

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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FELICIA T. GONZALES,  
*Plaintiff/Appellant,*

*v.*

BURTON D. HOLLEY JR.,  
*Defendant/Appellee.*

No. 2 CA-CV 2013-0126  
Filed April 24, 2014

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).*

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Appeal from the Superior Court in Pima County  
No. C20110868  
The Honorable Gus Aragón, Judge

**AFFIRMED**

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COUNSEL

Hollingsworth Kelly, Tucson  
By Louis Hollingsworth, Michael F. Kelly, and John F. Kelly  
*Counsel for Plaintiff/Appellant*

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*Counsel for Defendant/Appellee*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 Rule 77(f), Ariz. R. Civ. P., provides that following an appeal of an arbitration award, the trial court must compare the arbitration award to the judgment entered after a trial de novo. If the judgment on the trial de novo is not more favorable by at least twenty-three percent, the court shall award to the appellee costs and fees, including attorney fees necessitated by the appeal, unless it finds the imposition to be a substantial economic hardship. In this personal-injury action, Felicia Gonzales appeals from the trial court's judgment on a trial de novo after appellee Burton Holley Jr. appealed the arbitration award. On appeal, Gonzales contends the court erred by denying her request for attorney fees pursuant to Rule 77(f) because it refused to consider the monetary sanctions to which she was entitled under Rule 68(g), Ariz. R. Civ. P., when comparing the arbitration award and the judgment on the trial de novo. For the reasons stated below, we affirm.

**Factual and Procedural Background**

¶2 The facts are undisputed. After an automobile accident in which Gonzales was injured, she sued the driver of the other vehicle, Holley, for negligence. Gonzales served Holley with an offer of judgment pursuant to Rule 68 to settle her claim for \$20,500. Holley did not accept the offer. The case proceeded to compulsory arbitration, and the arbitrator entered an award in favor of Gonzales for \$38,500 in damages and \$2,070.64 in Rule 68(g) sanctions, including double taxable costs and prejudgment interest. Holley

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appealed the arbitration award, and the matter was set for a trial de novo pursuant to Rule 77(a) and (c).

¶3 After a trial, the jury found in favor of Gonzales and awarded her \$22,000 in damages. Gonzales moved for attorney fees pursuant to Rule 77(f). After a hearing, the trial court denied Gonzales's request. The court then entered a final judgment, which included the damages and an award of \$16,425.86 in Rule 68(g) sanctions, including double taxable costs, prejudgment interest, and expert witness fees, in favor of Gonzales. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

**Discussion**

¶4 Gonzales challenges the trial court's denial of her request for attorney fees. She contends the court misapplied Rule 77(f) "by subtracting the Rule 68(g) sanctions from the arbitration award and the judgment on the trial de novo before making the Rule 77(f) comparison." Because the issue presented here requires us to interpret court rules, our review is de novo. See *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, ¶ 6, 189 P.3d 1114, 1117 (App. 2008).

¶5 Rule 77(a) allows all parties who appear and participate in compulsory arbitration to appeal the arbitration award by filing a notice of appeal and motion to set for trial. The appeal is "de novo on law and facts." Ariz. R. Civ. P. 77(c). However, "to discourage appeals of reasonable arbitration awards," *Farmers Ins. Co. v. Tallsalt*, 192 Ariz. 129, ¶ 8, 962 P.2d 203, 204 (1998), Rule 77(f) provides:

If the judgment on the trial de novo is not more favorable by at least twenty-three percent (23%) than the monetary relief, or more favorable than the other relief, granted by the arbitration award or other final disposition, the court shall order the deposit to be used to pay, or that the appellant pay if the deposit is insufficient, the following costs and fees unless the

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court finds on motion that the imposition of the costs and fees would create such a substantial economic hardship as not to be in the interests of justice:

...

(2) to the appellee, those costs taxable in civil actions together with reasonable attorneys' fees as determined by the trial judge for services necessitated by the appeal; and

(3) reasonable expert witness fees incurred by the appellee in connection with the appeal.

¶6 At any time more than thirty days before trial, any party may serve upon another party an offer of judgment to settle the matter. Ariz. R. Civ. P. 68(a). Rule 68(g) provides in pertinent part:

If the offeree rejects an offer and does not later obtain a more favorable judgment . . . , the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer and prejudgment interest on unliquidated claims to accrue from the date of the offer.

The purpose of Rule 68(g) is "to encourage settlement and avoid protracted litigation." *Levy v. Alfaro*, 215 Ariz. 443, ¶ 12, 160 P.3d 1201, 1203 (App. 2007). Gonzales timely served Holley with an offer of judgment in the amount of \$20,500.

¶7 In denying Gonzales's request for attorney fees pursuant to Rule 77(f), the trial court concluded that Holley "was successful in improving the result by a number better than [twenty-three] percent of the arbitration award." In reaching that conclusion,

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the court compared the jury verdict plus costs – \$28,069.73 – to the arbitration award plus costs – \$38,047. The court rejected Gonzales’s argument that it had to include Rule 68(g) sanctions in the Rule 77(f) determination. Relying on *Bradshaw v. Jasso-Barajas*, 231 Ariz. 197, 291 P.3d 991 (App. 2013), the court said it first had to determine whether Gonzales was entitled to attorney fees under Rule 77(f) and second had to determine whether Gonzales was entitled to Rule 68(g) sanctions.

¶8 “We evaluate procedural rules using principles of statutory construction.” *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7, 111 P.3d 1027, 1030 (App. 2005). When interpreting a rule, we strive to effectuate the intent of the drafters and look to the plain language of the rule as the best indicator of that intent. *Alejandro v. Harrison*, 223 Ariz. 21, ¶ 8, 219 P.3d 231, 233-34 (App. 2009). Accordingly, if the language is clear and unambiguous, we apply it as written. *Champlin v. Bank of Am., N.A.*, 231 Ariz. 265, ¶ 13, 293 P.3d 541, 543 (App. 2013). However, if the language is “inconclusive or ambiguous, we then consider other factors such as the[] context, subject matter, effects, consequences, spirit, and purpose.” *Vega v. Sullivan*, 199 Ariz. 504, ¶ 8, 19 P.3d 645, 648 (App. 2001).

¶9 “The plain language of Rule 77(f) demonstrates that the trial court must compare the arbitration award to the judgment entered at trial.” *Bradshaw*, 231 Ariz. 197, ¶ 7, 291 P.3d at 993; *see also Vega*, 199 Ariz. 504, ¶ 12, 19 P.3d at 649 (discussing former Rule 7(f), Unif. R. P. Arbitration). What is included in the “arbitration award” and the “judgment,” however, has been the subject of much litigation. Both certainly include any award of damages, and this court has also said they can include taxable costs, *Vega*, 199 Ariz. 504, ¶ 12, 19 P.3d at 649, attorney fees, and prejudgment interest, *Aqua Mgmt., Inc. v. Abdeen*, 224 Ariz. 91, ¶¶ 13, 16, 227 P.3d 498, 501-02 (App. 2010).

¶10 Relying on Rule 76(a), Ariz. R. Civ. P., Gonzales argues that the “arbitration award” discussed in Rule 77(f) also includes Rule 68(g) sanctions. She seems to reason that, because Rule 76(a) refers to an “offer of judgment” and “sanctions,” the “arbitration award” must include Rule 68(g) sanctions. Gonzales’s reliance on Rule 76(a) is misplaced.

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¶11 In relevant part, Rule 76(a) provides that “either party may submit to the arbitrator a proposed form of award or other final disposition, including any form of award for attorneys’ fees and costs whether arising out of an offer of judgment, sanctions or otherwise.” *See Aqua Mgmt., Inc.*, 224 Ariz. 91, ¶ 13, 227 P.3d at 501 (relying on this rule to conclude that Rule 77(f) analysis requires inclusion of attorney fees). However, Rule 68(g) sanctions only include taxable costs, expert witness fees, and prejudgment interest; they do not include attorney fees as provided in Rule 76(a). And, it would make little sense for a proposed arbitration award to include only a portion of the Rule 68(g) sanctions—the taxable costs. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 47, 181 P.3d 219, 233 (App. 2008) (we do not apply meaning that defies common sense or produces absurd results). Thus, the “offer of judgment” and “sanctions” language in Rule 76(a) must refer to other bases of attorney fees and costs. *See, e.g.*, A.R.S. §§ 12-341.01(A), 12-349(A).

¶12 This court addressed the issue presented here in *Bradshaw*. There, the defendant made an offer of judgment for \$9,501, but the plaintiff rejected it. *Bradshaw*, 231 Ariz. 197, ¶ 2, 291 P.3d at 992. An arbitrator subsequently awarded the plaintiff \$12,000 in damages plus \$374.10 in taxable costs. *Id.* The defendant appealed the award, and, after a jury trial, the plaintiff received \$8,604 in damages and \$934.10 in costs, totaling \$9,538.10. *Id.* ¶ 2 & n.1. The court “compared the arbitration award to the jury verdict (plus taxable costs), determined that the difference was not greater than twenty-three percent, and ordered [the defendant] to pay [the plaintiff] \$8784 in attorneys’ fees as a sanction” under Rule 77(f). *Bradshaw*, 231 Ariz. 197, ¶ 3, 291 P.3d at 992-93. The court then awarded the defendant \$572 in sanctions pursuant to Rule 68(g). *Bradshaw*, 231 Ariz. 197, ¶ 3, 291 P.3d at 993.

¶13 On appeal, the defendant challenged the award of attorney fees pursuant to Rule 77(f), arguing that the trial court should have deducted the Rule 68(g) sanctions to which she was entitled from the verdict before determining whether to award the plaintiff Rule 77(f) sanctions. *Bradshaw*, 231 Ariz. 197, ¶ 4, 291 P.3d at 993. This court affirmed. *Id.* ¶ 1. Pointing to Rule 68(g)’s

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language, we concluded that the trial court must “determine whether to impose a sanction under Rule 68(g) only after first complying with Rule 77.” *Bradshaw*, 231 Ariz. 197, ¶ 8, 291 P.3d at 994. Rule 68(g) expressly provides: “The determination whether a sanction should be imposed after an arbitration hearing shall be made by reference to the judgment ultimately entered, whether on the award . . . or after an appeal of the award pursuant to Rule 77.”<sup>1</sup> And, we explained that the trial court “must first review the judgment after the appeal of an arbitration award, compare it to the arbitration award pursuant to Rule 77(f), impose any appropriate sanctions, and then consider the imposition of any Rule 68(g) sanctions.” *Bradshaw*, 231 Ariz. 197, ¶ 8, 291 P.3d at 994.

¶14 Gonzales, however, contends that the language in Rule 68(g) relied on in *Bradshaw* “does not address the question of whether the court has to first deduct Rule 68(g) sanctions before engaging in a Rule 77(f) analysis.” Rather, according to her, “this language merely clarifies that Rule 68(g) sanctions are to be imposed in arbitration cases based on the final judgment, whether that judgment results from the arbitration award itself or an appeal of that award.” Gonzales also argues that *Bradshaw* “does not apply when the arbitration award includes Rule 68(g) offer-of-judgment sanctions.”

¶15 We agree with Gonzales that the purpose of the language in Rule 68(g) relied on in *Bradshaw* is to explain that, in determining whether to award sanctions, the trial court should consider “the judgment ultimately entered,” regardless of how it came to be—through arbitration or a verdict following an appeal of the arbitration award. Ariz. R. Civ. P. 68(g). But if that was the drafters’ sole intent, they could have said so without referring to Rule 77. Because Rule 68(g) explicitly refers to Rule 77, the drafters of Rule 68(g) must have contemplated the judgment entered after an appeal as including attorney fees and costs pursuant to

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<sup>1</sup>This provision of Rule 68(g) became effective January 1, 2012, after entry of the arbitration award in this case but before the appeal of the award and the judgment on the trial de novo. *See* Ariz. Sup. Ct. Order R-10-0030 (Sept. 1, 2011).

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subsection (f). See *Pinal Vista Props., L.L.C. v. Turnbull*, 208 Ariz. 188, ¶ 10, 91 P.3d 1031, 1033 (App. 2004) (“[E]ach word or phrase of a [rule] must be given meaning so that no part is rendered void, superfluous, contradictory or insignificant.”).

¶16 We recognize that in this case, unlike in *Bradshaw*, both the arbitration award and the final judgment, on their face, contain awards for Rule 68(g) sanctions. And, Rule 77(f) requires an “apples to apples” comparison of the arbitration award and the judgment. *Bradshaw*, 231 Ariz. 197, ¶ 9, 291 P.3d at 994, quoting *Hales v. Humana of Ariz., Inc.*, 186 Ariz. 375, 378, 923 P.2d 841, 844 (App. 1996). However, Rule 68(g) sanctions are “generally collateral to the underlying judgment or award,” not a part thereof. *Aqua Mgmt., Inc.*, 224 Ariz. 91, ¶ 18, 227 P.3d at 502; see also *Levy*, 215 Ariz. 443, ¶ 12, 160 P.3d at 1203 (discussing purpose of Rule 68(g)). Indeed, Rule 68(g) sanctions are “a separate and distinct obligation, even though, as occurred here, the trial court enters a single judgment that includes both the underlying damages and the sanctions imposed.” *Metzler v. BCI Coca-Cola Bottling Co. of L.A., Inc.*, 233 Ariz. 133, ¶ 16, 310 P.3d 9, 14 (App. 2013). Because Rule 68(g) sanctions are independent from the underlying arbitration award and judgment on the trial de novo, they should not be considered in the Rule 77(f) analysis. The trial court thus did not err by refusing to include them in its determination.

**Disposition**

¶17 For the foregoing reasons, we affirm.