IN THE SUPREME COURT OF FLORIDA

COASTAL PETROLEUM COMPANY, a
Florida corporation,

Petitioner,

vs.

CASE NO. 74,975
First DCA Case No. 88-119

XOBIL OIL CORPORATION, a
New York corporation,

Respondent.
_____/

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

RESPONDENT MOBIL OIL CORPORATION'S BRIEF ON THE MERITS

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Note: The following symbols are used in this brief:

"A" for Coastal's appendix
"RA" for appendix to this brief

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INTRODUCTION

COASTAL PETROLEUM COMPANY ("Coastal") seeks review of a decision of the First District Court of Appeal denying its petition for a writ of common law certiorari involving a cost judgment entered in favor of MOBIL OIL CORPORATION ("Mobil") against Coastal. The district court certified to this Court as being of great public importance the question whether the trial court properly included as taxable costs "reasonable and necessary preparation costs and fees of expert witnesses who were never called to testify because [Coastal] voluntarily dismissed" its claim against Mobil.

In its brief on the merits, Coastal argues the certified question and also argues other points summarily disposed of by the district court without discussion as "involv[ing] factual determinations not shown to be clearly erroneous, and application of legal principles not shown to constitute departures from the essential requirements of law" [A 4]. Mobil will respond to each point raised by Coastal.

The cost judgment entered by Chief Judge J. Lewis Hall, Jr., of the Leon County Circuit Court awarded Mobil $2,117,992.34 of the costs it incurred in defending against a $2.5 billion conversion claim vigorously prosecuted against Mobil from 1976 until 1987, when Coastal filed its notice of voluntary dismissal.[1]

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[1] Coastal's claim against Mobil is no stranger to this Court. E.g., Coastal Petroleum Cc. v. Mobil Oil Corp., 378 So.2d 336 (Fla. 1st DCA), cert. denied, 386 So.2d 635 (Fla. 1980); Coastal Petroleum Co. v. Ott, 440 So.2d 351 (Fla. 1983) (2 cases); Coastal Petroleum Co. v. American Cyanamid

Coastal's brief contains a selective statement of the case and facts that conveys an incomplete and inaccurate portrayal of the background of the litigation. Mobil believes it is essential to present a more thorough recitation of these matters and a brief review of the extensive trial preparations that were required of Mobil by Coastal's claims, all of which was made known to the district court as a predicate for its decision [R 52].

STATEMENT OF THE CASE AND FACTS[2]

"The litigation between these two parties began in 1976 when Mobil Oil Company, the respondent, filed suit in Leon County Circuit Court seeking an interest in certain leases Coastal had signed with the State of Florida. Coastal filed five counterclaims. In 1977, the Trustees of the Internal Improvement Trust Fund of the Florida Department of Natural Resources ... were joined as a necessary party and filed their own counterclaim."

The most notable of Coastal's counterclaims sought damages, later asserted by Coastal to be almost $2.5 billion, for the alleged conversion of phosphate from thousands of

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Co. and Estech, Inc., 454 So.2d 6 (Fla. 2d DCA 1984), quashed in part and approved in part, 492 So.2d 339 (Fla. 1986), cert. denied sub nom. Mobil Oil Corp. v. Board of Trustees, 479 U.S. 1065, 93 L.Ed.2d 999, 107 S.Ct. 950 (1987).

[2] All of these matters were presented to the district court in Mobil's Response to Order to Show Cause [R 52]. The initial paragraph is quoted from the district court's opinion.

acres of land adjoining a twelve-mile stretch of the Peace River between Bartow and Fort Meade, and a shorter stretch of the North Prong of the Alafia River, in Polk County, Florida. Coastal claimed that although Mobil or its predecessors had purchased, possessed, and paid taxes on these lands as a matter of public record long prior to 1941, the lands were in fact state-owned sovereignty lands subject to its lease.

The Trustees' claim against Mobil requested damages for the alleged removal of phosphate from state-owned lands. Although the Trustees became parties to the suit, Coastal asserted much larger damage claims and has always been recognized as the driving force behind this litigation.

In a 1978 bench trial before Judge Charles Miner of the Leon County Circuit Court, Mobil prevailed against Coastal on its claim for a one-half interest in certain offshore lands included in Coastal's leases. See Coastal Petroleum Co. v. Mobil Oil Corp., 378 So.2d 336, 337 (Fla. 1st DCA), cert. denied, 386 So.2d 635 (Fla. 1980). Focus then shifted to Coastal's $2.5 billion conversion claim. In defense of this claim, Mobil asserted ownership of the lands from which the phosphate was alleged to have been converted and filed a "reply counterclaim" against Coastal and the state, seeking a declaration of its rights to an 80-acre parcel of unmined lands coursed by the Peace River.

Based upon Mobil's reply counterclaim, in December of 1979 the state and Coastal removed the case to federal

district court in Tallahassee. Mobil immediately moved to remand the case to state court for lack of jurisdiction, but the federal district court denied the motion and allowed the case to proceed.

One of Coastal's counterclaims pertaining to the offshore lands was tried in federal court in December of 1980 and resulted in a jury verdict for Coastal, which Mobil appealed. Less than a week before the scheduled trial of Coastal's $2.5 billion phosphate conversion counterclaim in federal court, the Eleventh Circuit Court of Appeals vacated Coastal's judgment and ordered the entire suit remanded back to the Leon County Circuit Court for lack of subject matter jurisdiction. See Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 426 (11th Cir.), cert. denied, 459 U.S. 970 (1982). In its remand order dated May 6, 1982, the federal district court reserved jurisdiction to award costs and did in fact subsequently award Mobil those costs occasioned by the wrongful removal and the trial without jurisdiction of Coastal's "oil show" claim.

Mobil and Coastal then settled the "oil show" claim, leaving unresolved only Coastal's and the state's conversion claims, Coastal's additional claim that it gave up its rights to both mined and unmined lands under its lease through its settlement with the state due to misrepresentations by Mobil, and Mobil's reply counterclaim. These claims remained pending before the Leon County Circuit Court until

January 26, 1987, when Coastal voluntarily dismissed its remaining claims. In the meantime, it had been determined in related litigation that Mobil's reply counterclaim was a nullity because it presented a local action which the Leon County Circuit Court lacked jurisdiction to adjudicate.

The related litigation was a quiet title action filed by Mobil in Polk County Circuit Court in April, 1982, seeking an in rem judgment to confirm its ownership of some of the disputed lands as against Coastal and the state. Mobil obtained a summary judgment in that case quieting its title on the grounds that Coastal and the state were precluded as a matter of law from contesting the validity of Mobil's record title even if the lands were sovereignty lands. Coastal elected not to appeal that quiet title judgment. On the state's appeal, the Second District affirmed the summary judgment for Mobil, but certified the three legal issues on which the judgment was based to this Court as questions of great public importance. Referring to this previously filed lawsuit, the Second District specifically held in its decision that "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," and suggested "that the Leon County Circuit Court notice the defect of want of jurisdiction as regards Mobil's reply counterclaim and enter an appropriate order." Board

of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corp., 455 So.2d 412, 416 and n.7 (Fla. 2d DCA 1984).

Mobil's quiet title case was then consolidated for this Court's review with two other quiet title cases presenting the same certified questions. This Court ultimately disagreed with the Second District's decision on the three certified questions, holding that the state was not precluded as a matter of law from attempting to prove that the lands were state-owned sovereignty lands; however, this Court expressly approved the Second District's ruling that the Leon County Circuit Court lacked jurisdiction of Mobil's reply counterclaim by agreeing "that respondent Mobil's counterclaim was in rem in nature and local only to Polk County circuit Court." Coastal Petroleum Co. v. American Cyanamid Co., 492 So.2d 339, 344 (Fla. 1986). Although the quiet title suit was remanded to Polk County on September 3, 1986, for further proceedings on the state's ownership claim against Mobil, Coastal did not receive the benefit of this Court's decision. As Coastal itself later acknowledged in a letter to the Polk County court, "Coastal did not appeal the final judgment and although the Supreme Court has held the judgment erroneous, it has been final as to Coastal for some time" (RA 86). Costs were awarded against Coastal in the Polk County suit, and those costs are not at issue here.

Thus, after the quiet title suit was remanded from this Court to the Polk County Circuit Court, the only matters

remaining to be resolved there were the competing title claims of Mobil and the state, because all ownership rights as between Mobil and Coastal had been finally resolved in Mobil's favor. When Mobil attempted to assert that Polk County quiet title judgment as a bar to Coastal's conversion and misrepresentation claims pending before the Leon County Circuit Court in this case, Judge Hall suggested that the most efficient means of resolving the entire controversy might be to transfer the remaining money damage claims of Coastal and the state to Polk County for disposition along with the remaining title and ownership issues (RA 87). At that point, Coastal voluntarily dismissed its conversion and misrepresentation counterclaims without prejudice.

In the notice by which it voluntarily dismissed its pending counterclaims after some 11 years of expensive litigation, Coastal frankly admitted to forum shopping based upon its fear that this case might be transferred to Polk County Circuit Court (A 21). Coastal had repeatedly attempted to avoid litigation in state court and to disqualify various state judges. Then, stating that it was "convinced it will not receive a fair disposition [of this case] in the home town of the phosphate companies," Coastal dismissed its 11-year-old claims for purely tactical reascns.

After Coastal's voluntary dismissal of its remaining money damage claims in the Leon County Circuit Court, Mobil filed a notice of voluntary dismissal of its

reply counterclaim (A 24). This action was taken by Mobil in accordance with the prior decisions of the Second District and this Court, which held that the Leon County Circuit Court lacked subject matter jurisdiction of the reply counterclaim because it was a local action that could only be adjudicated in Polk County. In effect, Mobil's notice of voluntary dismissal was purely a procedural formality to clear the record of a reply counterclaim that had already been declared a nullity due to lack of jurisdiction.

Once Coastal's counterclaims and Mobil's reply counterclaim had been eliminated, Mobil and the state entered into a settlement agreement that resolved the still-pending claims between them in both Leon County and Polk County. Coastal's attempt to characterize that settlement as a victory for the state (Br. 6) is misleading in that it conveniently omits any mention of the key provision which recites that (A 116)

> [T]he State has elected to settle its disputes with Mobil by agreeing to a Consent Final Judgment by the Polk County Circuit Court quieting Mobil's title to the lands described in the Complaint in [the quiet title suit] and barring the State from thereafter claiming by virtue of its sovereignty any interest in such lands.

The state further agreed to dismiss its claim for conversion in Leon County and to release Mobil from all other claims with respect to the disputed lands, which Mobil agreed to deed to the state over a period of years.

The Cost Judgment

In August, 1987, Mobil filed in the Leon County Circuit Court a Motion For Costs Judgment (A 30). Contrary to the assertions made in Coastal's statement of the case and facts at page 6, and as Coastal itself concedes in the argument section of its brief at pages 34-35, Mobil did not seek all the costs of its defense from Coastal, but allocated out those cost items attributable solely to the state's claim. After excluding costs relating solely to the state's claim, Mobil's list of costs incurred in defending against Coastal's conversion and misrepresentation claims amounted to $2,575,522.13 -- or about one-tenth of one percent (1/1000th) of the $2.5 billion which Coastal sought to recover from Mobil on its conversion claim alone. Significantly, Coastal requested and was given an opportunity to seek offsetting costs in connection with Mobil's voluntary dismissal of its reply counterclaim, but Coastal declined to do so.

To substantiate its motion for costs, Mobil filed, before the evidentiary hearing, a memorandum of law, a 63-page itemized list of costs, and 28 supporting affidavits, including those of Mobil's trial experts. In addition, with Judge Hall's approval, Mobil took the videotaped testimony of Mobil's principal trial experts (whose fields included all of the scientific disciplines employed in Mobil's defense) concerning the reasonableness and necessity of their charges,

and also the testimony of an independent expert who expressed his opinion concerning the reasonableness and necessity of the costs Mobil incurred. These videotapes and their transcripts were stipulated into evidence and filed with the court before or during the evidentiary hearing. At the two-day evidentiary hearing, Mobil presented the live testimony of three more witnesses: Mobil's lead trial counsel, Mobil's lead trial expert and coordinator of the expert trial team, and an independent expert witness. Mobil further introduced hundreds of pages of checks and invoices, demonstrative exhibits, and other information.

At the conclusion of the hearing, the trial court granted Mobil's motion in part and entered a costs judgment against Coastal in the amount of **$2,117,992.34.** [A 8]. Judge Hall expressly found, as a matter of fact, that the costs taxed "were reasonably and necessarily incurred as part of MOBIL's defense against COASTAL's second and fifth counterclaims" [A 9].

Coastal paid the judgment and filed its petition for writ of certiorari in the district court (R 1). While Coastal's petition did not discuss the reasons why Mobil was forced to incur such costs, Mobil believes that a summary of the substantive issues presented by Coastal's claims and the efforts required to prepare Mobil's defense is essential to an understanding of the enormous size and complexity of the case and of the basis for the trial court's decision.

Overview Of The Litigation

To succeed on its conversion claim, Coastal had a threshold burden of proving that Mobil unlawfully took minerals (primarily phosphate) from state-owned lands in which Coastal had a possessory interest under its lease. For the overwhelming majority of the lands, the asserted basis of state ownership was that the lands were unalienated sovereignty lands. Whether the lands are sovereignty in character essentially turns on whether they lay beneath the ordinary high water line of waterbodies that were navigable in fact when Florida attained statehood on March 3, 1845.

Assuming that the waterbodies were navigable, Coastal also had the burden of (i) establishing the location of the boundaries between state-owned sovereignty lands and private uplands -- i.e., the ordinary high water line; (ii) proving that Mobil mined within those boundaries; and (iii) establishing that the right to possession of the minerals mined by Mobil had been granted to Coastal by its lease. If Coastal had ultimately proved all the elements of its conversion claim against Mobil, Coastal would then have been required to substantiate the amount of damages it claimed as a result of the conversion.

From the beginning, Mobil disputed the allegations that any waterbodies near its mining activities were navigable in 1845; that any lands it mined were within the

ordinary high water line of the waterbodies; and that Coastal's lease established a basis for a conversion claim.

THE PRINCIPAL ISSUES

A. Navigability

In order to determine whether the lands in dispute are sovereignty lands, the first critical issue is whether the rivers and creeks which course the lands were "navigable." If the waters were "navigable in fact" at the time Florida attained statehood in **1845,** the underlying lands up to the ordinary high water mark may be sovereignty lands owned by the state. If not "navigable in fact," the subjacent lands are the private property of the persons to whom title was conveyed by either the state or the federal government.

Since proof of navigability of the waterbodies in **1845** was an essential element of Coastal's claim, Mobil hired various historians and researchers to investigate and interpret documents from Florida's days as a territory through its statehood. This included research in federal, state and local archives. Historic research and evaluation was performed regarding, among other things: the three Seminole Indian Wars from **1836** through **1857;** the official government surveys of the townships traversed by the waterbodies from **1849** through **1882;** the Civil War years; the legislative history from 1860 through **1923;** miscellaneous books and other publications; reconnaissance and examination

by the U.S. Army Corps of Engineers from 1879 through the 1960's; reports of phosphate mining on the Peace River from 1890 through 1900; early correspondence which had specific information about the waterbodies in their natural and ordinary condition at about the time of statehood; information relating to lumbering and logging along the Peace River; the 1895 records of a federal court case in which the court found the portion of the Peace River below Fort Meade to be nonnavigable; and early 1960's court records and transcripts of litigation between Coastal and the state wherein the First District Court of Appeal found that the upper reaches of the Peace River were in private ownership based on representations by the state.[3] Also, titles to the land in dispute were abstracted from the earliest public records and county ad valorem tax records were examined from 1956 forward.

B. Sovereignty Land Boundaries

Assuming the navigability of the waterbodies in question, Coastal's claims that the lands were state-owned sovereignty lands rested on its theory that the ordinary high water line (the landward boundary) of the waterbodies at the time of mining extended great distances, in some instances thousands of feet, from the banks of the waterbodies. Coastal filed maps depicting what it claimed to be the location of the ordinary high water line of the Peace River

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[3] Burns v. Coastal Petroleum Co., 194 So.2d 71 (Fla. 1st DCA 1966), cert. denied, 201 So.2d 549 (Fla.), cert. denied sub nom. Coastal Petroleum Co. v. Kirk, 389 U.S. 913 (1967).

along the twelve-mile stretch between Bartow and Ft. Meade. Rather than employing the traditional definition of the ordinary high water line as an observable mark on the banks, Coastal posited its own formulated standard that the ordinary high water line was located far beyond the banks and the natural levees of the river, at a point reached by the highest floods, on the outer edge of the floodplain. This new theory required Mobil to obtain a combination of opinions from experts in, among other fields, agronomy, biology, botany, dendrochronology, forestry, geology, geomorphology, hydrogeology, photogrammetry and land surveying.

Surveyors and photogrammetrists mapped the areas in dispute. Surveyors also plotted the descriptions given in the government field notes relevant to the land at issue for comparison with the current location and width of the river. Transects were located and meander lines approximating the ordinary high water line of the river in the contested area were surveyed. The swamp area and mined acreage within Coastal's claimed areas were calculated and plotted. Expert photogrammetrists compared past and current aerial photography of the area to determine the existence and probable causes of any changes in the size or location of the river.

Expert geologists, geomorphologists, soils scientists, and agronomists were employed to study the geology, geomorphology and soils or sediments of the riverbed, floodplains, and adjoining uplands. These studies

included organic soils evaluations, the collection and analysis of core samples of soils from the floodplain and sediment from the riverbed; Carbon-14 dating of "buried" soil horizons; the testing of the agricultural suitability of the soils; agricultural crop experiments; physical inspection of ridges, terraces, natural levees and other geomorphic forms found in the floodplain and on the river banks.

Botanists, foresters and dendrologists conducted studies of the vegetative communities in the areas claimed by Coastal to be within the "bed" of the streams at issue. This included the mapping of vegetative communities; identification, location, measurement and aging of hundreds of hardwood trees on the banks and throughout the floodplain of the river; inspection of the area for the effects of logging in the floodplain; and correlation of tree growth with rainfall.

In addition to forcing Mobil to defend against Coastal's new ordinary high water line theory, Coastal interjected another set of complex issues into the case by claiming that the waterbodies in dispute had been much larger before Mobil and other phosphate companies mined the lands and pumped water from the underground aquifers for use in the mining and phosphate recovery processes. In response, Mobil employed expert hydrologists who studied and examined both the surface and groundwater in the area in dispute. Their studies included, among other things, the collection and

analysis of rainfall and streamflow date; the analysis of records on water use; and the analysis of groundwater pumping data as well as the analysis of the physical features of the Peace River and Alafia River and surrounding areas. In gathering data, the hydrologists had to install piezometers, stage gages and other measuring devices. Experts were prepared to testify concerning the regional hydrological system; groundwater-surface water interrelations; regional trends in groundwater level; the hydrological cycle; evaluations of groundwater contributions to the watershed as part of the overall hydrologic water balance; interaction of surface and groundwater as affected by groundwater pumpage in Polk County; changes in stream flows; and water use analysis and impact evaluation of water control structures and mining on stream flows.

C. Damages

Regarding the measure of damages, Coastal claimed Mobil was a willful converter that dishonestly took phosphate from lands which Mobil knew at the time were state-owned sovereignty lands, and further that Coastal did not know and could not have discovered that Mobil was conducting these massive phosphate mining operations because Mobil had **"deceived"** Coastal. Thus, Coastal claimed that it was entitled to recover not just the value of phosphate rock at the time and place of mining, but the present market value of the finished chemical products, plus prejudgment interest,

without crediting Mobil for the value added by its investment of capital and labor. Coastal contended that it would be entitled to damages of almost two and one-half billion dollars for Mobil's taking of phosphate from the thousands of acres that Mobil or its predecessor had mined over a period of more than thirty years.

Mobil employed accountants and economists to analyze Coastal's damage calculations and to make alternative calculations based on damage theories that were consistent with Mobil's proof that it mined the lands in the good faith belief that it owned them. This included the calculation of recovery rates, prices and technology costs.

SUMMARY OF THE ARGUMENT

IA. Rule 1.420(d) requires a party taking a voluntary dismissal to pay costs to the adversary. The district court correctly concluded that the defending party should not be punished by the prosecuting party's unilateral decision to end the litigation. Further, the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions expressly provide for charges made by expert witnesses in preparing to testify at trial. Here, the trial judge found that the costs taxed were "reasonably and necessarily incurred" as part of Mobil's defense.

IB. Coastal elected not to seek costs associated with dismissal of Mobil's "reply counterclaim" and thus is not entitled to any offset from Mobil's cost judgment.

IC. General litigation costs do not ripen until conclusion of the litigation. The federal court had no authority to tax any costs other than those occasioned by the wrongful removal.

11. The trial court did not abuse its discretion in refusing to allocate a portion of Mobil's costs against the State of Florida or in taxing title examination expenses. The court found that all costs taxed would have been incurred in defending against Coastal's claims regardless of the joinder of the state.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT MOBIL IS ENTITLED TO RECOVER AS COSTS UNDER RULE 1.420(d) THE REASONABLE AND NECESSARY PREPARATION COSTS AND FEES OF EXPERTS WHO WERE NEVER CALLED TO TESTIFY BECAUSE COASTAL VOLUNTARILY DISMISSED.

A. Courts Are Not Precluded From Taxing Expert Witness Fees As Costs Where The Experts Were Prevented From Testifying By The Plaintiff's Own Stratesic Action In Voluntarily Dismissing Its Claim.

The principal issue for review here, and the only one deemed worthy of discussion by the district court, is the question that was certified:

> 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?

In passing upon that question, the district court observed that Rule 1.420(d) "does not define costs, nor does there

appear to be any case law construing the term as used in this rule." Noting, however, that the trial court has "broad discretion to assess costs" and that these expert witness fees were found to have been necessary and reasonable for Mobil's defense had the eleven-year-old litigation proceeded to trial, the district court concluded:

> To deny expert witness fees following a voluntary dismissal would punish the defending party for the prosecuting party's unilateral decision to end the litigation. We do not believe that Rule 1.420(d) demands such a harsh result.

The district court nonetheless certified the question because it recognized "that this issue may have a chilling effect upon voluntary dismissals."

As grounds for reversal of the district court's decision, Coastal advances essentially two arguments. First, as a matter of substantive law, Coastal asserts that "[n]o 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," and that section 92.231, Florida Statutes (1987), "precludes expert preparation charges ... until the experts are permitted by the Court to qualify and testify." Coastal's second argument, based on policy considerations, suggests that Mobil's expert preparation expenses resulted from Mobil's own insistence upon deposing the expert witnesses, and that "[t]o permit such fees on voluntary dismissal would discourage the use of this valuable tool

especially by smaller parties, and give larger parties an advantage." These arguments are wholly unfounded.

While no reported Florida decision appears to have addressed the precise issue of whether, upon a voluntary dismissal, the fees and preparation costs of expert witnesses who are thereby prevented from testifying at trial are taxable under Rule 1.420(d), the most closely analogous cases overwhelmingly support the district court's conclusion that such costs may be awarded. Because there is no doubt that expert witness costs, where taxable, include trial preparation expenses,[4] the only question to be resolved is whether such costs are taxable at all where the expert does not testify at trial due to the plaintiff's action in dismissing the suit. On that point, it is clear that costs incurred in preparation for trial are appropriately taxed even though the use of the witness or evidence was obviated by voluntary dismissal.

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[4] Coastal's assertion that "expert preparation expenses could not ride the coat tails" of other taxable expert witness fees is easily refuted. Florida courts have repeatedly recognized that "the cost of time for preparation of an expert witness's opinions and testimony may be included in the taxed costs." Bystrom v. Florida Rock Industries, Inc, 513 So.2d 742, 743 (Fla. 3d DCA 1987); see also Thursby v. Reynolds Metals Co., 466 So.2d 245, 252 (Fla. 1st DCA), rev. denied, 476 So.2d 676 (Fla. 1985); Conboy v. City of Naples, 230 So.2d 476, 476 (Fla. 2d DCA), cert. denied, 237 So.2d 537 (Fla.), cert. denied, 400 U.S. 825 (1970). In fact, Item 2A. of The Statewide Uniform Guidelines For Taxation Of Costs In Civil Actions, as published with the approval of this Court, specifically provides for the allowance of "[c]harges made by the expert [witness] for examinations or inspections or research prior to trial for purpose of enabling witness to express expert opinions."

In Goldstein v. Great Atlantic & Pacific Tea Co., 142 So.2d 115 (Fla. 3d DCA 1962), the plaintiff took a nonsuit when confronted with the prospect of a directed verdict at the close of its case. The court entered a judgment which, among other things, included "the taxation of costs for witness fees where witnesses were not called at trial." 142 So.2d at 117. In rejecting the plaintiff's contention on appeal that the taxation of such costs was error or an abuse of discretion, the Third District reasoned:

> If such an argument were held to have merit under the circumstances of the present case, we would have an appellant who as plaintiff prevented defendant-appellee from presenting his case, while precluding the recovery of the costs involved in the preparation thereof. Where a defendant is brought into court and put to the expense of preparing for trial, and where by taking a nonsuit plaintiff denies him the chance of a determination in his favor, the defendant should be compensated for his expenses, or else he shall have been forced to expend funds for nothing.

Id. at 118 (emphasis added).

In Keener v. Dunning, 238 So.2d 113 (Fla. 4th DCA 1970), the plaintiff voluntarily dismissed her personal injury action prior to trial, and the defendants moved to tax costs for taking depositions of medical experts, but the trial court deferred ruling on the costs motion pending disposition of the refiled claim. The defendants appealed and successfully argued that the deferral of the motion to tax costs was improper. In reversing, the Fourth District

acknowledged that "the taxation of costs is a matter which rests largely in the discretion of the trial court," but observed that "where costs are incurred in the taking of depositions ..., these costs should not be disallowed merely because the use of the depositions ... was obviated by a voluntary dismissal." 238 So.2d at 114 (citing Goldstein). See also Troutman Enterprises, Inc. v. Robertson, 273 So.2d 11 (Fla. 1st DCA 1973), in which the First District relied on Goldstein and Keener to hold that it was error to deny defendants' motion to tax costs of expert witness depositions under Rule 1.420(d) where the plaintiff voluntarily dismissed prior to trial.5

Coastal nonetheless contends that section 92.231 restricts the award of expert witness fees to those who are "permitted by the court to qualify and testify as such," citing Travieso v. Travieso, 474 So.2d 1184 (Fla. 1985), and

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5 Apart from the voluntary dismissal context, it is clear that costs of deposing an expert witness may be taxable in Florida although the witness does not actually appear and testify at trial, County of St. Lucie v. Browning, 358 So.2d 253, 255 (Fla. 4th DCA 1978), especially where the failure to testify was "a result of the plaintiffs' own actions." Brodbeck v. Gonzalez, 336 So.2d 475, 476 (Fla. 3d DCA 1976). Federal courts also recognize that witness fees may be allowed as costs "if the witness was ready to testify but extrinsic circumstances rendered his testimony unnecessary." Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1553 (5th Cir. 1984). See also Murphy v. City of Flaaler Beach, 761 F.2d 622, 631 (11th Cir. 1985) (trial court erred in applying blanket rule that no costs shall be awarded for fees of witnesses who were not called at trial where testimony was rendered unnecessary by adversary's actions).

Murphy v. Tallardy, 422 So.2d 1098 (Fla. 4th DCA 1982). Those decisions, however, dealt solely with the issue of whether the fees of a lawyer who testifies as an expert witness regarding the value of a reasonable attorney's fee should be allowed as a taxable cost under the statute. In neither case did the court consider or address the question presented here concerning the effect of a voluntary dismissal; nor is there any language in either opinion suggesting that the statute requires expert witnesses to be qualified and to testify at trial as a precondition to the taxation of their fees as costs.

The fact that the statute provides that an expert witness who testifies at trial "shall be allowed a witness fee ... and the same shall be taxed as costs" does not necessarily deprive courts of the discretion to award witness fees for experts who are prevented from testifying at trial because of the plaintiff's unilateral tactical decision to dismiss. In del Real v. Dawson, 320 So.2d 20 (Fla. 4th DCA 1975), the Fourth District upheld the denial of expert witness fees following a voluntary dismissal, but did so on the basis that "taxation of costs is a matter traditionally within the discretion of the trial court" and "the trial judge may have had good grounds for exercising his discretion as he did." Id. at 20 (emphasis added). If Coastal's reading of section 92.231 (then codified as section 90.231) as an absolute prohibition were correct, then the taxation of

fees for expert witnesses who were prevented from testifying due to the voluntary dismissal could not have been a matter of discretion.

Notably, the First District is not the only court to conclude that a statute like section 92.231 is subject to an exception where the defendant's experts are prevented from testifying by the plaintiff's voluntary dismissal. In Succession of Moody, 306 So.2d 869 (La. 1st Ct. App. 1974), writ denied, 310 So.2d 639 (La. 1975), the Louisiana court held that despite a state statute that "has generally been interpreted as requiring the expert witness to actually testify in court for the expert fees to be taxed as costs," the fees of two experts who were available to testify and whose depositions had been taken were taxable as costs because the plaintiff's voluntary dismissal "foreclosed the use of the testimony ... and made compliance with the statutory requirement of in-court testimony impossible." 306 So.2d at 875-76. See also Succession of Moody, 85 So.2d 20, 21 (La. 1955); Lotz v. Polizzotto, 161 So. 901, 903 (La. 1st Ct. App. 1935).

The two cases on which Coastal relies involved circumstances that are clearly distinguishable from those presented in cases where costs are awarded after a voluntary dismissal. In both Junkas v. Union Sun Homes, Inc., 412 So.2d 52 (Fla. 5th DCA 1982), and KMS of Florida Corp. v. Magna Properties. Inc., 464 So.2d 234 (Fla. 5th DCA 1985),

the experts were prevented from testifying at trial because the trial court directed a verdict for the defendant. Thus, as the district court recognized, the defendant's expert witnesses were prevented from testifying by virtue of the defendant's own action in moving for a directed verdict, resulting in a final disposition against the plaintiff on the merits. On a voluntary dismissal, by contrast, the defendant's experts are foreclosed from testifying at trial due to the plaintiff's tactical decision to terminate its case.

While important policy considerations support the right of a plaintiff under Rule 1.420(a) to voluntarily dismiss its action before the case is submitted for disposition, any concern for the "chilling effect" on that right here is clearly outweighed by the countervailing policy that mandates assessment of costs under Rule 1.420(d). As one Florida appellate court has explained:

> The purpose of this rule requiring that costs of a voluntarily dismissed action be paid as a predicate to renewing the action is to insure that the plaintiff "bear the cost of using a voluntary dismissal as a tactical tool against a particular defendant." DeLuca v. Harriman, 402 So.2d 1205, 1207 (Fla. 2d DCA 1981), rev. denied, 412 So.2d 465 (Fla. 1982). The rule, which has "the obvious salutary effect of discouraging repeated lawsuits on the same claim ..., Gordon v. Warren Heating & Air Conditioning, Inc., 340 So.2d 1234, 1235-36 (Fla. 4th DCA 1976), is designed to deter plaintiffs from using the voluntary dismissal rule to harass defendants.

McArthur Dairy, Inc. v. Guillen, 470 So.2d 747, 748 (Fla. 3d DCA 1985).

For eleven years, Mobil was forced to defend against the vigorous and unrelenting prosecution of what Coastal itself has touted as the largest claim ever litigated in Florida. Due to the extent and complexity of Coastal's claims, Mobil was required to spend millions of dollars to prepare its defense, which by its nature depended largely on experts. In fact, those costs that were taxed below represent only a fraction of the total financial burden imposed on Mobil by Coastal's claims. That Coastal elected to fold when faced with certain defeat does not entitle Coastal to evade its responsibility under Rule 1.420(d) to pay Mobil's reasonable and necessary costs.

The inclusion of expert preparation fees in those costs will not have a chilling effect on those plaintiffs who exercise the right of voluntary dismissal for its legitimate and proper purpose. If the claim can be refiled, the plaintiff will have an opportunity to recoup those costs previously paid to the defendant under Rule 1.420(d). McArthur Dairy, supra. Where, as here, the claim is voluntarily dismissed after the statute of limitations has run and cannot be refiled, no policy is undermined by requiring a plaintiff to pay the defendant for the expenses

of experts who would have testified at trial.[6] Because of the late dismissal by the plaintiff, the defendant will never have an opportunity to present the testimony of those experts at trial. and thus can never qualify to recover the costs under the literal terms of section 92.231.

Under these circumstances, the trial court must be allowed to assess expert witness fees as costs pursuant to Rule 1.420(d), or the defendant will be forever deprived of any opportunity to recover those costs. If the district court's conclusion is rejected in favor of Coastal's position, then the purpose of Rule 1.420(d) will be defeated because there will be less of a disincentive to the protracted prosecution of nonmeritorious claims. Without any intention of ever going to trial, a plaintiff could put a defendant to the expense of preparing its case and then evade liability by the simple expedient of a voluntary dismissal. The rule, and the right it secures, should not be subject to such abuse.

The certified question should be answered in the affirmative.[7]

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[6] A plaintiff who dismisses when the claim is barred will not likely be deterred from doing so by the requirement of paying additional costs, because proceeding to trial on a nonmeritorious claim poses the prospect of even greater costs and fees for both parties that the plaintiff will have to bear.

[7] This Court is under no compulsion to revisit the other points raised by Coastal that were summarily dismissed by the district court in footnote. Once the certified question has been answered, Coastal presents no reason why it should have "a full second review." Berezovsky v. State, 350 So.2d 80,

B. Mobil's Voluntary Dismissal Of Its Reply Counterclaim Did Not "Offset" Coastal's Voluntary Dismissal So As To Relieve Coastal Of Liability For Costs Under Rule 1.420(d).

Coastal's contention on this point is meritless. Rule 1.420(d) plainly requires that costs "in any action dismissed under this rule shall be assessed and judgment for costs entered in that action." The pendency and subsequent dismissal of Mobil's reply counterclaim is immaterial, because once Coastal voluntarily dismissed its claim, Mobil was entitled to have costs assessed immediately in that action, even though the case continued as to other parties and claims. See, e.g., Lona v. Martin, 410 So.2d 607, 608 (Fla. 5th DCA 1982); Chrysler Corp. v. Hames, 345 So.2d 813, 814 (Fla. 4th DCA 1977).

Mobil's right to costs arose when Coastal filed its notice in January, 1987, and Mobil subsequently moved to assess such costs. After Mobil filed its notice of voluntary dismissal, the trial court allowed Coastal to file its own motion for any costs that it might claim associated with Mobil's reply counterclaim. Coastal elected not to avail itself of that opportunity.[8]

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81 (Fla. 1977).

[8] Thus, to the extent that Mobil's voluntary dismissal of its reply counterclaim had any effect for purposes of Rule 1.420(d), Coastal could have requested an "offsetting" judgment for costs. The fact that Coastal chose not to assert its rights under Rule 1.420(d) does not defeat Mobil's right to recovery on its corresponding claim. Nothing in the rule or the relevant decisional law even remotely suggests

Coastal's conclusion that it somehow emerged as the "prevailing party" is devoid of factual, legal, or logical support. Contrary to Coastal's contentions, Mobil has not "lost" on the substantive issues as a result of this Court's decision in the American Cyanamid case. Although the Court there ruled in favor of the state on three of the legal issues, Coastal has conceded that it did not receive the benefit of that reversal, and that the Polk County Circuit Court's judgment in favor of Mobil on those issues is final as to Coastal, because Coastal chose not to appeal. In any event, this Court did not address in American Cyanamid the numerous other issues involved in this litigation, nor did it determine whether the three issues would be resolved in the same fashion with respect to Coastal's money damage claims as they were for the state's sovereignty title claims. Coastal cannot possibly be regarded as a prevailing party, because Coastal has yet to win anything from Mobil.

Rule 1.420(d) is designed to ensure that parties who bring actions are required to bear the costs of using a voluntary dismissal as a tactical device. McArthur Dairy, Inc. v. Guillen, 470 So.2d at 748. For the purpose of awarding costs, the filing of a voluntary dismissal makes the defendant a "prevailing party," notwithstanding that a counterclaim remains pending. McKelvey v. Kismet, Inc., 430

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that Coastal's election not to seek enforcement of its right to costs operates as a complete cancellation of Mobil's right to costs.

So.2d 919, 922 (Fla. 3d DCA), rev. denied, 440 So.2d 352 (Fla. 1983). Even where the action will continue as to other plaintiffs, costs are taxed against the voluntarily dismissing plaintiff. Lona v. Martin, 410 So.2d at 608. Under these authorities, Mobil was clearly entitled to recover its costs below.

Coastal's attempted reliance on cases and commentaries relating to offsetting judgments is misplaced. The pendency and subsequent dismissal of Mobil's reply counterclaim for a declaratory judgment as to ownership of 80 acres of land does not alter the fact that Coastal deliberately dismissed its $2.5 billion claim against Mobil after having forced Mobil to prepare its defense at enormous cost. Coastal took tactical advantage of Rule 1.420 and must properly bear the consequences of that decision.

The Second District Court of Appeal and this Court had previously determined that Mobil's reply counterclaim, which sought a declaration of rights with regard to an 80-acre parcel of land on the Peace River, was a local action over which the Leon County Circuit Court lacked subject matter jurisdiction. Thus, the reply counterclaim was already a juridical nullity, and the notice of voluntary dismissal filed by Mobil after Coastal had voluntarily dismissed its claims was merely a procedural formality that had no greater purpose or effect than to clear the record in accordance with the prior jurisdictional determination.

C. The Assessment Of Costs Incurred By Mobil While The Case Was Wronafullv Removed To Federal Court Was Authorized And Proper.

Coastal next contends that the trial court could not assess any costs incurred by Mobil during the nearly two and one-half year period while the case was pending and being prepared for trial in federal court following the wrongful removal by Coastal and the Trustees. Specifically, Coastal argues (a) that the state trial court lacked jurisdiction to consider costs accrued while the case was removed because the federal court had the exclusive authority to award such costs; (b) that the proceedings following removal constituted a separate federal case for which Florida law does not authorize the assessment of costs; (c) that the federal court's order awarding Mobil that limited portion of its costs occasioned by the wrongful removal and trial of Coastal's Fourth Counterclaim constituted res judicata as to **all** costs incurred with respect to **all** claims during the period of wrongful removal; and (d) that the costs expended by Mobil during removal were incurred in a separate federal action and thus are governed by federal law, which disallows expert witness fees and other large costs without advance approval.

Coastal's position is inconsistent with the policy that the rule requiring payment of costs is designed to promote. Clearly, costs cannot be awarded under any circumstances until the right to recover such costs ripens--

i.e., until it can be determined (a) which party is entitled to recover costs, and (b) the total amount of costs to which that party is entitled. Under Coastal's theory, the federal court would have been required to rule upon a motion to tax costs in the middle of the proceedings, at a time when the suit had not yet been concluded in a manner that entitled either party to recover costs, and while costs were still accumulating.

There can be no doubt that if Mobil had moved to tax costs other than those occasioned by the wrongful removal at the time of remand, Coastal would have protested that any award of such costs was premature; and properly so, because the right to recover general litigation costs could not ripen until that litigation was concluded either by a disposition in favor of one of the parties or, as here, by a dismissal. In effect, Coastal seeks to take advantage of its own wrongful removal of the case and simply walk away with impunity by taking a voluntary dismissal, concededly for the tactical purpose of facilitating forum-shopping, while leaving Mobil to bear the expenses which Rule 1.420(d) expressly requires to be imposed on Coastal as the party taking such a dismissal.

Coastal seeks nothing less than to be rewarded for its wrongful removal of the case and flagrant forum-shopping tactics. Coastal's position that Mobil cannot recover costs

incurred while the case was removed to federal court should be rejected as utterly frivolous.

1. The Trial Court Had Jurisdiction To Assess Costs That Were Incurred While The Case Was Wrongfully Removed To Federal Court.

Although no authority is cited for the proposition that a federal court has exclusive jurisdiction to assess all costs that accrue while a case is pending in federal court following a wrongful removal, Coastal attempts to support that theory here by fabricating an argument upon several faulty premises. First, Coastal mischaracterizes the remand in this case as a "partial remand," and contends that the trial court could not proceed to consider those costs incurred in federal court because jurisdiction over "that part of the case" was never remanded but was expressly reserved to the federal court.

As made clear in the very authority cited by Coastal, however, a "partial remand" refers to situations where a federal court has determined pursuant to 28 U.S.C. § 1441(c) that the removed case contains "separate and independent claims or causes of action," some of which are "not otherwise within its original jurisdiction" and should properly be severed for remand to state court. 1 A Moore's Federal Practice, ¶0.168[4,-2] n.28 and ¶0.163[4.-9]. The federal court in this case did not sever and retain jurisdiction over any separate and independent claim or cause of action, but remanded the entire case. Of more direct

significance here is the statement in Moore's, which appears two paragraphs above the one quoted by Coastal, that "[i]n remanding, the district court may order the payment of just costs occasioned by the removal. . . ." Id. at ¶0.168[4.-2], p. 655 (emphasis added).

Clearly, the provision of 28 U.S.C. § 1447(c) that the federal court upon remand for lack of jurisdiction "may order the payment of just costs" contemplates only those costs occasioned by or accruing by reason of the wrongful removal, and not all general litigation costs incurred while the case was pending in federal court. In most instances, of course, all costs that arise between removal and remand are attributable to obtaining the remand order, because the jurisdictional question is resolved before any further proceedings are conducted. Where, as here, the parties conducted extensive discovery and trial preparations while the case lingered in federal district court until the federal appellate court ordered a remand, it is necessary to distinguish between those costs incurred by reason of the improper removal, entitlement to which ripens upon the determination that the case must be remanded, and general litigation costs, entitlement to which does not ripen until the proceedings are concluded in the state court after remand.

As previously noted, the authority of the federal court to award costs upon remand is necessarily limited to

those costs occasioned by the wrongful removal, because neither the entitlement to nor the amount of other litigation costs can even be determined until the disposition of the substantive claims -- a disposition which the federal court lacks jurisdiction to effect. Where a case is remanded to state court for continuation of the proceedings, neither party has "prevailed" or otherwise become entitled to recover costs relating to the litigation of the substantive claims until those claims are resolved or dismissed. The only matter concluded at the point of remand, and thus the only matter with respect to which the federal court could conceivably be authorized to award costs, is the propriety of the removal itself. Mobil properly requested and received those costs that would not have been incurred but for the wrongful removal at the time of remand; but Mobil had no basis for claiming entitlement to any other costs at that time, and Coastal has suggested none.

Coastal next asserts that the federal court has authority to tax costs on remand not only under §1447(c), but also pursuant to 28 U.S.C. §1919 and Rule 54(d). 28 U.S.C. §1919 provides:

> Whenever any action or suit is dismissed in any district court or the Court of International Trade for want of jurisdiction, such court may order the payment of just costs.

This provision is inapplicable here because it relates only to the dismissal of cases originally filed in federal court, not to the remand of cases removed from state court.

Despite Coastal's attempt to equate a dismissal for lack of jurisdiction with a remand, there is a material difference of critical significance here: a dismissal terminates the case; a remand simply transfers the case back to state court for continuation of the proceedings that were wrongfully removed from state court. In effect, upon remand the suit is "sent back to the state court to be proceeded with there as if no removal had been had." Railroad Co. v. Koontz, 104 U.S. 5, 16 (1881). Since §1919 only permits an award of costs where a case is concluded by dismissal, it could not authorize such an award where, as here, the case is remanded to state court for the resumption of ongoing, unresolved litigation.

Costal's reliance on Rule 54(d) is likewise misplaced. First, the rule only authorizes an award of costs where there is a "judgment," which is defined in Rule 54(a) as "a decree and any order from which an appeal lies"; the removal statute expressly provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." 28 U.S.C. §1447(d). Thus, since the remand order was not one "from which an appeal lies," and since it did not dispose of or affect any substantive rights of the parties, see Glasser v.

Amalaamated Workers Union Local 88, 806 F.2d 1539, 1540 (11th Cir. 1987), it cannot be regarded as a "judgment" either by definition or as a practical matter.[9]

Coastal has failed to provide any authority to support its contention that the federal court could have awarded costs other than those occasioned by the wrongful removal in this case, or that any other litigation costs may be awarded as "just costs" under 28 U.S.C. §1447(c). The federal court's reservation of jurisdiction to assess costs when it remanded the case to state court was limited to those costs incurred by reason of the wrongful removal,[10]

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[9] Rule 54(d) is also inapplicable here for two other reasons that are readily apparent from its plain language:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.

(Emphasis added.) Clearly, the express provision of 28 U.S.C. §1447(c) for the award of costs upon remand preempts any application of Rule 54(d) to authorize assessment of costs in wrongfully removed cases. In addition, there is no "prevailing party" as a result of a remand order, except with respect to the propriety of the removal itself; thus, it would be impossible to determine which party is entitled to costs under Rule 54(d) other than those costs occasioned by the wrongful removal.

[10] Coastal's reliance on Clark v. Fairbanks, 249 F. 431 (5th Cir. 1918), for the proposition that "[f]ederal costs are assessed in federal court by federal rules and state court costs in state court by state court rules" (Brief at 26), is misplaced. The Clark case did not involve the removal and remand of a state court case, but a separate federal action to enjoin a sale of property pursuant to a mortgage foreclosure proceeding in state court. Mobil does not dispute that a federal court has authority to award costs pursuant to federal rules in a separate federal action when

because other costs associated with preparing the substantive claims for trial could only be assessed after the case was remanded and had proceeded to a conclusion in the court having jurisdiction of the claims.

2. The Trial Court Was Authorized To Assess The Costs That Accrued In Federal Court As If The Case Had Never Been Removed.

Coastal next contends that the trial court lacked power to tax the costs that were incurred during the period of removal because there is no authority under Florida law permitting a state court to assess costs in a federal proceeding. Obviously, this argument is predicated on the notion that the case was a "federal proceeding" from the time of removal until remand, a conclusion that Coastal reaches through the following reasoning:

> 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.

Brief at 27-28. Coastal's rationale may be readily refuted.

The contention that removal of a suit to federal court effectively creates a new case was long ago rejected by the federal courts. See Birdseye v. Shaeffer, 37 F. 821,

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that action is finally concluded, as in Clark; but Clark is plainly inapposite to a case such as this, where a state court action is remanded for lack of federal jurisdiction to be continued to its conclusion in the state court.

826-29 (W.D. Tex. 1888). Under settled principles, "[a] proceeding removed to a federal court remains what it was in the state court. . . ." New York v. Galamison, 342 F.2d 255, 257, n.3 (2d Cir.), cert. denied, 380 U.S. 977 (1965). Coastal's suggestion that upon removal the suit "[f]or all practical purposes . . . became a new case," merely because a new federal court docket number was assigned, is patently ludicrous. As a practical matter, proceedings after removal are simply a continuation of the state court litigation, since the case goes forward without new service of process or refiling of pleadings.

Likewise, the remand of an improperly removed case does not mark the end of the lawsuit. Contrary to Coastal's representations, a remand order has never been held to be a "final judgment." The case of Karsoules v. Moschos, 16 F.R.D. 363 (E.D. Va. 1954), states only that "an order of remand constitutes a 'final hearing' under Section 1923" for purposes of assessing docket fees -- fees that were incurred only by reason of the wrongful removal to federal court.[11]

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[11] To the same effect is the cited decision in Walsh's Administratrix v. Joplin & P. Ry. Co., 219 F.2d 345 (D. Kan. 1915), which simply stated that a remand order is "in the nature of a final judgment" for purposes of allowing the federal docketing fee of ten dollars as costs -- notably, on the rationale that the plaintiffs were required to pay the fee only as a result of the wrongful removal. As the Walsh's court observed, "[i]f the removal is improvidently sought, the removing party should, to this extent, compensate his adversary for the inconvenience and expense to which the latter has been subjected without leaal warrant." 210 F. at 347 (emphasis added).

A remand order has never been deemed a "final judgment," and could not be so construed here because it did not terminate the litigation nor affect the substantive rights of the parties. See Glasser v. Amalgamated Workers Union Local 88, 806 F.2d 1539, 1540 (11th Cir. 1986). The effect of a remand order "is simply the restoration of a jurisdiction previously acquired by the state court, but held in abeyance during the pendency of the cause in [federal] court." Birdseye v. Shaeffer, 37 F. at 828. As the United States Supreme Court has observed, a remand order effectively results in the suit being "sent back to the state court to be proceeded with there as if no removal had been had." Railroad Co. v. Koontz, 104 U.S. 5, 16 (1881).

Consistent with the view that a remanded case should be treated as if it had never been in federal court, the Supreme Court has consistently held that "[i]t will be for the state court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the [federal] jurisdiction." Ayres v. Wiswall, 112 U.S. 187, 190-91 (1884); see also Cates v. Allen, 149 U.S. 451, 461 (1893). Generally, state courts treat the proceedings that occurred during the period of removal as if they had been conducted in state court. E.g., Wallace v. Warehouse Employees Union #730, 482 A.2d 801, 803 (D.C. App. 1984) (motion for summary judgment filed in federal court deemed

properly pending in state court after remand); Teamsters Local 515 v. Roadbuilders, Inc., 291 S.E.2d 698, 701 (Ga. 1982) (timely answer filed in federal court after removal is effective upon remand); Armentor v. General Motors Corp., 399 So.2d 811, 812 (La. App. 1981) (same); Citizens National Bank v. First National Bank, 331 N.E.2d 471, 476 (Ind. 2d DCA 1975) (motion to dismiss filed but not ruled on in federal court before remand need not be "refiled" in state court).

As courts have consistently recognized, the treatment of a case as a continuous proceeding, both in the federal court after removal and in the state court upon remand, is proper to avoid the needless waste of time, effort, and expense that would result if the proceeding during removal were regarded as a separate federal suit. See Edward Hensen, Inc. v. Kearny Post Office Assocites, 399 A.2d 319, 323 (N.J. Super. 1979); see also Laauna Village, Inc. v. Laborers International Unions, 672 P.2d 882, 885-86 (Cal. 1983). Not surprisingly, Coastal has cited no authority to support its contention that everything which transpires between removal and remand should be deemed a distinct "federal proceeding." Consequently, since the case should now be treated "as if no removal had been had," Railroad Co. v. Koontz, supra, the trial court below had the same authority to assess costs under Rule 1.420(d) as it would have in any other case where the entire proceedings were conducted in state court.

3. The Judgment Entered By The Federal Court With Respect To Those Limited Costs Occasioned By The Wronaful Removal Was Not Res Judicata As To All Costs Incurred During The Period Of Removal.

Coastal next asserts that the trial court was precluded from assessing any costs incurred by Mobil while this case was pending in federal court because the cost judgment entered upon remand, which dealt only with these costs occasioned by the wrongful removal and trial without jurisdiction of Coastal's Fourth Counterclaim (the "oil show" claim), constituted res judicata as to all costs.

Coastal's theory is fatally flawed for two principal reasons, both of which have been previously discussed and require no further elaboration here. First, it is clear that the federal court did not have authority to assess all costs, but only those occasioned by the wrongful removal. Second, Mobil could not have presented its other costs for assessment at the time of remand, because there had been no disposition of the substantive claims in a manner which would have entitled Mobil to recover those costs.

4. Federal Law Does Not Govern The Assessment Of Costs Other Than Those Occasioned Bv The Wronaful Removal.

As its final theory to avoid liability for costs incurred by Mobil during the removal, Coastal asserts that such costs are governed by federal law, which requires disallowance of expert witness fees and "very large cost items" that were not "approved in advance." The complete

answer to this position is that (1) Coastal has cited no case which even suggests that costs incurred in preparing for the trial of state law claims while a case is pending on a wrongful removal to a federal court should be assessed under federal rules; (2) the application of federal rules to determine assessment of costs would be irreconcilable with the principle enunciated by the Supreme Court in Railroad Co. v. Koontz, supra, that a remanded case "should be proceeded with [in the state court] as if no removal had been had"; and (3) the theory espoused by Coastal necessarily rests on the notion, already discredited, that a removed case can be characterized as a separate "federal proceeding" while pending in federal court prior to remand.

The Eleventh Circuit determined when it directed the remand to the state court that the present case is and always has been a state law suit, in which there is no federal jurisdiction or interest. Coastal's position that the costs recoverable by Mobil should be limited under the federal rule that disallows expert witness fees is utterly nonsensical because it would actually reward Coastal for a wrongful removal -- which should never have occurred and certainly should not have any adverse effect on Mobil's rights -- and would enable Coastal to profit from its forum-shopping tactics.

Because Coastal has failed to demonstrate that the district court erred in upholding the award of costs under

Rule 1.420(d) for expert witness fees incurred by Mobil, the certified question should be answered in the affirmative and the decision of the district court should be approved.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW WITH RESPECT TO THE ALLOCATION OF COSTS AND THE AWARD OF EXPERT TITLE EXAMINER FEES.

Apart from the certified question and the collateral issues presented by Coastal in Point I of its Brief, Coastal asserts that the district court committed reversible error in rejecting its contentions that the trial court departed from the essential requirements of law (a) by assessing Mobil's costs against Coastal without allocating a portion to the state; and (b) by awarding the fees of the expert witness who examined and deraigned the record title to the disputed lands, which Coastal contends was "essentially" paralegal work. Mobil submits that the district court correctly concluded "that resolution of these issues involved factual determinations not shown to be clearly erroneous, and application of legal principles not shown to constitute departures from the essential requirements of law."

A. Coastal Failed To Demonstrate A Departure From The Essential Requirements Of Law With Respect To The Allocation Of Costs.

Coastal's claim that the costs were not properly allocated between the state and Coastal is erroneous for several reasons. First, in preparing its motion to tax costs, Mobil consciously excluded costs relating solely to

the state's claim. Indeed, prior to the hearing below, Coastal itself only pointed to a handful of cost items worth under $17,000 that it claimed were solely attributable to the state; for the sake of expediency, Mobil conceded those costs. With respect to the remaining cost items, no further allocation between Coastal and the state was warranted beyond that made by Mobil and approved by the trial court.

Even a cursory review of the record shows that Coastal was the driving force behind this litigation. Coastal first asserted the phosphate conversion counterclaims in this suit on October 20, 1976. On March 23, 1977, Coastal joined the state as a necessary party. Correspondence between Coastal's attorneys and the state's counsel shows that Coastal was involved with and encouraged the state's participation in this suit.[12] Clearly, Coastal developed the conversion theory, brought the claim, and made the state a party; Coastal cannot now avoid the consequences of its action by attributing half of its cost obligation to the state.

Furthermore, the record is clear that, for all practical purposes, the land areas claimed by the state were

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[12] A December 5, 1977, memorandum from the Florida Attorney General's Office solicits comments from Coastal's attorneys about the "anticipated recovery and resources necessary to adequately proceed in this matter." [RA 90.] The memorandum for which comments are solicited states: "Thus far we have relied extensively on the investigatory and legal abilities of the attorneys for Coastal Petroleum." [RA 91.]

subsumed within the vastly larger areas claimed by Coastal. For example, along the main stem of the Peace River, the ordinary high water line asserted by the state closely paralleled or fell within Coastal's broader ordinary high water line in most instances. Coastal also claimed vast additional acreages by asserting that numerous tributaries flowing. into the Peace River were navigable "highways of commerce.'' The state disavowed any claim of ownership to many of these tributaries.

The significance of these facts is that Mobil had to incur the costs involved here in order to defend against Coastal's claims, and would have been required to do so regardless of the presence of the state. As the trial court properly concluded, except for those items attributable solely to the state's claim (which Mobil eliminated on its own), "the costs claimed by Mobil would have been incurred in defense of Coastal's counterclaims regardless of the joinder by the State defendants in support of those claims." [A 9.]

Finally, it merits emphasis that Coastal claimed entitlement to 90% of all damages recovered for the alleged conversion of minerals by Mobil occurring prior to the 1976 settlement agreement between the state and Coastal. This time period would encompass the vast majority of Mobil's mining activity. In addition, Coastal claimed more than three times as much phosphate and uranium that was allegedly converted by Mobil from the lands in dispute as the state

claimed. In sum, Coastal's allocation theory does not reflect the true facts of the case.

The law on allocation of costs also does not support Coastal's position. Certainly, there is no abuse of discretion in apportioning costs between multiple parties. See International Patrol and Detective Agency, Inc. v. Aetna Casualty & Surety Company, 396 So.2d 774, 777 (Fla. 1st DCA 1981), approved, 419 So.2d 323 (Fla. 1982). It has also been held that cases separately filed and later consolidated require the apportionment of costs between unsuccessful parties. Martel v. Carlson, 118 So.2d 592, 594 (Fla. 3d DCA 1960), cert. denied, 123 So.2d 674 (Fla. 1960). However, nothing in the cases cited by Coastal stands for the proposition that under the circumstances of this case, costs must be apportioned between the state and Coastal.

The principal authority relied upon by Coastal is Food Fair Properties, Inc. v. Snellarove, 292 So.2d 66 (Fla. 3d DCA 1974). Food Fair involved an adverse verdict against one defendant but an exoneration of the other defendants. The court found it was improper in such cases to assess the costs that the plaintiffs had incurred litigating against the successful defendants to the single losing defendant. The case was remanded with directions for the assessment of costs in accordance with the views expressed in Van Devander v. Knesnik, 281 So.2d 57 (Fla. 3d DCA 1973). In Van Devander, the successful defendants taxed their costs against the

plaintiff. The trial court then allowed the plaintiff to tax the amount recovered against it by the successful defendants against the unsuccessful defendants. Id. at 58. The appellate court held that the costs awarded to the successful defendants against the plaintiff could not be properly added to the costs claimed against the unsuccessful defendants. Thus, neither of these cases stands for the broad proposition asserted by Coastal.

In fact, in a later decision of the same district court, the holding of Food Fair was properly analyzed:

> In Food Fair Properties . . . we recognized the injustice of allowing a plaintiff to obtain a cost judgment against the single losing defendant where those costs included prosecution of a successful joint defendant. Accordingly, Mrs. Lopez may not be taxed for the costs attributable to the successful defendant.... For this reason, the cost judgment...is reversed and remanded for deletion of those costs attributable solely to the [successful defendant].

Department of Transportation v. Vesa, 414 So.2d 559, 560-61 (Fla. 3d DCA 1982), rev. denied, 424 So.2d 763 (Fla. 1983) (emphasis added). Under Food Fair, only the costs attributable solely to the state are to be allocated, even assuming the state may be characterized as a "successful co-party." Since Mobil conceded the cost items that Coastal claimed were attributable solely to the state, the Food Fair formula has been satisfied and no additional allocation need be made.

Coastal failed to demonstrate that the trial court departed from the essential requirements of law in the allocation of costs. It is well settled that "[a]n award of costs rests within the sound discretion of the trial court and will not be disturbed on appeal in the absence of a clear showing of an abuse of that discretion." Puder v. Revitz, 424 So.2d 76, 77 (Fla. 3d DCA 1982); see also Department of Revenue v. Amrep Corp., 358 So.2d 1343, 1353 (Fla. 1978). Because the record before the district court fully supported Judge Hall's exercise of discretion in the allocation of costs, certiorari was properly denied.

B. Coastal Failed To Demonstrate A Departure From The Essential Requirements Of Law With Respect To The Award Of Expert Title Examiner Fees.

The cost of the expert title examiner, Charles Garner, is clearly recoverable in a case such as this where Mobil's defense depended principally on the validity of its title to the lands. At the time when he performed the services as an expert title examiner, Garner was an independent professional. The fact that he was later employed by Mobil's counsel does not retroactively transform that work into a "paralegal fee."

As Garner's testimony below showed, he was responsible for the research and deraignment of title for literally thousands of acres of land which Coastal placed at issue in this case. Garner is unquestionably an expert in his field and was prepared to give expert testimony regarding

the status of the Polk County records with regard to the ownership of the lands in issue. Garner was going to present testimony on a legally related subject, and his work was certainly reasonable and necessary to Mobil's defense in this case. Accordingly, like any other expert, his costs are recoverable, and the district court correctly ruled that the taxation of those costs did not constitute a departure from the essential requirements of law.

CONCLUSION

The district court's decision denying Coastal's certiorari petition was correct under the law and should be approved.

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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 this 29th day of December, 1989, to: ROBERT J. ANGERER, Esq., Post Office Box 10468, Tallahassee, FL 32302.

Julian Clarkson

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