IN THE SUPREME COURT OF FLORIDA

COASTAL PETROLEUM COMPANY, a Florida corporation,

Petitioner,

vs.

MOBIL OIL CORPORATION, a New York corporation,

Respondent.

CASE NO. 74,975
FIRST DCA CASE NO. 88-119

DISCRETIONARY PROCEEDING TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA, CERTIFYING A QUESTION OF GREAT PUBLIC IMPORTANCE

PETITIONER COASTAL PETROLEUM COMPANY'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

(a) Nature of the Case. This case is a discretionary proceeding to review a decision of the District Court of Appeal, First District of Florida, denying certiorari of a judgment for costs in the amount of $2,117,992.34 in Leon County, Florida, after a voluntary dismissal of a counterclaim, and is brought here pursuant to Rule 9.120, Florida Rules of Appellate Procedure. This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, and Article V, Section 3(b)(4), Florida Constitution (1980), to review decisions of district courts of appeal that pass upon a question certified to be of great public importance. The District Court certified the following question:

> "DOES THE TERM 'COSTS' IN RULE 1.420(d), FLORIDA RULES OF CIVIL PROCEDURE, INCLUDE REASONABLE AND NECESSARY PREPARATION COSTS AND FEES OF EXPERT WITNESSES WHO WERE NEVER CALLED TO TESTIFY BECAUSE A PLAINTIFF VOLUNTARILY DISMISSED?" (A-7)

(The certified question refers to a voluntary dismissal by "Plaintiff." Actually, Mobil Oil Corporation (Mobil), the plaintiff, did voluntarily dismiss its remaining claims, but the costs which were assessed against Coastal Petroleum Company (Coastal), a Defendant, arose after Coastal voluntarily dismissed its counterclaim.)

(b) The Course of Proceedinss. The case started when Mobil Oil Corporation sued Coastal Petroleum Company in 1976 seeking declaratory and other relief. Coastal answered and

filed counterclaims. Mobil prevailed upon some of its claims and was awarded an interest in Coastal's leases, but ultimately relinquished the interest for a release of one of Coastal's counterclaims. Mobil, the Plaintiff, filed what it called a "reply counterclaim" to Coastal's remaining counterclaims (A-109). The Trustees, joined by Coastal, removed the case to Federal Court based upon this reply counterclaim (A-95). Ultimately the case was remanded to the Circuit Court in Leon County by the Federal court (A-98).

The counterclaim and "reply counterclaim" involved essentially the same root issues addressed by this Court's decision in *Coastal Petroleum Company v. American Cyanamid Company,* 492 So.2d 339 (Fla. 1986) (A-123). Coastal filed a voluntary dismissal of its counterclaim (A-21). Mobil filed a voluntary dismissal of its own "reply counterclaim" (A-24) claiming to be the prevailing party. Mobil sought its costs under Rule 1.420(d), Fla.R.Civ.P., against Coastal, principally for fees for expert witnesses, who never testified and who were never qualified, incurred principally during periods while the case was removed to Federal court (A-30).

(c) Disposition in the lower tribunal. The trial court granted a final judgment for costs against Coastal in the amount of $2,117,992.34 (A-8). Coastal petitioned the

District Court of Appeal, First District, for a writ of certiorari to review the cost judgment entered after its notice of voluntary dismissal. On October 19, 1989, the District Court denied the petition for writ of certiorari (A-1), but certified a question as being of great public importance (A-7).

(d) Statement of the Facts. Coastal is the lessee of three State of Florida leases covering large areas of sovereignty lands. Mobil entered an exploration contract with Coastal in 1964 in which it could earn an interest in certain areas of the leases.

Mobil brought this suit in 1976 against Coastal seeking a one-half interest in areas of Coastal's leases. Coastal answered and filed counterclaims and eventually the Florida Board of Trustees of the Internal Improvement Trust Fund filed claims against Mobil (A-26). After a trial on Mobil's claims and two of Coastal's related counterclaims, the Circuit Court, on February 20, 1979, ruled in favor of Mobil, granting it a one-half interest in certain areas of the leases. Costs were assessed and paid by Coastal. These initial judgments were affirmed.

Mobil filed a new claim, the so-called "reply counterclaim" seeking declarations and determinations concerning the exact issues raised by Coastal's and the Trustees' phosphate-related counterclaims (A-109).

Plaintiff Mobil's express purpose in bringing this new claim was to prevent any voluntary dismissal of the phosphate claims (A-111,112).

Ironically, on December 18, 1979, premised upon this new claim by Mobil, the Trustees, joined by Coastal, removed the case to the United States District Court in Tallahassee, Florida (A-95). After the removal to Federal court, the phosphate claims were prepared for trial. Most of the expert preparation efforts and costs, 82%, occurred after removal to Federal Court.

One of the removed claims, the "oil show" claim, proceeded to trial in Federal Court and a jury awarded Coastal $11 million in compensation and $9 million in punitive damages against Mobil for breach of contract and misrepresentation. Mobil appealed the judgment and the Eleventh Circuit Court of Appeals reversed the judgment on March 4, 1982, finding that the removal to Federal Court was improper.

Following this reversal by the Eleventh Circuit, the Federal Court remanded the case to the Leon County Circuit Court, expressly reserving the sole issue of costs to itself (A-98). After remand, Mobil filed with the Federal Court a Bill of Costs, including some expert and non-expert items of cost, but not including the other Federal costs it submitted to and which were awarded by the Circuit Court here. The Federal District Court disallowed the requested expert fees,

which are generally not allowed under federal law, assessed the balance, and Coastal paid those costs (A-105).

After remand from Federal Court to the Circuit Court, Mobil and Coastal agreed to settle Coastal's "oil show" claim which had resulted in the $20 million judgment. Mobil assigned and released any interest it had to Coastal's leases (including any obtained by its judgment on its claims) and Coastal released the "oil show" counterclaim. Thus in 1986, what remained of this case was Mobil's reply counterclaim and the Trustees' and Coastal's phosphate counterclaims.

In related litigation in Polk County, Florida, Mobil and other phosphate companies sought to quiet title to certain lands. Those cases resulted in a decision by this Court on May 15, 1986, determining legal issues involved in this case in Coastal's and the Trustees' favor. *Coastal* Petroleum *Company v. American Cyanamid Company,* 492 So.2d 339 (Fla. 1986). This Court specifically ruled that Mobil's reply counterclaim was not properly filed in the Circuit Court of Leon County (A-128).

Only after it became clear that these Leon County claims might also be assigned to Polk County, the home of the phosphate industry, which had been reversed by the Supreme Court decision and where Coastal felt it could not receive a fair trial, Coastal, on January 26, 1987, filed its notice of voluntary dismissal here in Leon County (A-

21). On February 19, 1987, Mobil also filed a notice of voluntary dismissal of its new reply counterclaim (A-24). Thus, both Coastal and Mobil filed notices of voluntary dismissal in 1987 on matching issues.

Subsequently, the Trustees entered into a settlement with Mobil releasing each other from any claim for costs in Polk County or in this case. Under that settlement, the Trustees were guaranteed title not to just the ordinary high water line, but to the 25 year flood plane plus 2000 acres of land outside that area in return for dropping the Trustees' claims (A-115).

Despite Mobil's own notice of voluntary dismissal and this settlement, and despite the federal nature of the costs, Mobil filed a motion to tax essentially all costs on August 21, 1987, seeking expenses against Coastal premised upon Coastal's notice of voluntary dismissal (A-30). The list of expenses included those federal costs which had accrued in Federal Court during removal (A-32). These federal costs amounted to 82% of the total expenses on the list and were largely expert witness preparation charges, not allowable under federal law. These federal expenses were not included in Mobil's federal Bill of Costs.

The list of expenses Mobil sought included all expenses of its defense, whether attributable to the Trustees' claims, Coastal's claims, or its own new claim, the reply counterclaim. No allocation was made between the expenses

for defense of the Trustees' claims although some were excluded that could only be identified in the Trustees' claims. Even though there were two claims for conversion, one by Coastal and one by the Trustees, none was assigned to the Trustees. No allocation - even though Mobil's recent settlement with the Trustees waived any claim to expenses against the Trustees (A-121).

The list of expenses Mobil sought also included such items as title search and deraignment costs (A-61). It included expert preparation time even though the experts were neither qualified nor testimony given at trial.

Coastal objected to the motion to tax costs and to these items of expense. The Circuit Court rejected some of Mobil's expense items, but included all of those above discussed, entering a cost judgment for $2,117,992.34 on December 16, 1987 (A-8). Coastal paid the judgment under protest.

Because of the departure from the essential requirements of the law, including: the award of costs where Mobil has also filed a notice of voluntary dismissal; the award of expenses where all costs are assessed against only one of two defendants; the award of expert preparation time amounting to paralegal work; and the award of expert preparation fees on voluntary dismissal; and the assessment of federal costs where: the federal court specifically reserved jurisdiction over costs; the state courts have no

express authority over such costs; the federal determination of costs is binding and res judicata of the issue and the issue of expert fees in federal court is governed by federal law disallowing such fees, Coastal sought a writ of certiorari from the District Court of Appeal, First District. The writ was denied on October 19, 1989, but the District Court certified a question of great public importance to this Court.

SUMMARY OF ARGUMENT

Rule 1.420(d), Florida Rules of Civil Procedure, provides that costs of an action may be awarded after a voluntary dismissal. Expert witness expenses after a voluntary dismissal are not specified by that or any other Rule. Section 92.231, Florida Statutes, however, precludes fees of experts unless the experts are permitted to qualify and testify by the court. Here the cost judgment included $1.8 million of expert expenses where the experts neither were permitted to qualify and testify by the court. The decision is at odds with *Junkas* v. *Union Sun* Homes, Inc., 412 So.2d 52 (Fla. 5th DCA 1982).

Further, here this cost judgment was awarded against the Defendant and arose after notices of voluntary dismissal were filed by both plaintiff and defendant on the same issues so neither could be termed a prevailing party in this proceeding. Even further, the vast bulk of these costs accrued during a period of removal to Federal Court and were governed by federal law which does not allow recovery of such expert expenses.

The District Court should have quashed the Circuit Court's judgment for two other reasons. First, there was no allocation of such costs between two Defendants' claims. Second, paralegal and title search costs were allowed even though no legal fees were authorized by law or otherwise.

Rule 1.420(d) does not permit the taxation of such expert preparation time after a voluntary dismissal. Coastal submits that the Court should exercise its discretion to review this case because of the chilling effect upon the use of voluntary dismissals. The judgment of the District Court should be quashed for these reasons and the District Court should be ordered to enter its own order quashing the Final Judgment of Costs.

POINT I

THE TERM "COSTS" IN RULE 1.420(d), FLORIDA RULES OF CIVIL PROCEDURE, DOES NOT INCLUDE CHARGES OF EXPERT WITNESSES WHO ARE NEVER QUALIFIED AND CALLED TO TESTIFY.

A. Section 92.231, Florida Statutes, precludes expert witness charaes here of any kind.

The bulk of the costs included in the cost judgment were Mobil's expert witness preparation charges. Although Rule 1.420(d), Florida Rules of Civil Procedure, does not specify what kinds of expenses are recoverable costs after a voluntary dismissal, Section 92.231 precludes expert preparation charges.

As the District Court correctly stated:

> "The rule does not define costs, nor does there appear to be any case law construing the term as used in this rule." (A-5)

No case has ever held the term "costs" in the context of Rule 1.420(d) to include the charges of experts who have not actually been qualified or actually testified in the proceeding. Rule 1.420(d), Fla.R.Civ.P., provides in pertinent part:

> "(d) Costs. Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action."

No description nor definition is given to the term "costs" in Rule 1.420(d), Fla.R.Civ.P. Like other provisions for assessment of costs, other substantive law actually

specifies what expenses are included within the word "costs."

At common law "fees" themselves were not allowed as costs. Even today, only those "fees" and costs which are provided for by statute or rule are recoverable. There are statutory substantive provisions for costs. Section **57.041** and Section **57.071. A** similar substantive provision is also made for witness fees. Section **92.151.** Only one substantive provision of law addresses the allowance of any charges for expert fees, Section **92.231.** The statute is clear, however, that only where the witness has been permitted by the Court to qualify and testify may such expert witness charges be allowed. It is undisputed that no such qualification or testimony took place in this case.

In a recent case, the Court emphasized the requirement of testimony of the experts under Section **92.231:**

> "Section **92.231,** Florida Statutes **(1983),** provides:
>
> **(1)** The term 'expert witness' as used herein shall apply to any witness who offers himself in the trial of any civil action as an expert witness or who is subpoenaed to testify in such capacity before a state attorney in the investigation of a criminal matter, or before a grand jury, and who is permitted by the court to qualify and testify as such, upon any matter pending before any court.
>
> **(2)** Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in the amount of **$10** per hour or such amount as the trial judge may deem reasonable, and the same

shall be taxed as costs." *Travieso* v. *Travieso*, 474 So.2d 1184, 1185 (Fla. 1985).

See also *Murphy* v. *Tallardy*, 422 So.2d 1098, 1099 (Fla. 4th DCA 1982).

What Rule 1.420(d), Fla.R.Civ.P., essentially does is to procedurally allow premature assessment of some expenses. Normally costs await the final determination. But where there has been a voluntary dismissal without prejudice, as here, some expenses that have substantively accrued may be assessed as costs immediately. Only those expenses that may be awarded as a matter of substantive law can be said to have accrued. Since these expert charges do not accrue until the experts are permitted by the Court to qualify and testify, there is no substantive accrual of any such expenses at the time of a voluntary dismissal.

In a similar situation involving directed verdicts, "costs" have been held not to include expert witness fees because the expert witnesses have not been permitted by the Court to testify. *Junkas* v. *Union Sun Homes, Inc.*, 412 So.2d 52 (Fla. 5th DCA 1982), and *KMS of Florida Corp.* v. *Magna Properties*, 464 So.2d 234, 235 (Fla. 5th DCA 1985). In fact in *Junkas*, *supra* at 53, the court held:

> "Appellee cites Florida Rule of Civil Procedure 1.420(d) providing for costs in any action dismissed under that rule. That rule is inapplicable because Rule 1.420(b) provides for an involuntary dismissal for insufficiency of proof 'after a party seeking affirmative relief in an action tried *by the court without a jury* has completed the

> presentation of his evidence . . .' and this was a jury trial. In any event, that rule begs the question here, which is whether an expert fee is a taxable cost under the circumstances. Section **92.231(2),** Florida Statutes **(1981),** provides for the allowance of an expert witness fee for any expert or skilled witness 'who shall have testified in any cause.' Florida Rule of Civil Procedure **1.390** (c) provides that 'an expert or skilled witness ***whose deposition is taken*** shall be allowed a witness fee . . . ." Counsel at oral argument conceded that this witness had never been deposed. Costs are taxable only where authorized by statute or rule. No applicable statute or rule permitting the allowance of an expert witness fee under the circumstances in this case has been directed to our attention." ***(Emphasis supplied.)***

The District Court held that these two cases, which held Section **92.231(2)** to exclude expert fees, were distinguishable for two reasons: first it found that the expert witnesses were deposed, and second, that because they involved directed verdicts, the prevailing party had prevailed on their **own** initiative and chose not to use expert witnesses. The District Court also recognized, however, that this conclusion would have a chilling effect upon voluntary dismissals and certified this conclusion to this Court.

As to the first reason for distinguishing these two cases, that the experts were deposed, it must be noted that Section **92.231(1)** requires that the testimony be given ". . . in the trial . . ." and the expert has been ". . . permitted by the court to qualify and testify as such . . .." Section **92.231** does not address deposition testimony.

To suggest that Section 92.231 allows a fee to an expert other than when the expert is permitted by the Court to qualify and testify is contrary to the express wording of that section.

It is true that in *Junkas, supra,* the court there referred to absence of the expert's deposition, but in addressing depositions that court referred to Rule 1.390(c), F.R.Civ.P., not Section 92.231. Depositions of some experts were taken by Mobil and the Trustees. The total assessed extent of the expert for depositions are determined in the order as $183.33. The total pretrial preparation expenses allowed for experts was $1,937,232.14 (A-9). In fact, what occurred was a demand for depositions in Federal Court by Mobil which insisted upon taking more of Coastal's expert depositions. Coastal informed the Court it did not desire to take depositions, but the Trustees did desire to take such depositions. Those Trustee deposition expenses were removed from Mobil's request for costs. Thus while the District Court was correct that some experts were allowed and were deposed while in Federal Court, these were at the insistence of Mobil or the Trustees. As the judgment for costs reflects, other such expenses were miniscule. Even if these deposition expenses of $183.33 were permitted by Rule 1.390(c), certainly the mountainous $1,937,232.14 of other expert preparation expenses could not ride the coat tails of that Rule.

The first distinction pointed to by the District Court below for ignoring *Junkas* does not pass scrutiny. Deposition testimony is clearly not within Section 92.231. Rule 1.390(c), even if applicable to the minor federal court depositions of some experts taken at the insistence of Mobil and the Trustees, could not justify the major expert pretrial preparation expenses more than 2000 times larger. The "finding" by the District Court that the experts were deposed is not complete nor pertinent to the very large expenses assessed under Rule 1.420(d).

The second reason given for distinguishing ***Junkas*** also does not pass scrutiny. The District Court sees a waiver of a right to expert expenses by a defendant who seeks a directed verdict. That analysis presumes a right to expert expenses before that time, however. This reasoning is circular and ignores the absence of the qualification and testimony required before Section 92.231 permits a fee. If there is no right shown to exist, a waiver is a very hollow gesture.

The facts here show that Mobil filed its own reciprocal claim, the so-called "reply counterclaim," to prevent the early voluntary dismissal. Had it not impeded the amalgamation of all claims to one court, the Federal Court, then the expenses it was awarded below would never have been expended in this case. Furthermore, if Mobil had not dropped its own reciprocal claim, it might have used one or

more those experts at trial. As will be seen, Mobil dropped its claim as a result of this Court's ruling in ***Coastal Petroleum*** v. ***American Cyanamid,*** 492 So.2d 339 (Fla. 1986). If there is any equity in the second distinction offered by the District Court, it surely does not apply to Mobil here.

Finally, the District Court itself recognized its decision raised the problem of chilling the use of voluntary dismissals. Experts' fees, like their testimony, are subject to wide divergencies. Some experts demand very large fees which may be considered reasonable in their practice. Large companies may hire many such experts and very early. To permit such fees on voluntary dismissal would discourage the use of this valuable tool especially by smaller parties, and give larger parties an advantage not contemplated by the American Rule of expenses or practice.

The two reasons for distinguishing the ***Junkas*** and ***KMS*** cases do not pass scrutiny. Obviously even the District Court was concerned with the effect upon the use of voluntary dismissal. Section 92.231 does not allow the recovery of such expert preparation time as costs, nor does any other Rule or statute.

Since expert expenses were not allowed at common law, and since no other substantive provision of statute allows the recovery of expert witness expenses, except where the witness has been permitted by the court to qualify and testify or for the costs of his deposition, no such expert

expenses are recoverable as costs under Rule **1.420,** Fla.R.Civ.P.

Thus the Circuit Court departed from the essential requirements of the law in awarding expert witness preparation time after a notice of voluntary dismissal where the experts were neither qualified nor testified. Coastal submits the Court should quash the District Court's order and order the District Court to quash the Circuit Court's Order.

B. This is Especially True Where Cross-Notices of Voluntary Dismissal are Filed So That No One Prevails.

Beyond the violation of this substantive law concerning the assessment of costs for expert expenses, there were cross-notices of voluntary dismissal served here. Mobil, the plaintiff, could not be held to have prevailed where the claims were reciprocal, especially in light of this Court's holding in ***Coastal Petroleum Company v. American Cyanamid*** **(A-123).** Here Mobil as the plaintiff asserted a new claim calling it a "reply counterclaim." Even though this claim was also voluntarily dismissed by Mobil, the Circuit Court entered a cost judgment against Coastal. The District Court should have held that the Circuit Court departed from the essential requirements of the law in awarding costs where both parties filed notices of voluntary dismissal on receiprocal claims.

Two points are relevant here concerning the merits of Mobil's own reply counterclaim. First, Mobil's reply counterclaim was determined to be beyond the jurisdiction of the Circuit Court and should have been dismissed. The District Court of Appeal, Second District, held on July 13, 1984:

> "In sum, the Leon County Circuit Court lacks jurisdiction of the subject matter of Mobil's reply counterclaim for the reason that the counterclaim is in **rem** in nature and local to the Polk County Circuit Court. See Cohen v. Century Ventures, Inc., 163 So.2d 799 (Fla. 2d DCA 1964). Because the Leon County Circuit Court lacks jurisdiction over the subject matter of Mobil's reply counterclaim, the rule of priority is inapplicable.7/
>
> 7. We suggest that the Leon County Circuit Court notice the defect of want of jurisdiction as regards Mobil's reply counterclaim and enter an appropriate order. See Bohlinger v. Higginbotham, **70** So.2d 911 (Fla. 1954)."

In the subsequent appeal to this Court, the Court held:

> "Finally, we agree with the district court in Mobil Oil that respondent Mobil's counterclaim was in *rem* in nature and local only to Polk County Circuit Court.
>
> . . . . . .
>
> We approve the portion of Mobil Oil holding that jurisdiction rested in Polk County and quash the remainder." (A-128)

Thus Mobil's new claims which it voluntarily dismissed, the so-called reply counterclaim, were specifically determined to be beyond the Circuit Court's jurisdiction by this Court.

The second point is that the merits of Mobil's new claims were rejected by this Court's same decision in ***Coastal Petroleum v. American Cyanamid,*** 492 So.2d 339 (Fla. 1986) (A-123). Thus, not only should the claims never have been brought before the Circuit Court, but as a matter of law, the issues sought to be declared have been declared against Mobil and in favor of the Trustees and Coastal. Mobil then filed its notice of voluntary dismissal, stating:

> " NOTICE OF VOLUNTARY DISMISSAL
>
> Pursuant to Rule 1.420(a), Florida Rules of Civil Procedure, and in accordance with Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corporation, **455** So.2d 412, 416 n. 7 (Fla. 2d DCA 1984), approved in pertinent Part, 492 So.2d 339 (Fla. 1986), MOBIL OIL CORPORATION hereby dismisses without prejudice the reply counterclaim filed in this cause on November 20, 1979." (A-24).

What Mobil claimed in its Motion to Tax Costs in the Circuit Court was that it was the winner by virtue of Rule 1.420, Florida Rules of Civil Procedure. In no way did Mobil prevail. On the substantive issues here raised in its own claims, Mobil has lost by the Supreme Court decision. Procedurally, when Mobil filed its voluntary dismissal, both the Trustees and Coastal became "prevailing parties" by Mobil's rationale. Furthermore, since the issues raised by Mobil met the issues raised by Coastal and the Trustees, neither party has actually prevailed. Thus, whether substantively or procedurally, Mobil is not a prevailing

party entitled to costs. Mobil, therefore, cannot claim a right to assessment of costs since neither substantively nor procedurally has Mobil prevailed. Mobil had one opportunity in Federal Court to seek costs. It sought some but not all there in Federal Court. If there was any doubt as to whether Mobil could claim costs after Coastal's notice of voluntary dismissal, it was dispelled when Mobil filed its own notice of voluntary dismissal.

Where there are offsetting judgments, then neither party is a prevailing party entitled to costs. Where there is not a complete offset, then the greater prevailing is the prevailing party. *Kendall East Estates v. Banks*, 386 So.2d 1245 (Fla. 3d DCA 1980). See also: "Who Is the 'Successful Party' or 'Prevailing Party' for Purposes of Awarding Costs Where Both Parties Prevail as Affirmative Claims," 66 ALR3d 1115, 1127, S7. The real issue in such a situation is not who wins a battle, but who wins the war. *McKelvey v. Kismet, Inc.*, 430 So.2d 919, 922 (Fla. 3d DCA 1983). Mobil lost the war on the substantive issues.

Mobil was not the prevailing party. Although Rule 1.420, Fla.R.Civ.P., provides for assessment of costs, it is not the only rule governing cost assessment. Even if some costs may have been assessable before Mobil filed its own notice of voluntary dismissal, after its notice it lost any claim to such costs. There was not even a separation of expert expenses between Mobil's voluntarily dismissed claims

and Coastal's or the Trustees' counterclaims. The District Court should have held that the Circuit Court departed from the essential requirements of the law in awarding expert expenses as costs where both parties filed notices of voluntary dismissal.

C. Expert Expenses Which Occur While a Case is in Federal Court May Not be Awarded by the State Courts.

Beyond ignoring the statutory preclusion of such expert fees and Mobil's own voluntary dismissal, the Circuit Court erroneously assessed costs which occurred during removal to Federal Court before remand. These costs amounted to **82%** of the total costs requested by Mobil. The Circuit Court stated:

> "It's my view that the cost hearing for this type of costs had not sufficiently matured while it was within the federal system. Therefore, the jurisdiction that remained under the federal orders was for the purpose of costs assessed on any improper removal; that this Court does in fact have the jurisdiction to entertain the motion for costs and to assess those costs under appropriate Florida law."

1. Under Federal Law The Circuit Court Did Not Have Jurisdiction to Consider the Items of Cost Accrued in Federal Court.

When this case was removed to Federal Court by the Trustees in **1979,** the Circuit Court's jurisdiction ceased eo instanti. ***Young v. Merchants Ins.*** **Co., 29** F. **273, 274** (Cir. Ct. D. S.Ca. **1886).** That Court could not exercise any

jurisdiction without violating express federal law. 28 USC §1446(e) provides:

> "(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded."

Until a federal court remands a case, a state court may proceed no further in a case. On a partial remand, such as is present here, the state court jurisdiction to proceed extends only to that part of the case remanded.

> "Where there is but a partial remand, this would necessarily effect a complete and total severance of what is retained by the federal court from what is remanded, and the state court would only acquire power to proceed with the portion of the case that is remanded." 1A Moore's ***Federal Practice,*** 0.168[4.-2], p. 656.

Therefore, until any matter is remanded to the court from the federal court, the state court cannot proceed.

The Federal Court has authority to determine costs following remand. Pursuant to 28 USC $1919, 28 USC §1447(c) and Rule 54(d), Fed.R.Civ.P., a federal court does have authority to assess "just costs" when a case is remanded or dismissed for lack of jurisdiction. In ***Postal Telegraph Cable Company v. Alabama,*** 155 U.S. 482, 487 (1894), the United States Supreme Court, in reversing the Court of Appeals for the Fifth Circuit and ordering remand, held:

> "The conclusion is inevitable, that the judgment of the Circuit Court of the United States must be reversed, and the case remanded to that court, with directions to remand it to the state court; and that, the case having been wrongfully removed into the Circuit Court of the United States by the Postal Telegraph Cable Company, that company must pay the costs in that court, as well as in this court. Tennessee v. Bank of Commerce, above cited; Hanrick v. Hanrick, **153** U.S. **192.**"

Also see ***Walker v. Collins,*** **155** U.S. **102 (1897).** In ***Mallonee v. Fahey,*** **122** F.Supp. **472, 475** (S.D. Cal. **1954),** the court stated the rule of law:

> "The next question is whether or not this court has jurisdiction to allow costs where the appellate court has held there is no jurisdiction of the subject matter. That question is answered in the affirmative by In re Northern Indiana Oil Co. (Moore v. Fletcher, **7** Cir., **1951, 192 F.2d 139.** There the court held that Section **1919** of Title **28** U.S. Code meant exactly what it says, that whenever any action or suit is dismissed in any District Court for want of jurisdiction, such court may order the payment of costs. The appellate court had previously reversed an order of the District Court on the ground of lack of jurisdiction. Thereafter, the District Court, after entering the order in compliance with the mandate, upon hearing, taxed costs. The order taxing costs was affirmed."

See also ***Devost*** v. ***Twin State Gas & Electric Co.,*** **252** F. **125, 126 (1st** Cir. **1918); *Clark v. Safeway Stores, Inc.*, 117** F.Supp. **583, 584 (WD** Mo. **1953); *Oil Well Service Company v. Underwriters at Lloyd's London,*** **302** F.Supp. **384, 385** (CD Cal. **1969); *Moore v. Bishop,*** **520** F.Supp. **1187, 1188** (SC **1981); *Walsh Adm'x v. Joplin & P. Ry. Co.,*** **219 F. 345, 346**

(Kansas **1915**); and ***Dunkin Donuts*** of ***America v. Family Enterprises, Inc.,*** **381** F.Supp. **371, 373** (D. Maryland **1974**).

28 US **$1919** provides a federal court authority to determine federal costs where a case is dismissed for lack of jurisdiction. See ***Oster v. Rubinstein,*** **142** F.Supp. **620, 621** (SD NY **1956**); ***In re Northern Indiana Oil Co.,*** **192** F.2d **139** (7th Cir. **1951**); ***Inglewood Federal Savings & Loan Ass'n. v. Richardson,*** **121** F.Supp. **80** (SD Cal. **1954**); and ***Mallonee v. Fahey,*** **122** F.Supp. **472** (SD Cal. **1954**). There is no great showing required for assessment of costs nor limitation to certain federal costs. ***In re Northern Indiana Oil Co., supra.***

Here Federal Judge William Stafford specifically retained a part of the case, the consideration of costs before the Federal Court:

" ORDER

> The mandate of the United States Court of Appeals for the Eleventh Circuit in Case Nos. **81-5533** and **81-5812** having been received by the Court, it is, thereupon,
>
> ORDERED AND ADJUDGED that this case is hereby remanded to the Circuit Court of Leon County, Florida. The bond in this case filed by Mobil Oil Corporation (Document **349**) is hereby discharged and the surety on the bond is released without liability. The Clerk of the Court is directed to mail a certified copy of this Order to the Circuit Court of Leon County, Florida, in accordance with Title **28**, Section **1447(c)**, United States Code.
>
> The Court reserves jurisdiction for the sole Purpose of assessinu costs.

DONE AND ORDERED at Tallahassee, Florida, this 6th day of May, 1982.

/s/ William Stafford
Chief Judge."
(Emphasis supplied). (A-98).

The Federal Court proceeded to determine the bill of costs submitted by Mobil after remand (A-105)! No other bill was submitted despite Local Rule 6(F), and the Federal Court has never relinquished jurisdiction to the Circuit Court on the matter of federal costs during removal.

Cost items (1) and (2) in Exhibit A (A-32) to Mobil's motion to tax costs make the point most dramatically that these are federal costs:

" A. Filing Fees

1) 06/26/81 #3355-CLERK, UNITED STATES DISTRICT COURT; FILING FEE-DEPOSITION SUBPOENA (2) 6.00

2) #153825-CLERK, UNITED STATES DISTRICT COURT; $65.00 DOCKETING FEE FIFTH CIRCUIT; $5.00 FILING FEE - NOTICE OF APPEAL; APPEAL OF INJUNCTION 70.00"

Both of these are federal filing fees! Clearly Mobil sought, and the Circuit Court assessed in its cost judgment, federal costs here that may be assessed and recovered only in federal court at an appropriate time. Federal costs are assessed in federal court by federal rules and state court costs in state court by state court rules. Clark v. Fairbanks, 249 F. 431 (5th Cir. 1918).

The District Court should have held that the Circuit Court was without jurisdiction as to this matter of federal costs because the issue was retained by the Federal Court which had sole authority and jurisdiction to determine the matter. All items of federal costs in Mobil's motion to tax costs should have been stricken for lack of jurisdiction in the Circuit Court.

2. There is no authority in the Florida Statutes nor Rules permitting the assessment of Federal costs in a State case.

On the other side of the coin, there is no provision of Florida law that allows the assessment of costs incurred in Federal Court. Payment of costs is in the nature of an indemnification. *City of Boca Raton v. Boca Villas Corp.,* 372 So.2d 485, 486 (Fla. 4th DCA 1979); and 12 Fla.Jur.2d Costs, §1, p. 137. In fact, at common law there was no right to costs at all. *Buckman v. Alexander,* 24 Fla. 46 (1888), and *Cruger* v. *City of Miami,* 154 *So.* 854, 855 (Fla. 1934). Thus, unless provided by statute or agreement, there still is no right to costs. *Sears, Roebuck & Company v. Richardson,* 343 So.2d 678, 679 (Fla. 1st DCA 1977), and *American Physicians Insurance Co. v. Hruska,* 428 S.W.2d 622 (Ak. 1968).

When the federal removal action started, it was by petition, 28 USC §1446(a), and was assigned a new case

number. For all practical purposes, it became a new case. When it was remanded, the order of remand was a final judgment. *Karsoules* v. *Moschos, supra,* and *Walsh Adm'x.* v. *Joplin & P.Ry.Co., supra.* The federal costs occurred in a federal proceeding.

There is no provision of law for the assessment of claimed federal costs in the state courts of Florida. Rule 1.420(d) makes no such provision. Not only did the federal court reserve jurisdiction and not remand the issue of federal costs, but there is no provision of Florida law to determine federal costs in a state court even if there was no express reservation of jurisdiction. The Circuit Court proceeded without jurisdiction.

3. The Determination of Costs in Federal Court is Res Judicata as to All Such Federal Costs.

Res judicata applies to a determination of costs. In *Wade* v. *Clower,* 114 *So.* 548, 552 (Fla. 1927), this Court considered the res judicata effect of a prior federal judgment in a different but related case, which included costs, and stated:

> "The general rule as to the conclusiveness of a former judgment is thus stated in Black on Judgments, $731:
>
> 'A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and

> received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.'
>
> See, also, 15 R.C.L. 951, 962-964; Grey v. Grey, 91 Fla. 103, 107 So. 261; Yulee v. Canova, 11 Fla. 9, 56; G.L. Miller & Co. v. Carmichael-McCalley Co. (Fla.) 109 So. 198. But this matter of allowance of solicitors' fees and court costs was not a matter which was specifically litigated in the case in the federal court or covered by its decree, nor was it a matter which 'might with propriety have been litigated and determined in that action.' As the case in the state court was still pending, and as the matter of solicitors' fees and court costs in such case was peculiarly one to be ascertained and determined by the state court, the federal court very properly made no effort to adjudicate the same."

Thus, there the federal cost judgment was not res judicata only because the fees accrued in state court in a <u>different</u> case, <u>before</u> the federal judgment, and because the matter of costs which arose in state court was a matter that <u>could</u> <u>not</u> have even been determined by the federal court. Here the Federal Court had authority to determine federal costs at the time of remand (28 USC §1447(c), 28 USC §1919, Rule 54(d), Fed.R.Civ.P.), and did adjudge costs by determining the Bill of Costs submitted by Mobil. Thus under the Court's decision, *Wade* v. *Clower, supra,* the Federal Court cost determination is res judicata of the issue of <u>all</u> federal costs.

Federal judgments are entitled to res judicata effect in Florida courts: *State Farm Mutual Automobile Insurance*

Co. v. Lee, 171 So.2d 899 (Fla. 1st DCA 1965); *Weed v. Horning,* 33 So.2d 648 (Fla. 1947); *Standard Accident Ins. Co. v. Simpson,* 10 So.2d 85 (Fla. 1942); *South Florida Securities, Inc. v. Seward,* 195 *So.* 600 (Fla. 1940); *National Mutual Insurance Company of the District of Columbia v. Dotschay,* 134 So.2d 248 (Fla. 3d DCA 1961); *Allstate Insurance Company v. Warren,* 125 So.2d 886 (Fla. 3d DCA 1961); and *Bardwell* v. *Langston,* 244 So.2d 742 (Fla. 4th DCA 1971).

Cost judgments and determinations are entitled to res judicata effect: *Wade* v. *Clower, supra;* 50 CJS Judgments, §§611, 613 and 712, note 69. Also see, *Munson* v. *Straits of Dover S.S. Co.,* 99 F. 787 (SD NY 1900); aff'd. 100 F. 1005 (2d Cir. 1900); *Westergren v. Campbell,* 127 S.W.2d 985 (Tex. 1939); and *Hadwin v. Southern Ry. Co.,* 45 S.E. 1019 (S.Ca. 1903). Thus when the United States District Court determined the issue of costs during removal on Mobil's Bill of Costs, that determination is res judicata of issues of federal costs during removal. *Wade* v. *Clower, supra.* This is consistent with the Federal Court's jurisdiction and discretion to consider "just" costs.

Res judicata applies to preclude the litigation of all issues which might have been considered by the Federal Court, including all of those other federal costs from the time of removal to remand. There is no question that the Federal Court had jurisdiction to consider costs, even

though it lacked jurisdiction over the controversy (28 US $1919, 28 US §1447(c) and Rule 54(d), Fed.R.Civ.P.). There is also no question but that any and all federal costs could have been considered by the Federal Court on remand. Therefore, since all items of cost might properly have been presented, even though they were not, the determination by the Federal Court is res judicata of the federal cost items. *Wade* v. *Clower, supra.*

4. The Law of The Forum Governs the Accrual of Costs, and Federal Law Disallows Expert Witness Expenses and Certain Other Large Costs Unless Approved in Advance.

For another reason, most of the federal costs should have been stricken rather than being awarded by the Circuit Court. The law governing costs is the law of the forum in which they were accrued. Actions in federal courts are governed by federal law. 36 CJS Federal Courts, $190, p. 527. Federal costs are taxed by federal law or rules. *Conte* v. *Flota Mercante Del Estado,* 277 F.2d 664, 672 (2d Cir. 1960), and *United States* v. *Treadwell,* 15 F. 532 (1883).

Costs are paid on the theory of indemnification, and the indemnity accrues under the substantive law of where the cost is expended. See the analogy to another indemnity, a bond. *Fidelity & D.Co. v. L. Bucki & Son Lumber Co.,* 189 U.S. 135, 138 (1903). Also see: *Tullock* v. *Mulvane,* 184

U.S. 497, 511-515 (1901); *Heiser V. Woodruff,* 128 F.2d 178, 180 (10th Cir. 1942); and 7 Moore's Federal Practice, 65.10[1], p. 65-97. Thus, where obligations are undertaken in federal court, such as costs, federal law governs the rights and amounts. The costs at issue here are the federal cost items accruing while in Federal Court. Thus, it is not surprising they are therefore governed by federal law.

There are other good reasons why the law of the forum governs cost items, including necessity for the incurring, authority, reasonableness and other matters. The judge in charge of the case during accrual of such costs would have best knowledge of such matters. This is particularly true here where the costs accrued and are governed by a "just" costs standard in federal court.

Federal law is clear that expert witness costs are not allowed. *Bosse v. Litton Unit Handling Systems, Division of Litton Systems, Inc.,* 646 F.2d 689 (1st Cir. 1981), and *Compensation of Expert Witnesses as Costs Recoverable in Federal Action by Prevailing Party Against Party Other Than United States,* 71 ALR Fed. 875 (1981), specifically pages 885 and 911 for Eleventh Circuit Court of Appeals cases.

Furthermore, very large cost items must be approved in advance or they will not be taxed as costs. See *Farmer v. Arabian American Oil Co.,* 379 U.S. 227 (1964). In fact, to attempt to force state law rules on federal cases may create Federal Constitutional problems. *Sacramento Municipal*

Utility Dist. v. Pacific Gas & Electric Co., 128 P.2d 529 (Cal. 1942), states:

> "Another phase of this same question is manifested in the rule that, as to matters of costs in actions in the federal courts, the United States statutes when they cover the subject are controlling, and may not be regulated by state statutes which result in penalizing the free access to the federal courts in proper cases. In that connection defendant refers to the federal statutes on the subject of fees and costs in actions in the federal courts. 28 U.S.C.A. §§571, 572. Assuming that the subject of costs is wholly covered by the federal statutes, it does not follow that section 526b is a regulation or provision for costs contrary to those statutes."

Here Mobil did submit some expert witness expenses in its federal Bill of Costs after remand relating to the oil show claim tried (A-99). Even those expert witness costs were disallowed (A-105)! Mobil did not seek the other expert witness costs in Federal Court where they could have been sought but would have been denied. Instead, Mobil seeks to have federal expert costs assessed in state court, using state rules, as a tactic of attrition. Of the total items claimed, 82% of the total dollar amount are federal items, and the great bulk of these are federal expert items. Thus the Circuit Court departed from the essential requirements of the law in assessing federal costs on state law rules. Expert fees are not permitted. Coastal respectfully submits the District Court of Appeal should have quashed the Circuit Court's order.

POINT II

THE DECISION OF THE DISTRICT COURT IS OTHERWISE ERRONEOUS.

Two other points of law were rejected by the District Court:

A. THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY FAILING TO ALLOCATE THE COSTS BETWEEN THE TWO DEFENDANTS - COASTAL AND THE TRUSTEES

B. THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW IN AWARDING PARALEGAL AND TITLE SEARCH COSTS WHERE NO LEGAL FEES WERE AUTHORIZED BY LAW OR OTHERWISE.

A. The Circuit Court Departed from the Essential Requirements of Law by Failing to Allocate the Costs Between the Two Defendants - Coastal and the Trustees.

In this case, there were counterclaims by two Defendants, Coastal and the Trustees **(A-26).** The claims both sought damages against the Plaintiff, Mobil, for conversion of phosphate. Mobil defended against both claims. Mobil and the Trustees have settled, releasing any claim for costs against each other in this case (A-115). Coastal filed a notice of voluntary dismissal and Mobil sought all expenses against only Coastal, whether related solely to Coastal, solely to the Trustees, or related to both the claims of the Trustees and Coastal **(A-32).** Of its **own** volition, even Mobil eliminated some of these costs

related solely to the Trustees. Yet the trial court ruled that:

> "The pivotal hurdle that had to be crossed by Mobil in the defensive posture was to establish that the ordinary high waterline traversed the banks of the Peace River as they so contended. Whether the Trustees were in the picture, out of the picture, that had to be established; and it had to be established by a wide variety of expertise and presented persuasively so that six jurors could understand it, and do it simply, lucidly and vividly so that it would stick with them. So I don't see the necessity of prorating, as it were, between Coastal and the Trustees."

Thus, even though almost all of the expenses were related to both the claims of Coastal and the Trustees, and even though the Trustees settled with Mobil and any costs were released as to the Trustees and Mobil could not claim these any longer against the Trustees, the trial court failed to allocate and assessed all of these costs against only Coastal.

Specifically, Mobil claimed costs against Coastal for Trustees' witness depositions, documents for defense against the Trustees' claims, experts invoices related to Trustees' positions, and Trustees' depositions of Mobil's experts. As a matter of fact, there was no allocation nor separation of any expenses related to the Trustees' claims by the Court, although Mobil, of its own volition, eliminated some such costs.

The law on costs where there are multiple parties is clear - separation and allocation are required. 12 Fla.Jur.2d, Costs, $13, p. 151, states:

> "Likewise, in an action involving several defendants, it is error to tax the single defendant found liable for the entire costs of the proceeding."

This article cited *Food Fair Properties, Inc. v. Snellgrove,* 292 So.2d 66 (Fla. 3d DCA 1974), which states:

> "Appellant's point directed to the assessment of the entire costs of the proceeding against it as the single defendant found liable is well-taken. See Van Devander v. Knesnih, Fla.App. 1973, 281 So.2d 57."

Other cases have said the same thing. In *International Patrol and Detective Agency, Inc. v. Aetna Casualty & Surety Company,* 396 So.2d 774, 777 (Fla. 1st DCA 1981), the lower court even said:

> "We find that in this case the trial court's award of the cost of one copy of each deposition, to be divided between the three appellees, was not an abuse of discretion."

In *Martel* v. *Carleson,* 118 So.2d 592, 594 (Fla. 3d DCA 1960), the court considered consolidated cases with multiple plaintiffs, and said:

> "Upon the question of the taxation of costs we find that the appellant's assignments are well taken. Since the causes were filed separately and were consolidated for trial a joint judgment against the plaintiffs for the total amount of the costs is improper, inasmuch as one plaintiff would thereupon be liable for the entire amount of the costs. It is proper under such circumstances to apportion the costs between the unsuccessful

> plaintiffs. See Coleman v. Johnson, 138 Fla. 687, 190 So. 11."

See: *Campbell* v. *Pine Holding Co.,* 161 *So.* 726, 727 (Fla. 1935), where this Court ordered taxation proportioned to the number of tax certificates:

> "We think that it was proper for the final decree to require the defendant to pay the costs of foreclosure. Of course, this does not mean that a deficiency decree could be entered against the defendants for such costs, but it does mean that to redeem the lands embraced in any certificate the defendants, in addition to paying the principal, penalties, and interest shown by the certificate and the attorney's fees apportioned to that certificate, will be required to pay the proportion of costs chargeable to that certificate. The proportionate amount of costs so to be paid by any one or more of the defendants for the redemption of any one or more of the certificates shall be ascertained and determined by the chancellor, if and when application for redemption is made prior to sale and confirmation."

Also see *Kotick* v. *Durrant*, 196 So. 802 (Fla. 1940). Thus it is not merely a discretionary matter. Costs must be apportioned among the claims of multiple party plaintiffs and defendants even where the case is adversely determined as to only one.

Here Mobil sought to obtain all the costs of this proceeding against defendant Coastal, even such things as the costs of the depositions of the Trustees' experts. The Trustees may well have prevailed here on their conversion claim, yet according to Mobil's theory of costs, Mobil properly recovered all its costs from Coastal. *As* it is,

the Trustees and Mobil each released any claim for costs against each other, yet Mobil was awarded all such costs against Coastal. Under the law of Florida, costs must be separated and apportioned as they relate to defense against the Trustees' claims and as to those, Mobil has already given a release to the Trustees.

By failing to allocate the costs between the defendants Coastal and the Trustees, the Circuit Court departed from the essential requirements of the law and the District Court should have quashed the lower court's order.

B. THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW IN AWARDING PARALEGAL AND TITLE SEARCH COSTS WHERE NO LEGAL FEES WERE AUTHORIZED BY LAW OR OTHERWISE.

The cost judgment included preparation time of an expert witness who essentially acted as a paralegal. The District Court failed to find the Circuit Court departed from the essential requirements of the law in awarding paralegal and title search costs where no legal fees were authorized by law or otherwise.

Witness Charles Garner's affidavit (A-106) demonstrate that his so-called "expert" preparation was paralegal work he also did while employed by Holland & Knight. The following summarizes his relevant employment:

Year	Employed	Task
1976 - 1979	Holland & Knight	Title Research; Work on Litigation for Holland & Knight

1979 - 1984	Garner's Private Title Company	Title Research; Work on Litigation for Holland & Knight
1984-Present	Holland & Knight	Title Research; Work on Litigation for Holland & Knight

Thus by breaking away and continuing to do the same paralegal work he did while at Holland & Knight, he submitted a separate statement for his time, labeling it "expert" fees. However denominated, the fees are for the same preliminary title work he performed from 1976-1979 as a member of the staff of Holland & Knight. While this may save Holland & Knight overhead or result in greater profit to Mr. Garner, the character of his work and the time while employed at Holland & Knight were no different.

The work done by Mr. Garner was paralegal work done by him for Holland & Knight and, therefore, was not assessable either because it is not authorized by law or because it is the unauthorized practice of law. It is properly part of the attorney's fees, which are not allowed.

Mr. Garner did this title work and it was used in several of the Polk County cases. Florida law is clear that the giving of opinions as Mr. Garner has done here, as to the state of title, is unauthorized practice of law. In fact, he was told not to do any other such work by The Florida Bar. ***The Florida Bar v. McPhee,*** 195 So.2d 552 (Fla. 1967), ***Preferred Title Services, Inc. v. Seven Seas Resort***

Condominium, *Inc.*, 458 So.2d 884 (Fla. 5th DCA 1984), and **4 Fla.Jur.2d,** Attornevs At Law, §109, p. 267. The Supreme Court in *McPhee, **supra*** at 554, held that a non-lawyer title company could not do the following:

> "**(a)** Rendering, orally or in writing, opinions concerning the status or marketability of title to real property in Florida, whether respondents receive a fee or not;
> (b) Giving advice, orally or in writing, relating to methods of taking title or concerning the legal effect of any document."

Garner's work consisted of title searches and deraignment of title, affidavits of marketability, and ownership. His affidavits were and testimony would be the unauthorized practice of law. After he completed the deraignments, he went back to work with Holland & Knight as a paralegal, more than two years before the voluntary nonsuits! Such cost items represent the claim for fees which were not provided for by law or unauthorized practice of law.

Furthermore, even if such effort was not the unauthorized practice of law, it otherwise could only be viewed to be the assistance rendered to attorneys - or paralegal work. Recently the Legislature passed Chapter 87-260, Laws of Florida (1987), which provided that such paralegal work must be considered in determining legal fees. Legal assistant was defined as:

> "In any action in which attorneys' fees are to be determined or awarded by the court, the court shall consider, among other things, time and labor of any

> legal assistants who contributed nonclerical, meaningful legal support to the matter involved and who are working under the supervision of an attorney. For purposes of this section 'legal assistant' means a person, who under the supervision and direction of a licensed attorney engages in legal research, and case development or planning in relation to modifications or initial proceedings, services, processes, or applications; **or** who prepares or interprets legal documents or selects, compiles, and uses technical information from references such as digests, encyclopedias, or practice manuals and analyzes and follows procedural problems that involve independent decisions." (Emphasis supplied.)

Certainly Garner's work before, during and after the period sought as costs was paralegal work.

Although there is little law on paralegal fees as a part of attorneys' fees in Florida, federal law on the issue is clear. In ***Allen*** v. ***United States Steel Corp.***, 665 F.2d 689, 697 (5th Cir. 1982), the court held:

> "In addition to deposition costs, U.S. Steel argues that it is also entitled to paralegal expenses as a part of Rule 54(d) costs. Even though separately billed to the client, paralegal expenses are not 'costs' within the meaning of Rule 54(d). Such expenses are separately recoverable only as part of a prevailing party's award for attorney's fees and expenses, and even then only to the extent that the paralegal performs work traditionally done by an attorney. Otherwise, paralegal expenses are separately unrecoverable overhead expenses. Jones v. Armstrong Cork Co., 630 F.2d 324, 325 & n.1 (5th Cir. 1980)."

Also see other cases where paralegal assistants have been used and recovered if, and only if, attorneys' fees are

authorized and awarded: *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975); *Spray-Rite Service Corporation v. Monsanto Company,* 684 F.2d 1226 (7th Cir. 1982). Overhead is not recoverable as attorney's fees.

It is clear here that attorneys' fees are neither asked for nor authorized by law or contract in this case. *Bolton v. Bolton,* 412 So.2d 72 (Fla. 2d DCA 1982); *Dorner* v. *Red Top* Cab *& Baggage Co.,* 37 So.2d 160 (Fla. 1948). Attorneys' fees are not recoverable as a part of taxable costs for taking voluntary dismissal. *Campbell v. Maze,* 339 So.2d 202 (Fla. 1976). Since paralegal fees are a part of attorneys' fees and since attorneys' fees are not assessable here, no such paralegal fees could have been collected. Thus, whether viewed as independent efforts or assistant efforts, these items of cost related to Garner could not be claimed in this case.

In addition, such fees have been held to be unrecoverable legal expenses. See *Kennedy v. Hancock*, 146 So. 667 (Fla. 1933):

> "In this case the court included in the final decree an item, 'abstract information, $10.00,' intending thereby to permit complainant to recover as 'costs' the personal expense complainant had been put to, in ascertaining the state of the public records as to the title of the property, and the parties necessary to be joined in the suit in order to convey a perfect title at the foreclosure sale, against all having inferior claims.

> The word 'costs,' as used in the statute, does not authorize the recovery of those items of personal expense incurred by the tax certificate holder, such as costs of an abstract of the title, even though the statute provides that the proceeding shall conform in general to those provided for the foreclosure of mortgages. Even in mortgage foreclosure cases, expenditures for an abstract of the title to the property are not recoverable as 'costs,' but rather as 'expenses,' and then only when the mortgage provides for the payment by the mortgagor of all 'expenses' as well as 'costs' of foreclosure."

All the work done by Garner, as well as the other title work, falls within this category of expenses outside "costs." Charles Garner was merely a paralegal assistant and his expenses were not recoverable. The Circuit Court departed from the essential requirements of the law in awarding these costs and the District Court should have quashed the decision.

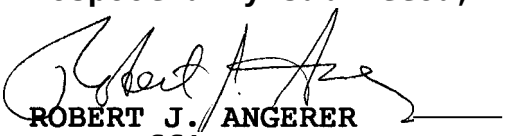
CONCLUSION

Section 92.231 precludes expert witness fees where the court has not permitted the expert to be qualified and testify. If a large corporate party may spend enormously for these types of expert fees in state or federal court and then recoup them, the threat of such a possibility will have the chilling effect contemplated by the District Court on the rights of smaller parties. The words on the United States Supreme Court Building are "Equal Justice Before The Law." Equal justice before the law must abhor such a practice. Such an interpretation of Rule 1.420(d), Florida Rules of Civil Procedure, would not only violate the substantive expression of Section 92.231, but chill vindication of rights.

Consistent with common law, Florida has long required a specific statute or rule before allowing expenses of experts. Here there is no such enabling authority for the premature assessment of expert fees.

Coastal Petroleum Company respectfully requests that the Court exercise its discretion to review this case and respectfully requests the Court to quash the decision of the District Court and order the District Court to quash the decision of the Circuit Court.

Respectfully submitted,



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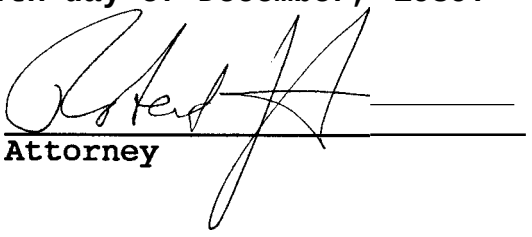
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to Julian Clarkson, Esquire, Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302, this 4th day of December, 1989.



Attorney