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 REPLY BRIEF ON THE MERITS

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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 Anv Kind.

In its Answer Brief, Mobil has understandably chosen to ignore the basic rule which governs expert preparation costs and fees. The basic rule is that: except as authorized by statute, compensation for expert witnesses, beyond the ordinary fees authorized for witnesses generally, cannot be taxed as costs. This is the rule in Florida, *Junkas v. Union Sun* Homes, *Inc.*, 412 So.2d 52 (Fla. 5th DCA 1982), and in most states. See the twenty-three states annotated in the pocket part of 20 CJS Costs §244, p. 106.

General provisions for "costs" have never included expert witness fees. See Section 57.041, Florida Statutes (1987). Not until relatively recently were expert fees recoverable in Florida by the terms of any enabling statute, Section 92.231, Florida Statutes. In fact, if expert fees had been included within the term "costs" under Section 57.041, Florida Statutes, Section 92.231, Florida Statutes (1987), would be duplicative.

Really Mobil argues that under Rule 1.420(d), the Court must leaislate what costs are substantively recoverable. Rule 1.420(d) was not intended to change the substantive law

of costs, including this basic rule of expert preparation costs and fees. Before any expert fees are recoverable, the fees must still be authorized by statute. While Section 57.041, Florida Statutes, provides that the "person recovering judgment" is entitled to costs, and while Rule 1.420(d) may be read to include Mobil as the "person recovering judgment" after a voluntary dismissal, neither Section 57.041 nor 57.071, Florida Statutes, authorizes expert witness fees. Mobil has failed to point to any other statute authorizing the assessment of expert preparation costs and fees upon voluntary dismissal.

Section 92.231, Florida Statutes, allows fees only where the expert was qualified and testified. As this Court held concerning Section 92.231, Florida Statutes:

> "The Fourth District in *Tallardy* correctly interpreted this provision to mean that when a person is called to testify in any cause if such person is presented and accepted by the court as an expert, the party calling the witness may have an expert witness fee taxed if costs are awarded to that party." (Emphasis added.) *Travieso v. Travieso*, 474 So.2d 1184, 1185 (Fla. 1985).

Mobil's experts do not meet these thresholds of the legislative enabling act and no expert preparation costs or fees may therefore be taxed under Section 92.231.

Where then does Mobil contend that the Court was authorized to tax expert preparation and fees? Rule 1.420(d)! But that rule does not even address expert fees, but simply "costs." That rule merely tells us that Mobil

becomes a prevailing party or the party recovering judgment that triggers the taxation of costs. The substantive extent of taxable costs is governed by other substantive provisions - none of which allow expert preparation costs or fees.

Stated simply, Mobil conveniently ignored the general rule that requires a statute authorizing expert preparation and fees. Mobil pointed to no enabling statute. Instead, Mobil pointed to other types of costs which have been recovered on voluntary dismissal. But in each case there was an enabling statute. For example, if a party is the prevailing party under Section 57.041, Florida Statutes, then deposition costs are recoverable. Section 57.071, Florida Statutes. There are no limitations in Section 57.071 like those of Section 92.231 for qualification and testimony.

If Mobil were correct, Section 92.231 would be unnecessary, duplicative and superfluous. It has a purpose. The Legislature, in breaking with the precedent of not allowing expert preparation costs and fees in excess of other witness fees, limited those fees. An expert is paid for his testimony unlike a regular witness who is summoned and merely reimbursed. *Cheatham Electric Switching Device Co. v. Transit Development Co.,* 261 F. 792 (2d Cir. 1919). Experts many times are prepared and are either not called or not qualified. Furthermore, much of what is to be testified to may be beyond the expert's qualifications. The expert's

preparation or testimony or parts of them may not even be relevant or material. Section 92.231, Florida Statutes, in authorizing the imposition of paid expert witness fees, imposed two limitations upon the authority. The expert must be qualified by the Court and testify. Clearly none of these expert witnesses were ever permitted by the Court to be qualified. Clearly none of these expert witnesses were ever permitted by the Court to testify. The two protective thresholds for allowance of expert fees under Section 92.231 were not met. Mobil thus contends that Rule 1.420(d) must be read to ignore the basic rule of expert preparation costs and fees as well as the Legislature's own safeguard thresholds.

Mobil has also argued that because of the depositions of some of its experts by the Trustees), that all expert preparation costs and fees are justified against Coastal. When expert depositions were asked for by Mobil, the case was in Federal Court. Coastal did not wish to take expert depositions but the Trustees did. The $2,000,000 of expert preparation costs and fees include only $183.33 for such depositions. Coastal submitted in its brief that:

> "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." (Emphasis added.)

Mobil has argued in its reply brief:

> "[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.'"

This mischaracterization further demonstrates the weakness of Mobil's position. Clearly Coastal did not argue that no expert witness preparation expense is ever recoverable. Coastal said that $2,000,000 of preparation expenses cannot be supported by relying upon $183.33 of depositions of experts even if Rule 1.390, Fla.R.Civ.P., governed the practice in Federal Court when the depositions were taken.

Furthermore, with regard to the State-Wide Uniform Guidelines for Taxation of Costs referred to by Mobil, the Court stated in that Administrative Order dated October 28, 1981:

> "Permission is hereby granted to publish and distribute the guidelines, but without prejudice to the rights of any litigant objecting to the application of the guidelines to a specific case on the basis that the assessment of costs pursuant to the guidelines is contrary to applicable substantive law. It is recognized that no approval of these guidelines shall relieve the trial judge of his responsibility under the law to assess the proper costs. This order is not to be construed as any intrusion on that responsibility of the trial judges." (Emphasis supplied)

Substantive law was not being affected. Contrary to Mobil's contention, this Court did not intend nor imply that in every case whether qualified or testifying that any expert's preparation costs and fees should be recoverable costs.

Section 2A of the Guidelines obviously was limited to situations which were authorized by enabling statutes:

> "The argument overlooks S92.231, Florida Statutes (1983) which permits the award of an expert witness fee to a witness who has been called in a civil trial as an expert and who 'is permitted by the court to qualify and testify as such,' and 'who shall have testified' in the cause. Appellee's reliance on the State-Wide Uniform Guidelines for Taxation of Costs promulgated by the Florida supreme court in an Administrative Order on October 29, 1981 [7 F.L.W. 517] is misplaced, because the administrative order, by its terms, does not purport to alter the substantive law with regard to the entitlement to any item of costs. Moreover, section 2A of the Guidelines clearly requires that the expert witness testify to be entitled to the award of a fee." *KMS* of *Florida Corp. v. Magna Properties*, 464 So.2d 234 (Fla. 5th DCA 1985).

Coastal recognizes that expert preparation time may be recoverable where the expert is qualified and testifies to relevant issues. The Uniform Guidelines simply do not address the situation of all voluntary dismissals.

Mobil claims that this "chilling effect" of the decision perceived by the District Court does not exist. This chilling effect is real. If in a case such as this, where Mobil employed many experts, if a party considering voluntary dismissal must pay for all Mobil's expert preparation costs and fees regardless of: whether the expert will be qualified and allowed to testify in all areas of his preparation; and whether the expert is actually allowed to testify; and in fact whether the testimony is even relevant and material, but simply because he or she was

employed as an expert, the party will reject voluntary dismissal and present his case. If a directed verdict is rendered, his costs will be considerably less and not include the expert preparation and fees. *Junkas* v. *Union Sun Homes, Inc.*, 412 So.2d 52 (Fla. 5th DCA 1982). If judgment is rendered after a trial held, only those fees where the testimony is relevant and material and where the expert is qualified and testifies will be taxed. Thus the "chilling effect" may force such a party to pursue the claim merely to reduce his costs and avoids the very purpose of voluntary dismissals.

Although Mobil and the District Court distinguish *Junkas v. Union Sun Homes, Inc.*, 412 So.2d 52, 53 (Fla. 5th DCA 1982), that case is applicable:

> "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." *Junkas, supra*, at 53.

Thus if Coastal had not filed a voluntary dismissal but had gone to trial, by *Junkas* Mobil could not have even collected expert witness fees or preparation costs if a directed

verdict were rendered, even though greater expense would surely have accrued.

Mobil's distinction based upon the "waiver" of such costs by asking for a directed verdict ignores its own "waiver" here when before the vast preponderance of these costs were incurred, Mobil filed the reply counterclaim to assure continuation of the case here.

The District Court's decision allowing taxation of expert witness preparation costs and fees regardless of their relevance, materiality or the expert's qualification or the fact of whether the expert testified upon a voluntary dismissal ignores the basic rule of expert fees in Florida and the legislative thresholds for expert fees, Section 92.231, Florida Statutes. The chilling effect of this decision may require many parties who wish to voluntarily dismiss to continue litigation.

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

Coastal submits that where there are reciprocal claims, that reciprocal voluntary dismissals produce no party who prevails. Mobil's answer is that its own voluntary dismissal was a nullity since this Court in *Coastal Petroleum* v. *American Cyanamid,* 492 So.2d 339 (Fla. 1986) (A 128), held that the Leon County Circuit Court had no jurisdiction to consider the reply counterclaim. Whether

this Court substantively determined the issues in the Trustees' and Coastal's favor, or whether the Court held Mobil's claim without jurisdiction, the net effect is that Mobil is no more of a prevailing party than Coastal.

C. Expert Expenses Which Occur While A Case is in Federal Court May Not Be Awarded by the State Court.

Coastal submitted that because the expert preparation costs accrued after the case was removed to Federal Court, and because the Federal Court retained jurisdiction over assessment of costs, and did actually determine costs, the lower court's order allowing such preparation expert fees was erroneous. Mobil's chief response was that this would apply to only the costs "due to the wrongful removal."

The error in Mobil's contention is that any and all expenses during removal fall within this category of "due to the wrongful removal" and not just some. Clearly looking to the list of costs awarded demonstrates the nature of the costs:

"(1)	06/26/81	#3355-Clerk, United States District Court; Filing Fee Deposition Subpoena (2)	6.00
(2)	08/11/81	#153825-Clerk, United States District Court; $65.00 Docketing Fee Fifth Circuit; $5.00 Filing Fee - Notice of Appeal; Appeal of Injunction	70.00

. . . . . ."

Such expenses could have been considered at the time of remand by motion with the Federal Court. *In re Northern Indiana Oil Co.,* 192 F.2d 139 (7th Cir. 1951); *Postal Telegraph Cable Company v. Alabama,* 155 U.S. 482, 487 (1894), and *Walker* v. *Collins,* 155 U.S. 102 (1897). Mobil did not submit these expenses of expert preparation costs and fees since they were not collectible under Federal law. Instead it filed only some of the expenses in its Motion with the Federal Court and waived raising the others, hoping to later take advantage of a different standard in State Court where expert fees are not wholly untaxable as in Federal Court. As seen, however, these expert preparation costs and fees do not even meet the thresholds of the Florida enabling law, Section 92.231, Florida Statutes.

Finally, Mobil did not even address *Wade* v. *Clower,* 114 *So.* 548 (Fla. 1927), which demonstrates that the Federal Court's determination of Mobil's cost motion ends the issue by res iudicata. Thus the District Court should have quashed the judgment for costs.

POINT II

THE DECISION OF THE DISTRICT COURT IS OTHERWISE ERRONEOUS.

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.

Mobil premises much of its argument on factual assertions not supported by its cited references. For example, Mobil claims Coastal was the "driving force" in the litigation. Mobil is the "plaintiff" in this case. When Coastal considered voluntary dismissal early in the case, Mobil filed a reciprocal claim, for the announced purpose of assuring the case would continue in Leon County (A-111).

Mobil also refers to a memorandum written by an Assistant Attorney General who also stated:

> "The State must remain active in these lawsuits, because it cannot, in good conscience, stand by shucking its duty to protect the public lands. In addition, this litigation involves a significant amount of money which could be returned to the State and its citizens." **(RA 92)**

It is significant that at the time of this December **5, 1977** memorandum, the Trustees had already filed their claim for relief on August **23, 1977** (A **26-28**). Even more significant is the fact that virtually every cost included in the Costs Judgment accrued after this claim for relief by the Trustees (A **32-94**). Mobil's own reciprocal reply counterclaim made a claim not only against Coastal, but also against the

Trustees (A 113). If it is relevant, the "driving force" in this litigation was Mobil, the Plaintiff.

Mobil also claims that Coastal stood to gain the most. Prior to 1976 Coastal did have a 90% working interest, however, after January 6, 1976, Coastal retained only a 5% interest so the Trustees would receive 95% thereafter. No comparison calculation of such damages appears in the record despite Mobil's reference. On the other hand the settlement between Mobil and the Trustees demonstrates the enormity of the Trustees' claims (A 115-122).

Mobil's factual arguments fail to focus upon the real error involved on this issue: Must one claimant, who voluntarily dismisses, pay costs which accrued due to its own claim and the claim of another party, where the other party has settled with the adversary with each bearing its own costs?

Mobil essentially argues that only those costs which relate solely to the Trustees' claims could have been assessed against the Trustees. But where there are co-parties, such costs must be taxed equally. 12 Fla.Jur.2d Costs, $14, p. 152; *Sanderson* v. *Sanderson's Adms.*, 20 Fla. 292 (1883); and *Brickell* v. *DiPietro*, 12 So.2d 782 (Fla. 1943). The issue then is not really whether Coastal may have been responsible for the Trustees' equal share, but whether the Trustees' equal share was waived as consideration for the settlement with the Trustees. That settlement provided:

> "The State and Mobil have agreed to bear their own costs in Mobil I and Mobil IV as against each other. Mobil does not intend for this instrument to constitute a relinquishment or waiver of its right to recover costs incurred in Mobil I and Mobil IV from any person or entity other than the State." (A 121)

When the Trustees' equal share of costs was waived in the settlement, Mobil could not have the benefit of these costs again by way of cost judgment against Coastal. Double collection of costs is not proper. The Circuit Court should have apportioned these expenses equally between the Trustees and Coastal. Since the settlement waived the Trustees' equal share, Coastal should not again be called to pay them.

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.

Coastal pointed to the nearly $150,000 "expert" fee paid to Charles Garner who acted essentially as a paralegal. Mobil has failed to address a single authority cited by Coastal. Rather, Mobil merely characterizes Mr. Garner as an expert who would testify regarding the "state of the Polk County records with regard to the ownership of the lands in issue. . .." His testimony could not help but touch the quality or status of title and would constitute the unauthorized practice of law. *The Florida Ear 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, Attorneys at Law, $109, p. 267.

Mobil also argued: "The fact that he was later employed by Mobil's counsel does not retroactively transform that work into a 'paralegal fee.'" (p. 49). This is not factually complete as his affidavit demonstrates (A 106). Mr. Garner worked for Mobil's counsel doing the same work before the period in question and after the period in question. By his becoming an "independent expert" in the middle of this employment period, Mobil attempted to convert what would amount to uncollectible paralegal work into expert costs. Mr. Garner was paid to assist Mobil's attorneys in gathering records and deraigning title. That work was premised largely upon Mobil's irrelevant and mistaken legal theory rejected by this Court in *Coastal Petroleum* v. *American Cyanamid,* 492 So.2d 339 (Fla. 1986) (A 123).

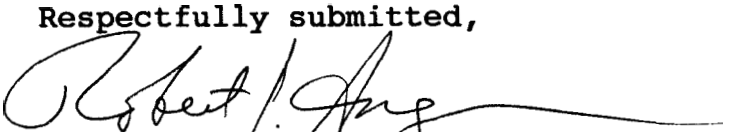
Even if his charges were not viewed as paralegal costs, the Court has long ago held that such expenditures are not *costs. Kennedy* v. *Hancock,* 146 So. 667 (Fla. 1933). Mobil has failed to address any of these authorities. The District Court decision is a departure from the essential requirements of law.

CONCLUSION

Florida law has required an enabling statute before expert preparation and fees may be taxed as costs. Section 92.231 does not enable but actually precludes such expert costs where a court has not permitted the expert to be "qualified" and "testify." The required enabling authority is not present to tax expert preparation and fees. Furthermore, the District Court's interpretation of Rule 1.420(d) would chill the very use of voluntary dismissals.

Coastal respectfully requests that the Court exercise its discretion to review this case and 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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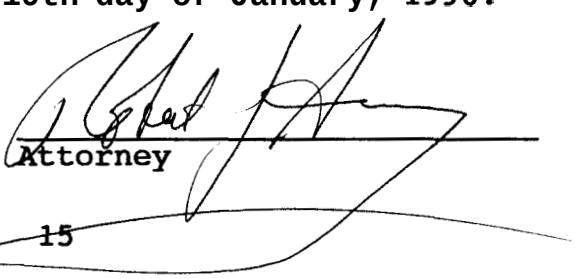
CERTIFICATE OF SERVICE

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 19th day of January, 1990.



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