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IN THE SUPREME COURT OF FLORIDA

KAREN JEANNE SMOLIC ASPEN,

PETITIONER,

v. CASE NO. 75,107

BROOKE T. BAYLESS,

RESPONDENT.

BRIEF OF FLORIDA DEFENSE LAWYERS' ASSOCIATION, AMICUS CURIAE

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PRELIMINARY STATEMENT

The Florida Defense Lawyers Association (hereafter, "FDLA"), pursuant to Rule 9.370, Florida Rules of Appellate Procedure, submits this brief, together with a motion for leave to appear as amicus curiae, in support of the position of Petitioner in this cause. FDLA expresses its appreciation to the Court for considering its motion and, should the motion be granted, for permitting FDLA to file this brief.

Since FDLA does not have access to the entire Record in this cause, FDLA will rely on the opinion of the District Court of Appeal as the basis for its understanding of the facts and proceedings.

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent filed an action seeking damages for injuries sustained due to petitioner's negligence. Petitioner filed an offer to take judgment in the amount of $9,001 plus taxable costs. Respondent did not accept the offer, but instead filed a demand for judgment in the amount of **$25,000.** The case was tried before a jury, which returned a verdict in the amount of $7,350 and found respondent **25%** comparatively negligent, resulting in a net verdict for respondents in the amount of **$5,412.50.** Final judgment in accordance with that jury verdict was entered.

Thereafter, petitioner filed her motion to tax costs and attorney's fees, attaching the offer to take judgment. The trial court denied that motion, stating that while the costs may have

been incurred in the name of petitioner, petitioner did not ultimately pay the costs, and any costs which were paid in her name were reimbursed by her insurance carrier.

This order was appealed to the District Court of Appeal, Second District, which affirmed the lower court, holding that neither Florida Rule of Civil Procedure **1.442,** nor Sections **45.061** and 768.79, Florida Statutes, permitted recovery of costs where those costs were paid for by petitioner's insurance carrier. Finding its decisiontroubling, however, and fearing the effect the holding might have on the purposes of Rule **1.442,** the District Court certified that its opinion passed on an issue of great public importance.

By appropriate notice, petitioner requested review of the District Court's decision pursuant to this Court's jurisdiction under Article V, Section 3**(b)(4),** Florida Constitution, and Rule 9.030 (a)**(2)(A)**(v)**,** Florida Rules of Appellate Procedure.

This Court accepted jurisdiction and issued a briefing schedule. This brief is submitted to the Court, together with a motion by FDLA for leave to appear as Amicus Curiae, pursuant to the provisions of Rule 9.370, Florida Rules of Appellate Procedure, within the time in which Petitioner is to file her brief (as extended by order of this Court dated December 18, 1989).

SUMMARY OF ARGUMENT

The District Court's misgivings about the correctness of the result it reached were well-founded. The District Court's decision, if upheld, would destroy the efficacy of this rule and

these statutes to achieve their salutary objective -- lessening court congestion by encouraging reasonable settlements -- in a great number of cases. The language of Rule 1.442, Florida Rules of Civil Procedure, and of Sections 45.061 and 768.79, Florida Statutes, does not compel the result reached below. Each is entirely compatible with permitting recovery of costs and fees paid directly by an insurance carrier. Nor do the decisions in Lafferty v. Tennant, 528 So.2d 1307 (Fla. 2d DCA 1988) and Citv of Boca Raton v. Boca Villas Corp., 372 So.2d 485 (Fla. 4th DCA 1979), compel the District Court's holding. For purposes of these provisions, liability for costs and attorney's fees is "incurred" by the named defendant, even if the mechanism of payment is through the insurance coverage he has purchased to protect himself. To the extent the insurer pays the costs directly, it is subrogated to the insured's rights; the District Court's rationale would destroy those subrogation rights.

Not only is the District Court's decision contrary to the purposes of these provisions, and not compelled by their terms, but it also has wide-ranging adverse consequences in other procedural settings. One District Court has already applied the same rationale in a voluntary dismissal context, while other District Courts have explicitly rejected it in such contexts as awards of costs to prevailing defendants, fee awards in case of frivolous suits, and fee awards in medical malpractice cases. Unless this Court rejects the District Court's holding, those and similar decisions will likewise be subject to question. In each such

instance, valid public policy considerations advanced by such provisions will be improperly subverted by a mechanistic approach based solely on who writes the check, rather than on the principled basis of what best serves the goals the provision seeks to implement.

The District Court's decision should be reversed and the cause remanded for entry of an order awarding costs already found by the trial court to be otherwise proper, and for any appropriate further proceedings as to an award of attorney's fees.

ARGUMENT

A PARTY MAY, ON BEHALF OF A NON-PARTY INSURANCE CARRIER, RECOVER COSTS INCURRED UNDER THE RULE AND STATUTES REGARDING OFFERS OF JUDGMENT.

The issue, as framed by the District Court, relates directly to one rule (Rule **1.442,** Florida Rules of Civil Procedure) and two statutes (Sections **45.061** and **768.79,** Florida Statutes); however, the rationale of the District Court's decision implicates several other rules and statutes, and the impact of the lower tribunal's holding on those additional provisions must be considered in determining whether the District Court's decision should be affirmed. Accordingly, we will first address the provisions directly at issue in this cause, and then address the implications of the District Court's decision on other provisions which would also appear to be affected by the rationale of that decision.

A. The District Court's Holding And Rationale.

Initially, the District Court, relying heavily on Laffertv v. Tennant, **528** So.2d **1307** (Fla. 2d **DCA 1988)** (hereafter, "Lafferty"),

and City of Boca Raton v. Boca Villas Corp., 372 So.2d 485 (Fla. 4th DCA 1979) (hereafter "City of Boca Raton"), held that costs paid directly by an insurer on behalf of its insured, the named defendant, may not be taxed under Rule 1.442, Florida Rule of Civil Procedure. The District Court based this conclusion on the observation that the rule is couched in terms of the "party defending against a claim" serving the offer on "the adverse party" and the fact that the insurer, under the non-joinder statute, is not a party.

Next, the District Court held that such costs may not be taxed under Section 45.061, Florida Statutes, noting that the statute refers to the "amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expense, expert witness fees, and other expenses which relate to the preparation for trial, incurred after the making of the offer of settlement; . . ." (Section 45.061(3)(a), Florida Statutes).

Finally, the District Court held that these costs could not be taxed under Section 768.79, Florida Statutes, because that statute speaks in terms of the "amount of the additional delay cost and expenses that the offeror would reasonably be expected to incur," citing Section 768.79(2)(b)6, Florida Statutes.

To buttress its decision, the District Court reasoned that the recovery of costs was in the nature of indemnification or reimbursement.' Holding that the named party had not directly paid

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'The District Court's statement is supported by such cases as Hart v. Bostwick, 14 Fla. 162 (1872), and City of Boca Raton v. (continued...)

those costs, the District Court concluded that no reimbursement or indemnification was appropriate.

Even though it felt compelled to reach this decision, the District Court expressed misgivings about it. The District Court observed that the non-joinder statute had been enacted to prevent the prejudicial impact of the "deep pocket syndrome," and further noted that failure to award costs in this situation would thwart the purposes of the rule and statutes (to encourage settlement of lawsuits), since the adverse party would not face the prospect of paying costs as a penalty for unreasonably rejecting a good offer of settlement.

The District Court's expressed misgivings about its decision are well-founded. Its decision frustrates the purposes of the provisions in issue, and was not compelled by the language of the statutes and rule involved. Additionally, the holding creates unacceptable effects in other areas of law, further indicating that the decision was incorrect and should be reversed.

B. The District Court's Decision Thwarts The Purposes Of The Provisions In Issue,

The District Court's decision undercuts the foundation of the provisions in issue in this cause, and does so for reasons which have absolutely no bearing whatsoever on the objectives of the rule and statutes in question. The purpose of Rule 1.442, Florida Rules of Civil Procedure, is to induce or influence a party to settle

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1. (continued)
Boca Villas Corp., 372 So.2d 485 (Fla. 4th DCA 1979). See also, Gordon Int'l Advertising, Inc. v. Charlotte County Land & Title Co., 170 So.2d 59 (Fla. 3d DCA 1964).

litigation and obviate the necessity of a trial. Tucker v. Shelby Mut. Ins. Co., 343 So.2d 1357 (Fla. 1st DCA 1977); Hernandez v. Travelers Ins. Co., 331 So.2d 329 (Fla. 3d DCA 1976); Santiesteban v. McGrath, 320 So.2d 476 (Fla. 3d DCA 1975).

As observed in Wisconsin Life Ins. Co. v. Sills, 368 So.2d 920, 922 (Fla. 1st DCA 1979):

> The purpose of Rule 1.442 is to encourage defendants to acquiesce in claims discovered during litigation to be meritorious and to shift to the claimant the financial burden of carrying on litigation beyond the point where an appropriate offer of judgment on the merits is made.

In those cases in which Rule 1.442 applies, the court does not have any discretion to decline to award taxable costs. Winn Dixie Stores, Inc. v. Cochran, 540 So.2d 914 (Fla. 5th DCA 1989); Santiesteban v. McGrath, supra.

Sections 45.061 and 768.79, Florida Statutes, serve the same purpose as Rule 1.442.[2] Each of these provisions is intended to

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[2]It is worthy of note that this Court has modified Rule 1.442, Florida Rules of Civil Procedure, to incorporate certain provisions taken from Sections 45.061 and 768.79, Florida Statutes, effective January 1, 1990. The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So.2d 442 (Fla. 1989). Although the Rule as modified does not apply retrospectively to this cause, and does not speak directly to the point at issue here, it provides some guidance as to the purpose and proper construction of the rule and statutes involved. As modified, Rule 1.442 provides for the imposition of "sanctions equal to reasonable attorneys fees and all reasonable costs of the litigation accruing from the date the relevant offer of judgment was made . . . ." Unlike the statutory provisions, which speak of costs and fees "incurred," the modified rule speaks of costs and fees "accruing" after the offer of judgment, thereby evidencing a determination that it is the existence of such costs and fees, not who pays them, which is the determinative factor in computing the amount of the sanction to be imposed.

help alleviate congestion of court dockets by encouraging reasonable settlements of disputes and penalizing an unreasonable refusal to settle litigation.

It is worthy of note that Section 768.79, Florida Statutes, states that "the defendant shall be entitled to recover reasonable costs and attorney's fees" where it applies. The use of the word "shall" in this context evinces a legislative intention to impose a mandatory penalty for unreasonable rejection of a reasonable settlement offer. Analogously, in Wright v. Acierno, 437 So.2d 242, 244 (Fla. 5th DCA 1983), a case involving the statutory provision for recovery of attorney's fees in the event of a frivolous action (Section 57.105, Florida Statutes), the court observed:

> We agree that the use of the word "shall" evidences the legislative intention to impose a mandatory penalty in the form of a reasonable attorney's fee once the determination has been made that there was a complete absence of a justiciable issue raised by the losing party. If we are to implement the legislative intent to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities, Whitten [v. Prosressive Cas. Ins. Co., 410 So.2d 501 (Fla. 1982)], the award must be based only on the reasonable value of the services, not on whether or how much the prevailing party has actually paid or whv, in fact, no fee was paid.

As the District Court correctly noted in the instant case, the salutary objectives of the provisions here in issue would be completely thwarted by holding that costs could not be recovered solely because the insurer paid them directly. Simply stated, the

fact that insurer pays costs directly, rather than the named defendant doing so, is wholly irrelevant to the purpose of those provisions -- encouraging the litigants to "take a hard look" at reasonable settlement of controversies short of trial.

Moreover, to the extent an insurer pays costs directly, it obtains subrogation rights. After payment of losses incurred by its insured, the insurance company is subrogated to any right the insured might have. Couch v. Drew, 14 F.L.W. 2808 (Fla. 1st DCA December 7, 1989). Forbidding the recovery of costs, on the basis that the insurer paid them, would destroy the insurer's subrogation rights. Id.

C. The District Court's Decision Is Not Compelled BY The Relevant Language.

The District Court held that no "party" had paid the costs involved, and concluded that the language of the rule and statutes accordingly did not provide a basis for recovery of costs in these circumstances. That holding is not required by the relevant language of these provisions.

In pertinent part, Rule 1.442, Florida Rules of Civil Procedure, simply states: "If the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer." A literal reading of the rule demonstrates that the defendant may serve an offer on his opponent to allow judgment to be taken against him (the defendant) and, if the judgment finally obtained is not more favorable than the offer, the plaintiff must pay the costs incurred after making of the offer. The rule does **not** specifically require

that the costs must have been actually paid by the named defendant, but only refers to the costs incurred. The literal terms of the rule were complied with in this cause: the defendant, Ms. Aspen, made an offer to allow judgment to be taken against her,[3] and the judgment finally obtained was not more favorable than the offer. Accordingly under the plain language of Rule 1.442, Florida Rules of Civil Procedure, the plaintiff, Mr. Bayless, was obligated to pay the costs incurred after the making of that offer, regardless of who actually paid them.

Section 45.061, Florida Statutes, likewise does not compel the result reached below. A closer examination of the statutory language reveals the flaw in the District Court's reading. Section 45.061(1), Florida Statutes, permits any party to serve on an adverse party a written offer to settle a claim. Section 45.061(2), Florida Statutes, provides that if the court determines that such an offer was unreasonably rejected, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate "sanction."[4] Section 45.061(3), Florida Statutes, then provides that in determining the amount of any such sanction, the court shall award the amount of the parties' costs and expenses, including reasonable attorneys' fees, etc., incurred after making of the offer of settlement. In short, the

[3]Although the Judgment would undoubtedly be satisfied by her insurer, rather than out of Ms. Aspen's personal assets, the judgment would be entered against her, as the party to the action.

[4]The same statutory provision also contains presumptions as to unreasonable rejection if the eventual judgment is 25% greater or less than the rejected offer.

statute imposes a sanction measured by some of the expenditures caused by the rejection of a reasonable settlement offer.

The District Court's reliance on the terminology of Section 768.79(2)(b)6, Florida Statutes, was likewise misplaced, and a closer reading of the statute belies the premise for the District Court's opinion. Section 768.79(1)(a), Florida Statutes, provides, in pertinent part:

> In any action to which this part applies, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25% less than such offer, and the court shall set off such costs and attorney's fees against the award.

Thus, the plain statutory language does not provide that the costs and attorney's fees must be directly paid by the named party (the insured), but only speaks of reasonable costs and attorney's fees "incurred." The provision on which the District Court relied is contained in a separate portion of the statute dealing with the factors to be considered in determining the reasonableness of an award of attorney's fees pursuant to the statutory provision.[5] Once again, the statutory language does not compel the result reached by the District Court in this cause.

Thus, the language of the rule and statutes involved do not compel the result reached below, but rather speak in terms of "the

[5]Other factors to be considered include the merit (or lack of merit) of the claim, the closeness of the legal and factual questions, and whether the suit was in the nature of a test case.

cost incurred after the making of the offer" (Rule 1.442, Florida Rules of Civil Procedure), "an appropriate sanction" measured by the extent of the costs and expenses resulting from rejection of the offer (Section 45.061, Florida Statutes), and "reasonable costs and attorney's fees incurred from the date of filing of the offer" (Section 768.79, Florida Statues).

Moreover, even if the pertinent language were read as requiring that the costs and fees involved have been incurred by the insured, that still does not compel the District Court's holding. Unless provided otherwise by contract or statute, the lawyer looks to his client to pay fees and costs. In Interest of M.P., 453 So.2d 85 (Fla. 5th DCA 1984), rev. denied, 472 So.2d 732 (Fla. 1985). When retained by an insurer to defend its insured in a lawsuit, the lawyer's client is the insured. Likewise, it is the insured who is the party, and thus "incurs" the cost (regardless of who actually pays it).

Webster's Third New International Dictionary, page 1146 (1971), defines "incur" as "become liable or subject to: to bring down upon one's self." Roget's College Thesaurus, page 180 (1958), lists "bring about" as a synonym for "incur." "Incur" means to become liable or subject to through one's own action or to bring upon one's self. Maryland Cas. Co. v. Thomas, 289 S.W.2d 652 (Tex. App. 1956); Georgia Farm Bureau Mut. Ins. Co. v. Calhoun, 127 Ga.App. 213, 193 S.E.2d 35 (1972). Thus, the insured defendant has, in fact, "incurred" liability for costs and attorney's fees, even if his insurer has contractually agreed to indemnify him for

those costs and attorney's fees and does so by paying them directly, without the necessity of the insured/client/defendant making the initial payment.

D. Effect Of Insurer's Non-Party Status.

The District Court also reasoned that an award of costs to the insurer was not feasible because the court did not have jurisdiction over the insurer, who was not a party[6] (due to the non-joinder statute). Without jurisdiction over the insurer, the District Court said, the court lacked power to ensure that the cost award would inure to the benefit of the insurer.

In so holding, the District Court apparently overlooked the fact that the insurer had enforceable subrogation rights. Additionally, the trial court could provide in its order awarding costs that the party to whom they were awarded (over whom the court clearly does have jurisdiction) was to reimburse any entity which had advanced costs on his behalf under a contractual obligation to do so.[7]

Finally, even if there were no assurance that the insurer would recover the costs it advanced, the policy considerations

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[6]Party status at the time of an offer of judgment under Rule 1.442, Florida Rules of Civil Procedure, is apparently not indispensable. See Horn v. Corkland Corp., 518 So.2d 418 (Fla. 2d DCA 1988), in which the court enforced an offer of judgment on a plaintiff who was added to the suit some time after the offer had been made.

[7]For the reasons set forth infra, we submit that a close reading of Lafferty v. Tennant, supra, reveals that it does not preclude such a provision in an order awarding costs. To the extent that Lafferty forbids such a provision, we submit it was wrongly decided and should be disapproved.

supporting a cost-shifting statute can outweigh any possible windfall to the party receiving the statutory benefit. See, for instance, Wright v. Acierno, supra.

E. The Cases Relied On By The District Court Are Inapposite.

The final basis of the District Court's holding was its reliance on Lafferty and City of Boca Raton. Neither case supports the District Court's decision in this context, as the First District pointed out in Couch v. Drew, supra.

In Lafferty, the parties had been involved in a real estate transaction which gave rise to litigation. Following a judgment for plaintiff, the trial court awarded attorney's fees to plaintiff. The basis of this award is not disclosed anywhere in the opinion; perhaps there was a contractual relationship requiring the unsuccessful party to pay attorney's fees incurred by the successful party, although the opinion never so states. After entry of the fee order, the trial court learned that a title insurance company involved in the transaction had funded the plaintiff's litigation, and entered an amended order directing that any attorney's fees recovered by plaintiff be paid over to the title insurance company. The District Court held that, since the title insurance company was not a party, it had established no basis for recognizing any liability on the part of the defendant to the title insurance company and that, accordingly, the trial court had erred in directing that the recovery of attorney's fees be paid to the title insurance company. Accordingly, the District Court reversed the amended order requiring that the attorney's fees

be paid over to the title insurance company. The District Court held that the trial judge had erred in directing that the attorney's fees be paid to the title insurance company, but did **not** hold that the award of attorney's fees was itself improper. Even if Laffertv can be read as entirely precluding an award of attorney's fees in this context, however, it must be pointed out that Laffertv involved a third party who apparently volunteered to fund litigation (albeit undoubtedly for some legitimate business reason) and **not**, as in the present case, a party contractually bound to advance litigation costs as part of a duty to defend the named party.

City of Boca Raton was an appeal from an order awarding costs to the successful party in an action challenging a city charter amendment which had established a maximum number of dwelling units allowable within the city.[8] Apparently due to the nature of the underlying action, a major portion of the plaintiff's court costs was contributed by developers and builders' associations without any agreement or obligation on the part of the named plaintiffs to repay those amounts. Because the sums had been, in part, advanced by volunteer third parties having neither party status nor contractual obligations in the matter, the District Court reduced the amount of costs, and awarded only those sums directly paid by the named plaintiffs. In short, the City of Boca Raton court declined to award costs which would otherwise have been

[8] As disclosed in the opinion, the case was a companion to City of Boca Raton v. Boca Villas Corp., et al., 371 So.2d 154 (Fla. 4th DCA 1979), which discusses the nature of the underlying action.

recoverable, because those costs had in fact been paid by volunteer third parties who had no legal obligation to do so, but who were interested in the outcome of the underlying litigation for purely business reasons. Clearly, that is not the same as the present situation, in which an insurance company is contractually obligated to provide a defense to its insured who is a named party defendant.

As the First District observed (albeit in a slightly different procedural context) in Couch v. Drew, supra, the element of insurance coverage, with its concomitant contractual obligation to provide a defense, results in the insurer being subrogated to any right the insured may have against the opposing party -- and removes the case from the operation of Lafferty and City of Boca Raton.

F. The Result Of The *District* Court's Holding.

Rule **1.442**, Florida Rules of Civil Procedure, and Sections **45.061** and 768.79, Florida Statutes, are intended to encourage the settlement of lawsuits by raising the prospect that a refusal to accept a reasonable settlement offer (or demand) will result in the imposition of costs (and/or attorney's fees) incurred after the making of that settlement offer or demand. If, as the District Court held in the instant cause, costs and attorney's fees paid by an insurer cannot be recovered against a plaintiff who unreasonably rejects a reasonable settlement offer, the purpose of the rule and statutes would be wholly thwarted in numerous cases. Plaintiffs could reject reasonable settlement offers with impunity, knowing that they would not have to pay their opponent's later-incurred

costs and attorney's fees. At the same time, the insured defendant would be treated unevenly, since he would still risk having to pay the plaintiff's costs and attorney's fees if he rejected a reasonable settlement demand by plaintiff. Rather than being balanced provisions providing equal incentives for both parties to "take a hard look" at the merits of settlement offers and demands, these provisions would become a single-edged sword, cutting only in favor of plaintiffs. Such a one-sided and unequal situation cannot have been the legislative intent.

In summary, sound policy considerations militate against the result reached by the District Court in the instant case, and that result is not compelled by the terms of the rule or statutes involved or by prior case law. On the narrow question posed by the District Court, its decision should be reversed.

G. Other Rules And Statutes.

The rationale applied by the District Court in the instant case potentially has further application in other procedural contexts, and could easily lead to untoward results in several areas of law if adopted. Accordingly, the Court should consider the implications of its decision in the context of other rules and statutes which may be affected by the District Court's rationale.[9]

Thus, for instance, in Turner v. D.N.E., Inc., 547 So.2d 1245 (Fla. 4th DCA 1989), the Fourth District applied the same rationale in the context of Rule 1.420(d), Florida Rules of Civil Procedure,

[9] In addition to the specific rules and statutes discussed infra, there are undoubtedly a number of other provisions which would be affected by adoption of the District Court's rationale.

and reversed an award of costs against a plaintiff who took a voluntary dismissal without prejudice. In doing so, the Fourth District noted that costs were only recoverable by a prevailing party who has paid the costs or incurred liability to do so, and observed that the defendant had stipulated that it did not have to pay the costs and was not obligated under its insurance policy to reimburse its insurer, who had done so.

That result, we submit, is inconsistent with the purposes of Rule 1.420(d), Florida Rules of Civil Procedure. The rule is intended to provide a disincentive to multiplying costs by dismissing and then refilling a case: more significantly, it also serves as a means of preventing a plaintiff from wholly escaping the sanctions imposed as to non-meritorious, and even frivolous, actions under other statutes and rules. Nullifying the sanctions of Rule 1.420(d), Florida Rules of Civil Procedure, simply because the insurer is contractually bound to pay costs of defense, effectively thwarts the purposes of the rule in numerous civil damage actions.

Another area in which the District Court's decision has implications is the recovery of costs by a prevailing party. Section 57.041(1), Florida Statutes, provides that: "The party recovering judgment shall recover all his legal costs and charges . . ." An award of costs to a prevailing party is a judicial attempt to make the winning party as whole as he was prior to the litigation. Gordon Int'l Advertising, Inc. V. Charlotte County Land & Title Co., supra. A party recovering judgment in a lawsuit

is absolutely entitled to recover costs from the adverse party under Section 57.041, Florida Statutes.[10] Under the rationale of the District Court in the instant case, however, a prevailing defendant would not be entitled to recover costs if his insurance carrier paid them directly as part of its contractual obligation to provide a defense. Several circuit judges, to the writer's knowledge, have denied an award of costs on this very basis. Prior to the District Court's decision in the instant case, that had never been the law in this state -- and at least one District Court[11] continues to hold that it is not the law of Florida.

Notwithstanding the reference to "party" in Section 57.041, Florida Statutes, the First District in Couch v. Drew, supra, explicitly rejected the rationale of the Second District in the instant case as being unsupportable in the context of that statute. In that case, the successful defendant moved for an award of statutory costs pursuant to Section 57.041, Florida Statutes: the trial court denied the motion on the basis of a stipulation that the defendant's fees and costs had been paid by his insurance carrier pursuant to the terms of his coverage. The trial court relied on Lafferty and City of Boca Raton in reaching its conclusion, stating that the defendant did not incur liability for,

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[10]Governing Board of St. Johns River Water Mgmt. Dist. v. Lake Pickett, Ltd., 543 So.2d 883 (Fla. 5th DCA 1989): Horn v. Corkland Corp., supra; Drasstrem v. Butts, 370 So.2d 416 (Fla. 1st DCA 1979). See also, to like effect, Rutkin v. State Farm Mut. Auto. Ins. Co., 195 So.2d 221 (Fla. 3d DCA 1967, approved, 199 So.2d 705 (Fla. 1967).

[11]Our research discloses no other Florida appellate decision on this precise issue.

nor pay, attorney's fees or costs because his insurer had done so. The First District found that reliance on Lafferty and City of Boca Raton to have been misplaced, observing (14 F.L.W. at 2809):

> We believe that the element of insurance coverage in the instant case necessarily removes it from the operation of the Boca Raton holding. It is well-established that, after full payment of a loss incurred by its insured, an insurance company is, by operation of law, without necessity for express policy provision or formal assignment by the insured, entitled to be subrogated to any right the insured may have against the third party "wrongdoer." (Citation omitted, emphasis in original).

Accordingly, the First District reversed the trial court's denial of the motion for statutory costs and remanded the matter for reconsideration.

Prior to this Court's decisions in Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), and Beta Eta House Corp., Inc. v. Gregory, 237 So.2d 163 (Fla. 1970), costs were routinely awarded to prevailing defendants -- notwithstanding the fact that those costs had been paid in many instances by an insurance company which was not a party to the action. Enactment of the nonjoinder statute, effectively reversing the decisions in Shingleton and Beta Eta, resulted in a return to the status quo ante. Under the District Court's rationale in the instant case, however, a prevailing defendant would not be permitted to recover costs which had been incurred in the successful defense of an action if his insurer paid them directly pursuant to its policy obligation to provide a defense.

Such a result makes no sense. Section 57.041, Florida Statutes, is intended not only to make the prevailing party as whole as he was prior to the litigation, but also to impose a mild disincentive on plaintiffs who utilize the resources of the judicial system through trial (or appeal) in pursuit of a claim which is found to be without merit. Under the District Court's rationale, that disincentive would be eliminated, and for reasons wholly unrelated to the statutory objective.

Another statutory provision potentially implicated by the rationale of the District Court's decision is Section 57.105, Florida Statutes, dealing with wholly frivolous actions. That section provides, in pertinent part:

> The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; . . .

Thus, like the other statutes and rules discussed above, Section 57.105, Florida Statutes, speak in terms of the prevailing and losing "party." Under the rationale espoused by the District Court in the instant case, Section 57.105, Florida Statutes, would not provide a basis for awarding a reasonable attorney's fee to a prevailing insured defendant in litigation which was wholly frivolous on plaintiff's part.[12]

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[12]Indeed, the statutory reference to "the losing party" could, under the Second District's approach, require a defendant whose attorney filed sham defenses to be held individually liable, since the insurance company was not a "party."

The Fifth District has, however, reached a contrary result in an analogous factual situation. In Wright v. Acierno, supra, the City of Winter Park and several of its officials were sued in an effort to enjoin certain contemplated municipal action. The trial court dismissed the action and granted the individual defendants' motions to award them attorney's fees under Section **57.105,** Florida Statutes. **A** successor judge, ruling on the amount of attorney's fees to be awarded, held that because the City had provided its officials with counsel, and the individual defendants had accordingly not paid attorney's fees, they were not entitled to any attorney's fee award. The Fifth District reversed. Noting that this Court in Whitten v. Progressive Cas. Ins. Co., **410** So.2d **501** (Fla. 1982), had explained the purpose of Section **57.105,** Florida Statutes, as being to discourage baseless claims, stonewall defenses, and sham appeals by placing a price tag (through attorney's fees) on losing parties who engage in such activities, the Fifth District remanded with directions to award a reasonable attorney's fee for the services rendered on behalf of the individual defendants. The court reasoned that the statutory mandate required that the attorney's fee award be based on the reasonable value of the services, ". . . not on whether or how much the prevailing party has actually paid or why, in fact, no fee was paid." **437** So.2d at **244.** The Fifth District further rejected a claim that, because the individual defendants had been provided counsel by the City, an award of attorney's fees to those defendants would represent a windfall; the court concluded that the

policy considerations supporting Section **57.105** outweighed that concern. See also, City of Boca Raton v. Faith Baptist Church of Boca Raton, Inc., 423 So.2d 1021 (Fla. 4th DCA **1982)** (holding that a reasonable attorney's fee under Section **57.105,** Florida Statutes, was to be measured by the reasonable value of the services rendered in the trial court, notwithstanding the fact that the City had been represented by a city attorney who was paid a salary, and hence that the City did not incur any additional attorney's fee by virtue of the litigation).

The defendants in Wright V. Acierno and in City of Boca Raton v. Faith Baptist Church of Boca Raton, Inc. were in essentially the same position as petitioner in the instant case: a statute provided that they were entitled to recover amounts expended in litigation, and a claim was made that the statute was inapplicable solely because they had no out-of-pocket expenditure. In those cases, the Fifth and Fourth District Courts held that the statute applied; in this case, the Second District held it did not apply. Any decision by this Court approving the Second District's decision will surely call into question the continuing vitality of the decisions of the Fifth and Fourth Districts.

Yet another area which will be affected by the rationale of the District Court's decision in this **case** is that of attorney's fee awards under Section **768.56,** Florida Statutes **(1983).** That statute provides for the award of a reasonable attorney's fee to the prevailing party in medical malpractice litigation and states, in pertinent part:

> Except as otherwise provided by law, the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages by reason of injury, death, or monetary loss on account of alleged malpractice . . ."

Section 768.56 (1), Florida Statutes (1983). Thus, like Section 57.105, Florida Statute, this statute provides, where it applies, for the award of a reasonable attorney's fee "to the prevailing party." As noted in Couch v. Drew, supra, the fee award provisions of these two statutes are analogous. Under the District Court's approach in the instant case, a prevailing defendant who was insured could thus not recover attorney's fees paid directly by his malpractice carrier.

In Couch v. Drew, supra, the prevailing medical malpractice defendant appealed from an order denying his motion for attorney's fees pursuant to Section 768.56, Florida Statutes (1983).[13] The trial court, relying on Laffertv and City of Boca Raton, held that defendant was not entitled to recover attorney's fees because it had been stipulated that the fees had been paid by his medical malpractice insurance carrier pursuant to the terms of his coverage. The First District, observing that the statutory intent was to discourage baseless claims, stonewall defenses, and sham appeals by placing a "price tag" (attorney's fee awards) on losing parties engaging in those activities, held that the implementation of this legislative goal required that the fee award be based only on the reasonable value of attorney's services rendered, not on

[13]As noted above, this case also involved an award of costs under Section 57.041, Florida Statutes.

whether the prevailing party had actually paid that or any other amount. Accordingly, the First District concluded, the fact that the fee was paid by defendant's insurance company was simply irrelevant to the deterrent effect intended by the Legislature to result from the operation of the statute, and the trial court erred in denying recovery of attorney's fees under the statutory provisions.

Each of these rules and statutes are susceptible to the rationale espoused by the District Court in this case. Each also serves a purpose other than making whole the party entitled to its benefits. Section **57.041,** Florida Statutes, provides a mild disincentive from litigating a matter which, although not entirely devoid of merit, is unlikely to be successful. Section **768.56,** Florida Statutes (1983), serves a similar purpose of providing a disincentive for non-meritorious claims and defenses in medical malpractice litigation. Section 57.105, Florida Statutes, provides a strong disincentive from asserting a claim or defense which is entirely frivolous. Rule 1.420(d), Florida Rules of Civil Procedure, prevents a plaintiff who belatedly realizes that his action is non-meritorious (or even frivolous) from entirely escaping the statutory penalties from bringing such actions.

In each of those instances, the rationale of the District Court would preclude a defendant who would otherwise be entitled to recover costs and/or attorney's fees from recovering them -- not in furtherance of any statutory objective or public policy, but based solely on the fact that the individual was socially

responsible enough to secure insurance coverage. Surely, that is not the law.

CONCLUSION

As shown above, the language of the provisions here in issue do not compel the result reached the District Court, and strong public policy considerations in favor of advancing the goals of these provisions strongly militate against that result. The District Court's decision should be reversed, and the cause remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to T. Phillip Hanson, Jr., Esquire, **103** North Third Street, Dade City, Florida **33525**; Bonite L. Kneeland, Esquire, **501** East Kennedy Boulevard, P.O. Box **1438**, Tampa, Florida **33601**; Alan E. McMichael, Esquire, P.O. Box **1287**, Gainesville, Florida **32602**; and H. Shelton Philips, Esquire, P.O. Box **14333**,

St. Petersburg, Florida 33733-4333 this 17th day of January, 1990.

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