

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

NOV 14 1990

ROBERT L. HOECKER
Clerk

WAYNE KITCHENS,
Plaintiff,
GARY L. RICHARDSON,
Movant-Appellant,
LLOYD PAYTON,
Movant-Appellee,
v.
BRYAN COUNTY NATIONAL BANK,
Defendant.

No. 90-7020
(D. C. No. 84-183-C)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before MCKAY, MOORE, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

34(1); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.¹

This appeal involves the continuing saga of two attorneys fighting over the division of a fee.

A detailed review of the facts is not essential to this appeal. Appellant (Richardson) and Appellee (Payton) are both attorneys. Payton filed suit on behalf of his client. Richardson took the case over during the early stages of pleading and discovery and successfully pursued the case to a \$200,000 verdict, which was upheld by this court in Kitchens v. Bryan County Nat'l Bank, 825 F.2d 248 (10th Cir. 1987).

Payton then filed an attorney's lien and moved for one-half of the attorney fees.² Richardson filed an offer of judgment in the amount of \$5,000. Following two evidentiary hearings the trial court allowed Payton one-half of the attorney fees, which was in excess of the \$5,000 offer of judgment. Richardson appealed this decision, and in an unpublished order and judgment in appeal No. 89-7000 we reversed and remanded with instructions to pay to Richardson all of the funds held by the court as attorney fees.

¹ Both parties have waived oral argument.

² The total attorney fees in question were approximately \$120,000.

Upon remand, Richardson filed a motion for costs including statutory attorney fees contending that under Fed. R. Civ. P. 68 he was so entitled. This broke down to approximately \$746 in costs and \$19,100 in attorney fees. The district court denied the motion, stating:

The plaintiff was the prevailing party in this case. A dispute arose between plaintiff's original attorney and his subsequent attorney as to entitlement to attorney's fees. After motions, hearings, and an appeal, it was ordered that plaintiff's subsequent attorney, Gary Richardson, was entitled to all of the attorney fee as prevailing party in this case. Mr. Richardson now applies to this court for attorneys' fees on the litigation over who was entitled to the attorney's fee.

The court finds that this dispute is not a separate case in which there is a "prevailing party" for purposes of attorneys' fees. Attorney's fees have already been granted in this case to the "prevailing party." Mr. Richardson chose to litigate this dispute in this case, rather than filing a separate lawsuit. Further, the court finds that this subsequent dispute between lawyers was unnecessary and should have been reasonably negotiated and settled between the attorneys. It has nothing to do with this case or its parties. Rather, its creation and pursuit was fostered by the personal differences of ex-law partners.

Accordingly, as to the litigation over the attorney's fee dispute herein, in the interests of justice and the discretion of the court, the court finds that each attorney should bear the expense of their own attorney's fee and costs. Plaintiff's application for attorneys' fees is denied.

We note at the outset that "the decision to award or deny attorney's fees lies within the sound discretion of the court, and, on appeal, review is subject to an abuse of discretion standard. Goichman v. City of Aspen, 859 F.2d 1466, 1471 (10th Cir. 1988). See also Security Nat'l Bank of Enid v. Bonnett, 623 P.2d 1061, 1064 (Okla. Ct. App. 1980).

Richardson now appeals, asserting:

I. The Trial Court erred, as a matter of law, in holding that Richardson was not a prevailing party in the litigation between Richardson and Payton.

II. Under Rule 68, F.R.Civ.P., the Trial Court is required to assess costs against a losing party who rejected a proper Offer to Allow Judgment tendered at least 10 days prior to trial which offer was of greater value than the amount ultimately awarded or received by the losing party.

III. Under Title 5 O.S. Ann. § 6 and Title 42 O.S. Ann. § 176, the prevailing party in an action on an attorney's lien is entitled to attorney's fees as costs of the action.

IV. Under Rule 54(d), the Trial Court is required to review the clerk's denial of taxation of costs, upon timely motion, for the proper taxation of costs due as a matter of course to the prevailing party.

I

Richardson claims that as he made an offer of judgment pursuant to Fed. R. Civ. P. 68 for \$5,000, and as he received far more, he is therefore a "prevailing party" and as such is entitled to costs. Payton responds by citing Delta Airlines, Inc. v. August, 450 U.S. 346 (1981).

Rule 68 provides in part: "[A] party defending against a claim may ... offer to allow judgment to be taken against the defending party If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs"

The Supreme Court has had occasion to discuss Rule 68 in Delta Airlines. In Delta Airlines, the defendant made an offer of

judgment to plaintiff. The offer was refused, the case was tried, and plaintiff lost. The defendant then moved to recover his costs. The Supreme Court held that Rule 68 applies only to offers made by defendants and only to judgments obtained by the plaintiff. Id. at 352. The Supreme Court then decided that Rule 68 was inapplicable to the case because it was the defendant who obtained the judgment.

Assuming, without deciding, that Payton enjoys the legal status of plaintiff as he brought the claim alleging he was entitled to one-half the attorney fees, we see no distinction between Delta Airlines and the case before us.

In his reply brief, Richardson tacitly concedes this argument and argues that the substantive provisions of Oklahoma law should control.³ He argues that the Oklahoma law controls and was triggered when he filed his Rule 68 offer of judgment.

The basic flaw in Richardson's argument is that he failed to properly raise this issue in the trial court. Mr. Richardson filed an application to set attorney fees requesting attorney fees "pursuant to 42 O.S. §176 and Rule 68." We also note that when Richardson made his offer of judgment it was specifically made "pursuant to Rule 68 of the Federal Rules of Civil Procedure."

³ Richardson cites Okla. Stat. tit. 12, § 1101, which provides in part that if plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer.

Mr. Richardson cannot now argue to the contrary. We cannot and will not consider an argument made for the first time in this court.

II

Richardson next argues that he is entitled to his costs of \$746.40 pursuant to Rule 68. This issue is also resolved by Delta Airlines wherein the Supreme Court held that Rule 68 has no application to a case in which judgment is entered against the plaintiff-offeree and in favor of the defendant-offeror.

III

Richardson's next argument is that the trial court should have granted his attorney's fees as costs. As noted, the appropriate standard of review is abuse of discretion. See Goichman, 859 F.2d at 1471; Security Nat'l Bank, 623 P.2d at 1064. Richardson has failed to demonstrate to this court that the district court abused its discretion in deciding against an award of attorney's fees under Okla. Stat. tit. 42, § 176.

IV

Richardson's final argument set forth above lacks merit and warrants no discussion.

The decision of the trial court is affirmed for the reasons stated in this order and judgment.

Entered for the Court:

**WADE BRORBY
Circuit Judge**