C. at 355, 464 S.E.2d at 412 (1995). The costs included attorney fees, expert witness fees, and interest from the date of the filing of the Complaint. Defendant-Appellant's Response to Petition for Discretionary Review Under N.C.G.S. § 7A-31 to the N.C. Supreme Court at 3, *Poole*, 342 N.C. 349, 464 S.E.2d 409 (1995) (No. 525PA94).

84. See *Poole v. Miller*, 116 N.C. App. 435, 448 S.E.2d 123 (1994).

85. *Poole*, 342 N.C. at 354, 464 S.E.2d at 412.

86. *Id.* at 353, 464 S.E.2d at 411.

87. The supreme court stated:

In resolving issues of statutory construction, this Court must first ascertain legislative intent to assure that both the purpose and the intent of the legislation are carried out. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991). In undertaking this task, we look first to the language of the statute itself. *Id.* at 656, 403 S.E.2d at 294. When language used in the statute is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E.2d 184 (1977) . . . The word "judgment" is undefined in Rule 68. As this word is unambiguous, we shall accord it its plain meaning.

Poole, 342 N.C. at 351-52, 464 S.E.2d at 410-11.

88. The supreme court stated:

Judgment means "[t]he final decision of the court resolving the dispute and determining the rights and obligations of the parties," and "[t]he law's last word in a judicial controversy." *Black's Law Dictionary* 841-42 (6th ed. 1990) (emphasis added). Further, this Court has stated before that "[t]he rendering of a judgment is a judicial act, to be done by the court only." Eborn

However, the supreme court in *Poole* never precisely interpreted the phrase “any applicable adjustments” to include costs incurred after the defendant’s offer of judgment. Without citing any authority to explain the phrase “any applicable adjustments,” the court approved the trial court’s calculation of plaintiff’s judgment finally obtained, portions of which included costs incurred after defendant’s offer of judgment.⁸⁹ The court summarily concluded that plaintiff’s “judgment finally obtained” was more favorable than defendant’s offer of judgment and awarded plaintiff those costs incurred after the date of defendant’s offer of judgment.⁹⁰ Five years later, the *Roberts* court relied on this portion of the supreme court’s decision in *Poole* to support its holding that the “judgment finally obtained” under Rule 68 includes the jury verdict plus costs incurred before and after defendant’s offer of judgment.⁹¹

The supreme court’s untenable departure from the federal approach in calculating the “judgment finally obtained” in *Poole v. Miller* was not necessary. The *Poole* court could have awarded plaintiff costs incurred after the date of defendant’s offer of judgment while only including pre-offer costs in calculating plaintiff’s “judgment finally obtained.” In *Poole*, defendant tendered an offer of judgment for “the amount of \$6,000 together with cost[s] accrued.”⁹² “A critical feature of a Rule 68(a) offer of judgment is that it include a tender of accrued costs.”⁹³ A settlement offer by the defendant pursuant to Rule 68 may specify the amount of the judgment and the amount of costs, specify the amount of the judgment and leave the amount of costs open to be determined by the court, or expressly include both the amount of the judgment and the amount of costs in one lump sum offer.⁹⁴ In *Craighead v. Carrols Corporation*,⁹⁵ the North Carolina

v. Ellis, 225 N.C. 386, 389, 35 S.E.2d 238, 240 (1945) (emphasis added) (quoting *Matthews v. Moore*, 6 N.C. 181, 182 (1812)). In contrast, the word “verdict” means “[t]he formal decision or finding made by a jury.” *Black’s Law Dictionary* 1559 (emphasis added) . . . Accordingly, we are in the view that within the strictures of Rule 68, “judgment finally obtained” does not mean a jury’s verdict.

Poole, 342 N.C. at 352, 464 S.E.2d at 411.

89. *Poole*, 342 N.C. at 354, 464 S.E.2d at 412.

90. *Id.* at 355, 464 S.E.2d at 412.

91. See *Roberts v. Swain*, 353 N.C. 246, 249-50, 538 S.E.2d 566, 568 (2000).

92. *Poole*, 342 N.C. at 354, 464 S.E.2d at 412.

93. *Wells v. Toms*, 129 N.C. App. 413, 417, 500 S.E.2d 105, 108 (1998) (citing *Aikens v. Ludlum*, 113 N.C. App. 823, 825, 440 S.E.2d 319, 320 (1994)).

94. *Aikens v. Ludlum*, 113 N.C. App. 823, 825, 440 S.E.2d 319, 321 (1994).

95. 115 N.C. App. 381, 444 S.E.2d 651 (1994).

Court of Appeals concluded that the phrase "together with costs accrued" is ambiguous as to whether "costs accrued" are included in the figure stated in defendant's offer of judgment or whether the costs are left to be separately determined by the court.⁹⁶ Any ambiguity in the offer of judgment must be construed against the drafter.⁹⁷

The court in *Poole* determined that "together with cost[s] accrued" obviously meant those costs which had accumulated as of the date defendant tendered his offer to plaintiff, and defendant's offer of judgment actually meant \$6,000 plus costs then accrued.⁹⁸ However, plaintiff construed defendant's offer as a lump sum offer of judgment for the amount of \$6,000.⁹⁹ It is not clear whether the "together with cost[s] accrued" clause modified the \$6,000 figure or whether it was a separate component to be determined by the trial court. It is clear that defendant's offer of judgment in *Poole* was ambiguous, and the court should have construed it as a lump sum offer of judgment for the amount of \$6,000.¹⁰⁰ Under the narrow holding articulated by the majority in *Poole* and the federal approach articulated by the Fourth Circuit in *Marryshow*, defendant's offer of judgment (\$6,000) still falls short of plaintiff's "judgment finally obtained"—the jury verdict (\$5,721.73) as modified by any applicable adjustments (\$821.43 in pre-offer costs). This result corresponds to the decision reached by the court of appeals in *Roberts v. Swain*.

B. *The Sound Logic Behind the Federal Approach to Calculating the "Judgment Finally Obtained" for Purposes of Rule 68*

The North Carolina Rules of Civil Procedure are mostly verbatim recitations of the federal rules, and decisions under the federal rules

96. *Id.* at 383, 444 S.E.2d at 652. See also *Aikens v. Ludlum*, 113 N.C. App. 823, 440 S.E.2d 319 (1994).

97. *Aikens*, 113 N.C. App. at 826-27, 440 S.E.2d at 321. See also *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973).

98. *Poole*, 342 N.C. at 355, 464 S.E.2d at 412.

99. Plaintiff-Appellant's Petition for Discretionary Review Under G.S. 7A-31 to the N.C. Supreme Court at 4-5, *Poole*, 342 N.C. 349, 464 S.E.2d 409 (1995) (No. 525PA94). In her petition for discretionary review to the North Carolina Supreme Court, plaintiff admonished the court to apply the federal approach to calculating the "judgment finally obtained" for purposes of Rule 68. Plaintiff stated, "Adding pre-offer attorney's fees and costs to the jury's verdict in this case results in an amount which clearly exceeds the offer of judgment." Plaintiff noted that the record on appeal showed she incurred well over \$500 in costs and attorney fees by the time the judgment was offered by defendant, and the addition of pre-offer costs and attorney fees to the jury award of \$5,721.73 results in a sum, which is more than the \$6,000, offered as judgment. *Id.*

100. See *Aikens v. Ludlum*, 113 N.C. App. 823, 826, 440 S.E.2d 319, 321 (1994).

are pertinent for guidance and enlightenment in developing the philosophy of the North Carolina Rules.¹⁰¹ The clear purpose of Rule 68 is to encourage settlements and avoid protracted litigation.¹⁰² Under this rule, an offer of judgment saves the defendant costs incurred after the offer is made if the plaintiff ultimately obtains a judgment for less than the amount offered.¹⁰³ Although Rule 68 only allows a defending party to tender an offer of judgment, a reasonable tender is potentially beneficial to both parties since the risk of any further cost to anyone is avoided if the offer is accepted.¹⁰⁴ Some parties might receive compensation in settlement where they might not recover at trial or would recover less at trial than what was offered.¹⁰⁵ Settlement provides compensation at an earlier date to those who would prevail at trial without the burden, stress, and time of litigation.¹⁰⁶ In short, settlements rather than litigation serve the interests of both plaintiffs and defendants.¹⁰⁷ "Litigation, as opposed to settlement, is expensive and inefficient for both [parties]."¹⁰⁸

The purpose of Rule 68 is to significantly increase the incentives for settlement by penalizing the rejection of a settlement offer proved reasonable by the final verdict ultimately awarded to plaintiff.¹⁰⁹ "In effect, Rule 68 moves the benchmark for determining which party has 'won' for purposes of awarding post-offer costs from zero to the amount of the defending party's offer."¹¹⁰ Once a party makes an offer, there are a number of potential results; however, if the plaintiff wins the case, the court faces the potentially difficult task of determining what constitutes a more favorable judgment under Rule 68.¹¹¹ Inconsistent interpretations of the rule by courts "[mean] that no one

101. *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)).

102. *Marek v. Chesny*, 473 U.S. 1, 5 (1985); *Scallon v. Hooper*, 58 N.C. App. 551, 554, 293 S.E.2d 843, 845 (1982).

103. *Wilson*, *supra* note 4, at § 68-1.

104. *Id.*

105. *Marek*, 473 U.S. at 10.

106. *Id.*

107. *Id.*

108. Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 Am. U. L. Rev. 813, 820 (1984).

109. Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 Geo. Wash. L. Rev. 379, 380 (1977).

110. 13 MOORE'S FEDERAL PRACTICE § 68.02 (3d ed.).

111. Bonney et al., *supra* note 109, at 412.

can make an offer of judgment with any degree of certainty as to how the rule will be applied in any given case."¹¹²

Federal case law seems to coalesce on the view that pre-offer costs must be added to the judgment award for the purpose of determining whether the "judgment finally obtained" by the plaintiff is more favorable than the defendant's offer of judgment which the plaintiff rejected.¹¹³ The leading case of *Marryshow v. Flynn*¹¹⁴ articulates the rationale for allowing pre-offer costs to increase the value of the judgment.¹¹⁵ The *Marryshow* court determined that to make a proper comparison between the defendant's offer of judgment and the "judgment finally obtained," the court must evaluate like judgments.¹¹⁶ The Fourth Circuit reasoned that because the defendant's offer includes costs then accrued, to determine whether the judgment obtained is "more favorable" under Rule 68, "the judgment must be defined on the same basis—verdict plus costs incurred as of the time of the offer of judgment."¹¹⁷ According to the *Marryshow* court, post-offer costs "should not . . . be included in the comparison and . . . become [a] vehicle to defeat the rule's purpose."¹¹⁸ Other circuits have adopted similar reasoning to conclude that the trial court must include not only the jury verdict, but also the costs awarded by the court for the period that preceded the offer of judgment when calculating the "judgment finally obtained."¹¹⁹

At the time an offer is made, the plaintiff knows the amount of damages caused by the defendant's challenged conduct and may easily ascertain any costs then accrued.¹²⁰ The plaintiff is capable of making a reasonable determination of whether to accept defendant's settlement offer "by simply adding these two figures and comparing the sum to the amount offered."¹²¹ "The purpose of [Rule 68] is to promote compromise and avoid protracted litigation."¹²² Using an amount including both pre-offer and post-offer costs for comparison

112. *Id.* at 430.

113. 13 MOORE'S FEDERAL PRACTICE § 68.07 (3d ed.).

114. *Marryshow v. Flynn*, 986 F.2d 689, 692 (4th Cir. 1993).

115. 13 MOORE'S FEDERAL PRACTICE § 68.07 (3d ed.).

116. *Marryshow*, 986 F.2d at 692.

117. *Id.*

118. *Id.*

119. See *Marek v. Chesny*, 473 U.S. 1 (1985); *Bevard v. Farmers Ins. Exchange*, 127 F.3d 1147 (9th Cir. 1997); *Scheeler v. Crane Co.*, 21 F.3d 791 (8th Cir. 1994); *Grosvenor v. Brienens*, 801 F.2d 944 (7th Cir. 1986).

120. *Marek*, 473 U.S. at 7.

121. *Id.*

122. *Wilson*, *supra* note 4.

with the offer of judgment defeats the rule's purpose since post-offer costs are frequently greater than costs accrued at the time of defendant's offer of judgment.¹²³ The purpose of the underlying cost-shifting provision of Rule 68 is to penalize plaintiffs "who continue to litigate after a reasonable offer of judgment, but fail to secure a better result."¹²⁴ Plaintiffs who continue to litigate after a defendant tenders a reasonable offer of judgment might actually benefit when post-offer costs are included in the Rule 68 calculus. Litigious plaintiffs might easily defeat the purpose of the rule by pressing an issue to trial on purpose to incur additional costs and increase the amount of their "judgment finally obtained." It would be anomalous to allow the plaintiff to benefit from additional costs of pressing the issue to trial; therefore, courts should not include costs incurred in advancing the case to trial.¹²⁵ Including costs and attorney fees incurred after an offer of judgment in calculating the "judgment finally obtained" discourages the settlement of cases.

IV. CONCLUSION

"[L]ike the 'doubling cube' in backgammon and the white flag used as a means of surrender in early frontier battles, the offer of judgment is intended to 'encourage settlements' and to 'avoid protracted litigation' by increasing the costs associated with unnecessarily continuing the game, battle, or case."¹²⁶ Lieutenants Swain, McCracken, and Ennis lost their battle in the appellate courts of North Carolina.

In *Roberts v. Swain*, a majority of the North Carolina Supreme Court agreed with neither the Court of Appeals' interpretation of *Poole v. Miller* nor the Fourth Circuit's reasoning in *Marryshow v. Flynn*. The *Roberts* court formally rejected the federal approach to calculating the "judgment finally obtained" for purposes of Rule 68 of the North Carolina Rules of Civil Procedure. In light of this holding, any attorney who wishes to argue that the North Carolina approach discourages settlement of cases and promotes protracted litigation may consider the advice of the *Roberts* court and direct his argument to the legislative branch of government.¹²⁷

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123. *Poole*, 342 N.C. at 356-57, 464 S.E.2d at 413 (1995) (Parker, J., dissenting).

124. Varon, *supra* note 108, at 834.

125. *Id.*

126. Varon, *supra* note 108, at 816.

127. *Roberts v. Swain*, 353 N.C. 246, 251, 538 S.E.2d 566, 569 (2000).