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CASENOTES

McDANIEL v. McBRAYER: REFORM NEEDED FOR RULE 68 – THE PENDULUM OF PROTECTION IS SWINGING UNEVENLY

LADONNA WILLIAMS*

INTRODUCTION

The right to seek redress for personal injury or property damage as the result of the negligence of others is ingrained into every American citizen.¹ It is the American way. Commercials, mailings, law firm advertisements and television shows encourage lawsuits for numerous personal injury and property damage claims. The North Carolina Legislature, recognizing the need for citizens with small damage claims to be represented by an attorney and have their day in court, established North Carolina General Statute Section 6-21.1.²

Under North Carolina General Statute Section 6-21.1, trial court judges are given discretion to award attorney fees over and above a verdict for judgments of \$10,000.00 or less.³ The balance to this statute is provided by Rule 68 of the North Carolina Rules of Civil Procedure, which allows a defendant to offer judgment and thus gain protection in the nature of recovering costs of litigation incurred after the service of the offer of judgment.⁴

The right to be represented in small claims is important to our society. But, has the pendulum now swung too far in favor of plaintiffs and taken the protection for defendants out of Rule 68 of the North

* Special thanks to H. Lee Davis, Jr. for encouraging me to go to law school and for encouraging me to submit a Case Note. Special thanks to Kent L. Hamrick for suggesting the title for the Case Note.

Both are partners in the law firm of Davis & Hamrick, L.L.P. located in Winston-Salem, North Carolina

Also, special thanks to all the attorneys in the law firm of Davis & Hamrick with whom I had the pleasure of working with over the past 23 years before deciding to go to law school – thank you for being an influence on my life. (LaDonna Williams is a second year student at North Carolina Central University School of Law).

1. The Seventh Amendment to the United States Constitution guarantees a right to a trial by jury for amounts in controversy exceeding Twenty Dollars. U.S. CONST. amend. VII.

2. N.C. GEN. STAT. § 6-21.1 (2003).

3. *Id.*

4. N.C. R. CIV. P. 68.

Carolina Rules of Civil Procedure? Does the discretion of courts to award costs that continue to defeat offers of judgment allow plaintiffs and their attorneys to forego serious evaluation of the case? Is an ethical dilemma created for attorneys who gamble in court, knowing that if a jury verdict is awarded, the court, in its discretion, can tack on costs and attorney fees, which may far exceed any amount the attorney might have reasonably received? Each year numerous appeals are filed questioning the award of costs in cases where reasonable offers of judgment were made. While this question was seemingly resolved by the North Carolina Supreme Court in *Poole v. Miller*,⁵ litigants and judges continue to question the law. Plaintiffs and defendants alike deserve the same protection under the law. Where is the middle of the road where both can be protected?

This note examines the recent decision in *McDaniel v. McBrayer*⁶ in which the court of appeals once again upheld the trial court's discretion in awarding attorney's fees after offers of judgment were made.⁷ This note outlines the law that has developed since *Poole* regarding Rule 68. This review suggests that there needs to be legislative reform. The precedent before *Poole*, as outlined in *Purdy v. Brown*,⁸ or the Federal approach in *Marryshow v. Flynn*,⁹ are more uniform in allowing plaintiffs with small claims a right to representation while balancing that right with protection for the defendant when reasonable offers of judgment are made.

BACKGROUND

North Carolina General Statute Section 6-21.1 (2003) provides:

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judg-

5. *Poole v. Miller*, 464 S.E.2d 409 (N.C. 1995).

6. *McDaniel v. McBrayer*, 595 S.E.2d 784 (N.C. App. 2004).

7. *Id.*

8. The plaintiff should bear the burden of costs after an offer of judgment is made. *Purdy v. Brown*, 296 S.E.2d 459 (N.C. 1982).

9. *Marryshow v. Flynn*, 986 F.2d 689, 692 (4th Cir. 1993). To make a proper comparison between an offer of judgment that includes costs incurred and the judgment finally obtained, only costs incurred up until the offer of judgment should be added to the verdict.

ment for damages in said suit, said attorney's fee to be taxed as part of the court costs.¹⁰

The general rule is that attorney fees are not allowed as costs in a civil action. However, Section 6-21.1 is an exception to the general rule.¹¹ Section 6-21.1 is intended to provide relief for plaintiffs whose claim is of such a small amount that the plaintiff could not afford to pursue the claim if they had to pay their attorney out of the recovery.¹²

Certainly, it is important to allow a plaintiff an opportunity to bring a claim; nonetheless, the court of appeals in *Harrison v. Herbin*¹³ stated:

While [Section 6-21.1] is aimed at encouraging injured parties to press their meritorious but pecuniarily small claims, we do not believe that it was intended to encourage parties to refuse reasonable settlement offers and give rise to needless litigation by guaranteeing that counsel will, in all cases, be compensated.¹⁴

North Carolina General Statute Section 1A-1, Rule 68 balances North Carolina General Statute Section 6-21.1 by providing protection to a defendant if a plaintiff rejects an offer of judgment made by a defendant. If a judgment finally obtained is less favorable than the offer of judgment, then the plaintiff must bear the costs and attorney's fees incurred after the offer of judgment.¹⁵ The purpose of the enactment of Rule 68 was to encourage settlement between the parties and work to avoid the case having to be litigated in court.¹⁶

The question arose in *Poole*, as to the meaning of "judgment finally obtained" within Rule 68.¹⁷ Rule 68(a) states:

(a) Offer of Judgment. – At any time more than 10 days before the trial begins, a party defending 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 10 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

10. N.C. GEN. STAT. § 6-21.1 (2003).

11. *Hicks v. Albertson*, 200 S.E.2d 40, 42 (N.C. 1973).

12. *Id.* at 42.

13. *Harrison v. Herbin*, 241 S.E.2d 108 (N.C. App. 1978).

14. *Id.* at 109.

15. N.C. R. CIV. P. 68; *Scallon v. Hooper*, 293 S.E.2d 843 (N.C. App. 1982).

16. *Scallon*, 293 S.E.2d at 844.

17. *Poole v. Miller*, 464 S.E.2d 409, 410 (N.C. 1995).

costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.¹⁸

The North Carolina Supreme Court in *Poole* interpreted the meaning of “judgment finally obtained” within Rule 68(a) of the North Carolina Rules of Civil Procedure to mean the jury’s verdict plus any costs added to the verdict by the court.¹⁹ In *Poole*, the defendant made an offer of judgment of \$6,000.00 with costs accrued. The plaintiff rejected the offer. The jury awarded plaintiff \$5,721.73. The trial court held that plaintiff was entitled to the jury award plus costs and attorney’s fees even though some of the costs and attorney’s fees were incurred after the offer of judgment was made. The trial court reasoned that “judgment finally obtained” under Rule 68 did not mean jury verdict.²⁰ The court of appeals then reversed the judgment that allowed costs incurred after the offer of judgment was made.²¹ However, the supreme court agreed with the trial court’s decision and found that the judgment finally obtained by the trial court is the correct amount to be compared to the offer of judgment in determining if plaintiff is responsible for costs incurred after the offer of judgment was made.²² Because the trial court has discretion to add attorney fees under North Carolina General Statute Section 6-21.1, this ruling granted almost unlimited power to the court to add enough attorney fees to exceed any offer of judgment.

The supreme court’s ruling in *Poole* affected the defendant’s protection under Rule 68 dramatically. Before *Poole* the supreme court held in *Purdy v. Brown*²³ that “any attorney’s fees which were incurred after the offer of judgment was made must be borne by the plaintiff.”²⁴ Plaintiff had demanded \$300,000.00 for injuries from defendant’s negligence. Defendant made an offer of judgment in the amount of \$5,001.00. The plaintiff rejected the offer and the case was tried. The jury returned a verdict in favor of the plaintiff in the amount of \$3,500.00. Plaintiff requested that costs and attorney’s fees be taxed against the defendant. The court held that defendant was only required to pay costs and the attorney’s fees incurred before the offer of judgment was made. The court held that Rule 68 provides protection after an offer of judgment is made by the defendant.²⁵ However, the ruling in *Poole* created a safety net for plaintiffs where

18. N.C. R. Civ. P. 68(a).

19. *Poole*, 464 S.E.2d at 412.

20. *Id.* at 410.

21. *Id.*

22. *Id.* at 413.

23. *Purdy v. Brown*, 296 S.E.2d 459 (N.C. 1982).

24. *Id.* at 463.

25. *Id.*

little pressure, if any, is placed on plaintiffs to seriously evaluate their claim and determine if the defendant has made a fair and reasonable offer of settlement.

Four years after *Poole*, the North Carolina Court of Appeals outlined the following factors that trial courts are to consider in exercising discretion in awarding attorney fees pursuant to North Carolina General Statute 6-21.1:

- (1.) settlement offers made prior to the institution of the action . . . ;
- (2.) offers of judgment pursuant to Rule 68, and whether the “judgment finally obtained” was more favorable than such offers;
- (3.) whether defendant unjustly exercised “superior bargaining power;”
- (4.) in the case of an unwarranted refusal by an insurance company, the “context in which the dispute arose;”
- (5.) the timing of settlement offers;
- (6.) the amount of the settlement offers as compared to the jury verdict²⁶

While the trial court has discretion whether to award attorney fees, the court’s power is not unbridled. An award of attorney fees may be overturned on appeal when the court abuses its discretion and its ruling “is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.”²⁷ In awarding attorney fees, the court must make specific findings as to the *Washington* factors, including the time and labor expended, the legal skill required by the attorney, the customary fees for similar work, and the attorney’s experience or ability.²⁸ The timing and amount of the settlement offers compared to the jury verdict are significant factors which the court is to consider in determining whether to award attorney fees.²⁹

While *Poole* established that “judgment finally obtained” means verdict plus any applicable adjustment, the North Carolina Supreme Court in *Roberts v. Swain*³⁰ addressed the question as to whether post-offer of judgment costs could also be added to the jury verdict to determine the “judgment finally obtained.”³¹ The supreme court interpreted that the *Poole* decision only answered the question as to whether judgment finally obtained was the same as jury verdict.³² The defendant in *Roberts* argued that the plaintiff was only entitled to costs incurred up to the date of the offer of judgment made pursuant

26. *Washington v. Horton*, 513 S.E.2d 331, 334-35 (N.C. App. 1999) (citations omitted).

27. *Thorpe v. Perry-Riddick*, 551 S.E.2d 852, 855 (N.C. App. 2001).

28. *Id.* at 856.

29. *Culler v. Hardy*, 526 S.E.2d 698, 702 (N.C. App. 2000).

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

31. *Id.*

32. *Id.* at 568.

to Rule 68. The defendant further argued that if post-offer costs were allowed to be added to the verdict, it would discourage settlement.³³ However, the court held that the definition of “judgment finally obtained” in *Poole* did not limit adjustments to the verdict to be for pre-offer costs only. Instead, post-offer costs could also be added to the jury verdict to determine the “judgment finally obtained.”³⁴

The appellate courts continue to uphold the rulings of the trial courts, whether the trial court allows attorney fees or denies attorney fees, when the *Washington* factors are considered and outlined in the judgments. In the recent decision by the court of appeals in *McDaniel v. McBrayer*³⁵, the trial court’s judgment granting attorney fees was again upheld.³⁶ The *McDaniel* case illustrates the need for reform of North Carolina General Statute Section 6-21.1. As Aristotle said: “Even when laws have been written down, they ought not always remain unaltered.”³⁷

STATEMENT OF THE FACTS

In *McDaniel*, the plaintiff retained counsel on January 9, 2002.³⁸ Six days later on January 15, 2002, plaintiff filed a complaint for personal injury from a motor vehicle accident that occurred on February 23, 1999.³⁹ Nothing in the record indicates that the plaintiff made a demand for settlement before retaining counsel or before filing suit.⁴⁰ Defendants received service of the suit papers on February 4, 2002.⁴¹ After the defendants’ insurer (Allstate Insurance Company) was advised that a suit had been filed, plaintiff allowed defendants an extension of time to answer and to allow negotiations of settlement of the claim.⁴² The insurer for the defendants made an offer of settlement for \$4,500.00 to plaintiff on March 26, 2002. This occurred forty-five days after the suit was received and before retaining defense counsel to represent the insured.⁴³ The offer was rejected and the insurer increased its offer to \$5,000.00. This offer was also rejected.⁴⁴

33. *Id.* at 569.

34. *Id.* at 568.

35. *McDaniel v. McBrayer*, 595 S.E.2d 784 (N.C. App. 2004).

36. *Id.* at 788.

37. Aristotle, *Politics* (350 B.C.)

38. Record on Appeal at 2, *McDaniel v. McBrayer*, 595 S.E.2d 784 (N.C. App. 2004) (No. COA03-939).

39. *McDaniel*, 595 S.E.2d at 786.

40. Record on Appeal at 2, *McDaniel* (No. COA03-939); Defendants –Appellants’ Brief at 8 n.1, *McDaniel v. McBrayer*, 595 S.E.2d 784 (N.C. App. 2004) (No. COA03-939).

41. Record on Appeal at 4-5, *McDaniel* (No. COA 03-939).

42. Defendants-Appellants’ Brief at 2-3, *McDaniel* (No. COA03-939).

43. *Id.* at 3.

44. *Id.*

After retaining defense counsel, a formal Offer of Judgment pursuant to Rule 68 in the amount of \$5,000.00, was served on plaintiff's counsel on July 1, 2002. Plaintiff again rejected defendants' offer.⁴⁵ A Request for Monetary Relief Sought, pursuant to Rule 8(a)(2) of the North Carolina Rules of Civil Procedure, was served on plaintiff. Defendants received a response to the Request for Monetary Relief Sought in the amount of \$15,000.00.⁴⁶

On October 10, 2002, a second Offer of Judgment for \$5,000.00 pursuant to Rule 68 of the North Carolina of Civil Procedure was served on plaintiff's counsel. Plaintiff again rejected defendants' offer.⁴⁷ Mediation was held on November 19, 2002. Defendants again offered \$5,000.00 to settle the case. Plaintiffs continued to demand \$15,000.00.⁴⁸

During a pretrial conference at the term of court beginning April 21, 2003, defendants' counsel advised the court and plaintiff's counsel that the \$5,000.00 offer remained open. Plaintiff's counsel did not respond to this offer and the case was tried.⁴⁹ The jury returned a verdict in favor of the plaintiff for \$800.00.⁵⁰

Defendants filed a Motion for Costs in the amount of \$754.67 believing that the verdict of \$800.00 was less than the Offer of Judgment of \$5,000.00, and therefore defendants should be entitled to costs incurred after the first formal Offer of Judgment.⁵¹ The Plaintiff also filed a Motion for Costs requesting \$1,437.90, in costs incurred and \$5,643.75 for attorney fees.⁵² Defendants' Motion for Costs was denied. Plaintiff was awarded Judgment in the amount of \$800.00 for the jury verdict plus costs in the amount of \$1,437.90 and attorney's fees in the amount of \$4,500.00 pursuant to North Carolina General Statute Section 6-21.1.⁵³ The judge reduced plaintiff's attorney's fees by \$1,143.75.⁵⁴

Defendants appealed this ruling.⁵⁵ The court of appeals upheld the trial court's ruling awarding attorney's fees and found no abuse of discretion.⁵⁶ The court held that the trial court made its ruling based on

45. *McDaniel*, 595 S.E.2d at 786.

46. Record on Appeal at 34, *McDaniel* (No. COA03-939); Defendants-Appellants' Brief at 3, *McDaniel* (No. COA03-939).

47. Record on Appeal at 34, *McDaniel* (No. COA03-939); Defendants-Appellants' Brief at 3, *McDaniel* (No. COA03-939).

48. Record on Appeal at 34, *McDaniel* (No. COA03-939).

49. *Id.* at 34.

50. *McDaniel*, 595 S.E.2d at 786.

51. Record on Appeal at 25-27, *McDaniel* (No. COA03-939).

52. *Id.* at 33-39.

53. *McDaniel*, 595 S.E.2d at 786.

54. Record on Appeal at 40-42, *McDaniel* (No. COA03-939).

55. *McDaniel*, 595 S.E.2d at 786.

56. *Id.* at 787.

the *Washington* factors, that the trial court had considered the entire record as required and had made findings of fact to support its ruling.⁵⁷

ANALYSIS

Allowing plaintiffs an opportunity to have representation in small claims is necessary and warranted, and North Carolina General Statute Section 6-21.1 provides the mechanism that allows attorneys who take such cases to recover attorney fees. However, based on the current precedent, defendants are being stripped of their protection as provided in Rule 68 in various ways.

First, defendants are not given an opportunity to evaluate a claim to determine if there is liability, or what amount of personal injury or property damage was sustained by the negligence of the defendant, before making a settlement offer. *McDaniel* is a prime example. One of the *Washington* factors to be considered in determining whether to award attorney fees pursuant to North Carolina General Statute Section 6-21.1 is whether a settlement offer was made prior to suit being filed.⁵⁸ Nothing in the *McDaniel* record indicates that any demand was made of the insurance company before suit was filed.⁵⁹ In fact, plaintiff filed suit only six days after retaining counsel.⁶⁰ Also, there is no indication that plaintiff's counsel attempted to contact the insurance company during the six days before suit was filed.⁶¹

The rationale that an offer should be made before a lawsuit is filed seems ironic. The Rules of Civil Procedure allow for a discovery period following the filing of a complaint wherein evidence may be obtained by the parties through the discovery process to determine the validity of plaintiff's allegations.⁶² Expecting a settlement offer to be made before a suit is filed, without proper documentation or investigation, is unfair to the defendant. "An award of attorney fees should not serve to punish proper case investigation and discovery by a defendant's insurer."⁶³

The defendant in *McDaniel* argued to the court of appeals:

Such a decision discourages settlement and is tantamount to a guarantee that lawyers will always be paid, even when they refuse reasonable settlement offers in order to gamble on jury verdicts. The result of

57. *Id.*

58. *Washington v. Horton*, 513 S.E.2d 331, 334 (N.C. App. 1999).

59. Record on Appeal, *McDaniel* (No. COA03-939); Defendant-Appellant's Brief at 8 n.1, *McDaniel* (No. COA03-939).

60. Record on Appeal at 2, *McDaniel* (No. COA03-939).

61. *Id.* at 36.

62. N.C. R. Civ. P. 26-37 (2003).

63. Defendants-Appellants' Brief at 15, *McDaniel* (No. COA03-939).

such gambles is increased expense, time, and effort for the courts, witnesses, and parties. This Court has consistently held that Section 6-21.1 should not be used to this end.⁶⁴

Another factor to be considered is the timing of the settlement offers.⁶⁵ In *McDaniel*, the insurance company made a settlement offer within forty-five days of service of the complaint.⁶⁶ Rule 68 provides that an offer of judgment can be made anytime prior to ten days before the case is called for trial.⁶⁷ However, the *Poole* and *Roberts* rulings, along with the *Washington* factors, appear to run in opposition to Rule 68. The *Washington* factors place emphasis on the timing of an offer.⁶⁸ It appears this rationale suggests that the sooner an offer is made the better. An early offer would give relief to the plaintiff for damages incurred but at the same time would provide protection for the defendant and cut off post-offer costs.

The amount of settlement offers are also to be compared to the jury verdict.⁶⁹ The *McDaniel* jury returned a verdict of \$800.00.⁷⁰ Defendants offered \$5,000.00 several times during the lawsuit, even offering to pay \$5,000.00 at the pre-trial conference.⁷¹ While the trial judge's findings of fact indicate that this factor was considered,⁷² the transcript of the motion hearing does not reflect that consideration was given to the timing of the offers of judgment.⁷³ Instead, the transcript indicates that after hearing argument by plaintiff's counsel, the judge indicated that he had already made up his mind.⁷⁴

The *McDaniel* jury heard the facts and made a determination that *McDaniel* was entitled to \$800.00.⁷⁵ Plaintiff did not question the verdict of \$800.00 the jury granted him for his damages. Instead, Plaintiff only requested that he be awarded adjustments to the verdict to cover the costs he had incurred in the amount of \$1,437.90 and attorney fees in the amount of \$4,500.00.⁷⁶

On July 1, 2002, defendant made an offer of judgment pursuant to Rule 68 in the amount of \$5,000.00.⁷⁷ Assuming plaintiff's counsel was representing *McDaniel* on a standard one-third contingency fee,

64. *Id.* at 9.

65. *Washington v. Horton*, 513 S.E.2d 331, 334 (N.C. App. 1999).

66. Record on Appeal at 34, *McDaniel* (No. COA03-939).

67. N.C. R. Crv. P. 68.

68. *Washington*, 513 S.E.2d at 334.

69. *Id.* at 335.

70. *McDaniel*, 595 S.E.2d at 786.

71. *Id.*

72. Record on Appeal 40-42, *McDaniel* (No. COA03-939).

73. Defendants-Appellants' Brief at App. 6, *McDaniel* (No. COA03-939).

74. *Id.*

75. *McDaniel*, 595 S.E.2d at 786.

76. Record on Appeal at 33-35, *McDaniel* (No. COA03-939).

77. *McDaniel* at 786.

the plaintiff would have received \$3,333.33 minus costs incurred of \$80.00 as of that date.⁷⁸ The plaintiff would have been compensated more than four times the verdict of \$800.00 that the jury believed to be the damages sustained.⁷⁹ The one-third contingency fee would have been \$1,666.67. As of that date, plaintiff's counsel had incurred 5.48 hours at \$150.00 an hour or \$822.00 in time expended.⁸⁰ Had the offer of judgment been accepted, the attorney would have received more than twice his hourly rate.

The Rules of Professional Conduct state that, "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client . . ." ⁸¹ Are plaintiffs rejecting offers of judgment upon advice of counsel? Are attorneys tempted to reject offers of judgment in smaller cases because attorney's fees are usually awarded? Is the supreme court's belief that plaintiffs are entitled to have costs and attorney fees added to jury verdicts to determine if it surpasses an offer of judgment creating an ethical dilemma for plaintiff's counsel?

It is obvious that attorneys for plaintiffs and attorneys for defendants evaluate cases differently. It is common belief that attorneys for plaintiffs evaluate claims high and attorneys for defendants make low offers. Our legal system requires citizens to serve as jurors.⁸² Jurors are asked to listen to the facts of a case and make a determination regarding what, if anything, a plaintiff is entitled to recover.⁸³ Allowing adjustments to a jury verdict not only strips the defendant of any protection from a plaintiff refusing to critically evaluate their claim, it also undermines the jury's role in evaluating the facts of a case and making a determination as to what a plaintiff is entitled to recover.

If the *Washington* factors had been strictly considered in *McDaniel*, the court should not have granted plaintiff's motion for attorney fees. Nothing in the record indicates that the defendants did not timely respond to plaintiff but instead shows the defendants responded quickly and with a reasonable offer.⁸⁴

Plaintiffs should be awarded costs and attorney fees if a defendant fails to make reasonable offers to settle when an offer is merited, when an insurance company is using unreasonable bargaining power against a plaintiff, or when a defendant fails to make a reasonable

78. Record on Appeal at 39, *McDaniel* (No. COA03-939).

79. *Id.* at 40.

80. *Id.* at 33-38.

81. N.C. ADMIN. CODE tit. xxvii, r. 1.08(i) (2004).

82. N.C. CONST. art. 1, § 26; N.C. GEN. STAT. §§ 9-6, -10 (2004).

83. N.C.P.I. – Civil 101.50. It is the duty of the jury to recall and consider all the evidence.

84. Record on Appeal, *McDaniel* (No. COA03-939).

offer before trial is imminent. However, when an offer has been made and is ultimately determined to be more than reasonable based on the jury's verdict, defendants should not be punished for failing to give in to plaintiff's demands for settlement that are too high. In *McDaniel*, plaintiff never attempted to negotiate a compromise settlement.⁸⁵

Rule 68 was designed to encourage settlement of cases.⁸⁶ The court system continues to encourage the settlement of cases prior to trial. Mediation has become common in most North Carolina superior court cases.⁸⁷ The rulings in *Poole*, *Roberts* and *Washington* are counterproductive to the encouragement of settlement. Instead, these rulings encourage plaintiffs to take a case to trial, knowing that a small verdict may, in the court's discretion, lead to a larger "judgment finally obtained" when costs and attorney's fees are tacked on. Even after the judge taxes attorney's fees, the ultimate recovery for the plaintiff remains the verdict reached by the jury.

Defendants have no recourse for attempting to negotiate in good faith for judgments finally obtained for \$10,000.00 or less. Before *Poole*, if defendants made an offer of judgment, then plaintiffs were not entitled to costs or attorney fees after the offer of judgment was made.⁸⁸ Now, defendants are placed in the dilemma of having to determine whether to offer more than \$10,000.00 for claims that are not worth \$10,000.00 to avoid adjustments being made to the verdict by the trial judge. Defendants are being punished even after making reasonable offers of judgment. Plaintiffs have no incentive to evaluate their claims reasonably.

The dissent in *Poole* by Justice Parker stressed the concerns that seem to echo through the continuous appeals surrounding the taxing of attorney's fees after an offer of judgment.⁸⁹ Justice Parker believed "the majority's construction of the Rule, . . . undermines the intent of the legislature in adopting Rule 68(a). The objective of the Rule is to encourage settlements."⁹⁰ Justice Parker felt that because Rule 68(a) of the North Carolina Rules of Civil Procedure was almost identical to Rule 68 of the Federal Rules of Civil Procedure, *Marryshow*, which interpreted federal Rule 68, could provide guidance to the state courts in determining how to compare "judgment finally obtained" to an of-

85. *Id.*

86. *Scallon v. Hooper*, 293 S.E.2d 843, 844 (N.C. App. 1982).

87. *See* N.C. GEN. STAT. § 7A-38.1 (2004).

88. "We agree with plaintiff's argument that he is entitled to recover from defendant the attorney's fees which were incurred prior to the time the offer of judgment was made. The Rule 68 sanctions only provide protection against the costs incurred *after* the offer has been made." *Purdy v. Brown*, 296 S.E.2d 459, 463 (N.C. 1982).

89. *Poole v. Miller*, 464 S.E.2d 409 (N.C. 1995) (Parker, J., dissenting).

90. *Id.* at 413.

fer of judgment.⁹¹ The court in *Marryshow* held that costs and attorney fees should be added to the verdict, but only in an amount equal to the costs and attorney fees incurred up until the offer of judgment made pursuant to Rule 68.⁹² This would provide an equivalent measure. Otherwise, if costs and attorney fees incurred after the offer of judgment were allowed to be added to the verdict, then the comparison would not be equitable and would provide a means to defeat the purpose of Rule 68.⁹³ *Marryshow* follows closely the precedent of *Purdy*, which was the law before *Poole*. The court in *Purdy* held that costs incurred after an offer of judgment could not be added as costs to the verdict.⁹⁴

The North Carolina courts have hinted that there is a problem with the current precedent regarding Rule 68. For example, in *Williams v. Manus*,⁹⁵ the jury awarded plaintiff \$62.00 after defendant had made an offer of judgment of \$501.00.⁹⁶ The trial court then awarded \$5,000.00 in attorney's fees. Although *Williams* was reversed on the grounds that the trial court failed to make findings of fact, the *dicta* implied that an award of attorney's fees in light of the small verdict might be unreasonable.⁹⁷

In *McDaniel*, the transcript of the hearing on the motion for costs indicates that trial court Judge Larry Ford believed he did not have a choice in awarding attorney's fees. The transcript also reflects Judge Ford's unhappiness with the decisions in *Poole* and *Roberts*, which are now binding on the trial courts. Judge Ford stated:

Back in the good old days if the defense counsel filed an offer of settlement and the plaintiff got less than that, that was the end of it. Guess what? The higher courts changed that position and it would have been a lot simpler if they'd have left us alone and let us go the old way.⁹⁸

The Judge went on to discuss an Iredell County case where the court of appeals recently upheld a court's award of attorney's fees in the amount of \$9,500.00 where an offer of judgment of \$5,000.00 had been made and the subsequent verdict was \$211.00. The Judge stated:

But I believe it was an Iredell County case. And there again, once again, I think that case illustrates the *preposterousness* that all this has

91. *Id.*

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

93. *Id.*

94. *Purdy v. Brown*, 496 S.E.2d 459, 463 (N.C. 1982).

95. *Williams v. Manus*, 542 S.E.2d 680 (N.C. App. 2001).

96. *Id.* at 681-82.

97. *Id.*

98. Defendants-Appellants' Brief at App. 3, *McDaniel* (No. COA03-939).

gotten to. You know, I think everybody is entitled to their jury trial, but, oh, lord.⁹⁹ (emphasis added).

Defense counsel then argued against plaintiff's motion for costs. In his argument he stated that he believed the "*Williams* case emphasizes the fact that sometimes there is still such a disparity between the verdict amount and the offer of judgment that attorneys fees which would otherwise be reasonable are no longer so."¹⁰⁰ Judge Ford responded:

No, I read what you had underlined here and the problem is here, and let me say this, that the chief judge in that case and I were good friends in law school and are still close friends today. And I respect him, I think he's a fine lawyer and he's been a fine judge. And I, but I think what's happened, quite often we come up with all these little finely tuned things in the court system and we wind up painting ourselves into a corner. And the *Williams* case shows where they're trying to get out of a corner without messing up the paint they've already painted. But in my opinion what they did is they stepped on it anyway.¹⁰¹

Even the Supreme Court has suggested a need for change. The *Roberts* court stated:

As in *Poole*, defendants argue that including costs and attorney's fees incurred after an offer of judgment in calculating the "judgment finally obtained" discourages the settlement of cases In view of the precedent of *Poole*, including the dissenting opinion therein, we believe defendants' argument would be better addressed to the legislative branch of government.¹⁰²

CONCLUSION

There needs to be reform of the precedent established in *Poole* and *Roberts* regarding Rule 68. As indicated above, trial courts, appellate courts, and litigants share concerns that the fine tuning of the law has created more problems than it has resolved. Unfortunately, there does not appear to be any move by the North Carolina Supreme Court toward an undoing of the tangled web the interpretation of Rule 68 has created. In *McDaniel*, the defendant was not given an opportunity to settle the claim before suit was filed, but did make a reasonable settlement offer early in the litigation. Even though the offer was rejected, the defendants continued throughout the litigation process to attempt to settle the claim. The amount offered would have compensated the plaintiff fairly and would have covered costs incurred and attorney's fees. Quoting Judge Larry Ford, "this illus-

99. *Id.* at App. 5.

100. *Id.* at App. 9.

101. *Id.* at App. 9-10.

102. *Roberts*, 538 S.E.2d at 569 (N.C. 2000).

trates the preposterousness that all this has gotten to.”¹⁰³ The precedent before *Poole* recognized that defendants should not be punished after making reasonable offers of judgment.¹⁰⁴ As stated in the *Poole* dissent, the federal court decision in *Marryshow* held that in order to make a proper comparison between an offer of judgment that includes costs incurred and the judgment finally obtained, only costs incurred up until the offer of judgment should be added to the verdict.¹⁰⁵ *Marryshow* allows the pendulum to swing evenly, not too far to the right or to the left. It is time for the Legislature to stop the pendulum from swinging unevenly in favor of the plaintiffs. While there must be protection for plaintiffs who have suffered loss, there must also be a device in place to protect defendants from paying costs and attorney’s fees after making a reasonable offer. Such a balance not only protects plaintiffs in their quest for justice, but also protects defendants after a reasonable offer has been made.

103. Defendants-Appellants’ Brief at App. 5, *McDaniel* (No. COA03-939).

104. *Purdy*, 296 S.E.2d at 463.

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