IN THE SUPREME COURT
OF THE STATE OF FLORIDA

KAREN JEANNE SMOLIC ASPEN,
f/k/a KAREN JEANNE SMOLIC,

Appellant,

vs.

CASE NO.: 75,107

BROOKE T. BAYLESS,

Appellee.

BRIEF OF AMICUS CURIAE OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW SUPPORTING POSITION OF PETITIONER KAREN JEANNE SMOLIC ASPEN

Bonita L. Kneeland, Esquire
Florida Bar No. **607355**
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box **1438**
Tampa, Florida **33601-1438**
(813) 228-7411

On Behalf of the Amicus Curiae
FLORIDA ASSOCIATION FOR INSURANCE REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW AS AMICUS CURIAE

This amicus brief is submitted by the Florida Association for Insurance Review on behalf of the defendant/respondent, KAREN JEANNE SMOLIC ASPEN. The Florida Association for Insurance Review is a non-profit organization consisting of insurance companies doing business in the State of Florida.

The purposes and objective of this Association are two-fold. First, the Association provides a regular educational forum to discuss current developments in Florida law affecting the claims submitted to casualty insurance companies and the insurance coverage typically provided in casualty insurance policies. Secondly, the Association submits amicus briefing to assist Florida courts concerning major issues which affect casualty insurance coverage and the claims which are payable by that coverage.

The issues which are presented by this proceeding are of substantial interest to the Florida Association for Insurance Review, as this case concerns the ability of an insurance carrier to recover costs expended on behalf of its insured, the named party, under Florida's offer of judgment rule and statutes.

CERTIFIED QUESTION

CAN A NONPARTY RECOVER COSTS IT HAS INCURRED ON BEHALF OF A NAMED PARTY UNDER THE RULE *AND* STATUTES REGARDING OFFERS OF JUDGMENT, OR *ARE* COSTS RECOVERABLE UNDER THOSE PROVISIONS ONLY BY PARTIES WHO HAVE PAID COSTS OR INCURRED LIABILITY TO DO SO?

ANSWER OF AMICUS CURIAE

A NONPARTY INSURANCE CARRIER MAY RECOVER COSTS EXPENDED ON BEHALF OF THE NAMED INSURED UNDER THE RULES AND STATUTES REGARDING OFFERS OF JUDGMENT BY WAY OF THE DOCTRINE OF EQUITABLE SUBROGATION SO AS TO RECOGNIZE THE REALITIES OF LITIGATION *AND* PRESERVE THE INCENTIVE FOR SETTLING CLAIMS, THE PURPOSE FOR WHICH THE RULES AND STATUTES WERE CREATED. THIS DOCTRINE SHOULD ALSO BE INVOKED TO PERMIT COMPLIANCE WITH SIMILAR STATUTES AND RULES INVOLVING THE RECOVERY OF COSTS OR FEES.

STATEMENT OF THE CASE AND FACTS

This amicus would rely upon the Statement of the Case and Facts as contained in the Petitioners Initial Brief on the Merits filed by the defendant/petitioner, KAREN JEANNE SMOLIC ASPEN.

SUMMARY OF THE ARGUMENT

The court below was not compelled to rule as it did. The cases upon which it relied were distinguishable as to the narrow issue which has been certified to this Court, since none of the opinions involved the rule or statute regarding offers of judgment. The ruling below thwarts the incentives which were built into the rule and statutes and ignores the realities of litigation. The rule and statutes were designed to encourage settlements and eliminate trials whenever possible by imposing cost sanctions on those who will not accept a reasonable settlement. Both the legislative history of the statutes regarding offers of judgment, as well as this Court's own statement regarding the purpose of the rule in Cheek v. McGowan Electric Supply Co., 511 So.2d 977 (Fla. 1987), make this clear. These enactments serve no purpose if applied only in cases where the opposing party happens to have no insurance coverage for the event. The opinion below also ignores the fact that the offer of judgment statutes and rule express the penalty in mandatory terms.

This Court should adopt the sensible approach to rules and statutes which impose a penalty involving attorneys' fees and costs as contained in Couch V. Drew, ____ So.2d ____ (Fla. 1st DCA 1989 [14 FLW 2808 December 15, 19891). The Couch court noted that the intent of such statutes would fail to be implemented if they were based only on whether or not the prevailing party had actually made the original payment. Id. at 2809. The Couch court wisely noted that the payment of fees or costs by an insurance company is irrelevant to the deterrent effect intended by the operation of such statutes. The Couch court also recognized that the insurance carrier's right to subrogation, either through contract or through equity, provided a substantial method by which the costs would ultimately be recovered by the carrier.

This sensible interpretation should be applied not only to rules and statutes relating to offers of judgment, but also to statutes allowing for the recovery of attorneys' fees in frivolous claims and taxable costs to a prevailing party. See §§57.105 and 57.041 Fla. Stat. Indeed, such a result is necessary in order to protect the application of this Court's own provisions for sanctions for disobedience of its procedural rules, such as discovery violations and violations of appellate rules. See e.g., Fla.R.Civ.P. 1.380; Fla.R.App.P. 9.410.

The doctrine of "equitable subrogation" is the ideal medium through which this logical interpretation of the rules and statutes

can be affected. If necessary, the trial court could permit intervention by the carrier for purposes of obtaining a cost judgment or judgment for attorneys' fees. Alternatively, the trial court could permit the amendment of the style of the case for purposes of a final cost judgment or attorneys' fees judgment so that it is brought by the insured for the "use and benefit" of his carrier. To rule otherwise, would render meaningless the rules and statutes imposing sanctions in the nature of costs and attorneys' fees.

Moreover, there is no logical reason to limit the application of the rules only to insurance carriers who provide coverage to "named" insureds. Insurers often provide coverage to "additional" insureds and when they do so, should also be entitled to recover costs and fees under appropriate circumstances.

ARGUMENT

A NONPARTY INSURANCE CARRIER NAY RECOVER COSTS EXPENDED ON BEHALF OF THE NAMED INSURED UNDER THE RULE *AND* STATUTES REGARDING OFFERS OF JUDGMENT BY WAY OF THE DOCTRINE OF EQUITABLE SUBROGATION SO AS TO RECOGNIZE THE REALITIES OF LITIGATION *AND* PRESERVE THE INCENTIVE FOR SETTLING CLAIMS, THE PURPOSE FOR WHICH THE RULES *AND* STATUTES WERE CREATED. THIS DOCTRINE SHOULD ALSO BE INVOKED TO PERMIT COMPLIANCE WITH SIMILAR STATUTES AND RULES INVOLVING THE RECOVERY OF COSTS OR FEES.

A. Cases holding that the insured cannot recover costs expended by his insurance carrier are distinguishable from the narrow issue in this case, and need not have been followed by the court below.

The Second District Court of Appeal below felt compelled to follow the holdings of three Florida cases. In City of Boca Raton v. Boca Villas Corp., 372 So.2d 485 (Fla. 4th DCA 1979), the court ruled that there was no obligation on a plaintiff's part to repay costs to a prevailing party whose costs had been paid by a group of associations. Those associations paid the City's costs of litigation without any agreement or obligation for repayment; repayment was not required even if the costs were taxed against the opposing party. Under the circumstances, the absence of such an obligation moved the court to hold that costs were not recoverable by the named party.

This case is distinguishable from the unusual facts presented in that case in several respects. First, the costs were paid by

the associations as a volunteer, without either a contractual or equitable basis for recoupment. Secondly, the case did not involve the rule and statutes regarding offers of judgment. The purpose of those rules and statutes, that of encouraging early settlement without need for protracted litigation, were never considered by the Fourth District in that decision. Finally, the court chose to follow the general rule that costs are not normally recovered by a person not a party to a suit based on the suggestion that the assets of a nonparty are not available to respond for the other party's costs if the other party is successful. Id. at 486. This, of course, would hardly hold true in a situation where an insurance company is contractually bound to pay costs to the opposing party if that party is successful.

Unfortunately, the Boca Raton case was blindly followed by the same court of appeal in Turner v. D. N. E., Inc., 547 So.2d 1245 (Fla. 4th DCA 1989). Without making the distinction between a pure volunteer, and an insurance company which is required to pay costs owed to the other side, the Turner court determined that, since it was stipulated that the insurance policy did not require the insured to reimburse the insurer, any award of costs was in error. Again, the Turner case did not involve the offer of judgment rule or statutes, whose purpose would be thwarted by this opinion.

Finally, the court below felt compelled to follow its earlier holding in Lafferty v. Tennant, 528 So.2d 1307 (Fla. 2d DCA 1988).

The Laffertv case was also inapplicable and need not have been followed. In that case, a court permitted an award of attorneys' fees to be entered directly on behalf of a title insurance company which funded the litigation on behalf of the prevailing party. The trial court was deemed to be in error for awarding these fees directly to a non party. Although the Laffertv court determined that there was error because the prevailing party incurred no liability for attorneys' fees, the court never explored the issue of whether a cost judgment entered under the Offer of Judgment Rule or statutes would be similarly treated. Thus, the court below was not required to follow its earlier holding in Laffertv.

A review of the opinion below demonstrates that the court was deeply troubled by its decision to "follow" Laffertv, Boca Raton, and Turner. In fact, the Second District admitted that the language of rule 1.442 did not specify by whom the awardable costs must be incurred. The court found that the rule only "perhaps" implied that the costs must be incurred by a party. The Second District expressed grave concerns that the nonjoinder rule would mean nothing if an insurance carrier had to be joined throughout a proceeding in order to recover costs. The court also feared that its holding would thwart the purpose of rule 1.442 to encourage the settlement of lawsuits. Indeed, the court determined that "in light of [its] reservations regarding [its] holding," it would certify the question to the supreme court. It was obviously with great reluctance that the Second District ruled as it did.

B. Holding that the insured cannot recover costs expended by his carrier thwarts the incentives built into the rule and statutes regarding offers of judgment and ignores the realities of litisation.

The purpose of Fla.R.Civ.P. 1.442 is best described in this court's words in Cheek V. McGowan Electric Supply Company, 511 So.2d 977 (Fla. 1987):

> The purpose of rule 1.442 is to encourage settlements and eliminate trials whenever possible by imposing cost sanctions against an offeree who fails to accept a timely offer which equals or exceeds the amount of the offeree's ultimate recovery.

The purpose is framed in terms of a "cost sanction" against an offeree rather than an indemnification of the offerer. This same purpose is echoed in the legislative history of section 45.061 Fla. Stat. (1987) on offers of settlement. The Senate staff analysis report remarks that the proposed statute "expands upon the offer of judgment concept to encourage settlement between parties." (Petitioner's App. XII) The report goes on to state that "[t]his legislation is designed to encourage settlements, and as such could result in lower litigation costs." (Petitioner's App. XIII) The House Committee's staff analysis report notes that this act "would provide sanctions for the unreasonable rejection of an offer of settlement given by either a defendant or plaintiff." (Petitioner's App. XVI) The report also states that "[t]his legislation is designed to encourage settlements, and as such could result in lower litigation costs." (Petitioner's App. XVII)

There can be no doubt that eliminating the sanctions and penalties simply because an insurance carrier has paid the costs of the litigation would seriously erode the effect of the offer of judgment rule and related statutes. These enactments do not speak to the indemnification of a party. They speak to the imposition of a penalty on a party who unreasonably refuses to accept an offer to settle and end litigation. In this sense, these provisions supersede the common law of indemnification in order to serve a higher public good. These enactments serve no purpose if applied only in cases where the opposing party happens to be uninsured for the event. Moreover, the result below is hardly what the Florida Legislature or this Court intended when the rule was established and the statutes promulgated.

Indeed, Fla.R.Civ.P. 1.442 was first adopted by this Court in 1972. See, In re The Florida Bar: Rules of Civil Procedure, 265 So.2d 21, 40-41 (Fla. 1972)(enacting Rule 1.442, effective on January 1, 1973). At that time, Florida required mandatory liability coverage under the financial responsibility law. (Chapter 324, Florida Statutes (1971).[1] Obviously, this Court was aware that anyone operating motor vehicles in this state was required to have that coverage. Certainly, if the court intended that this rule not apply when an insurance company was defending

[1] Although this mandatory coverage was later excepted in cases where there was compliance with Florida's no-fault law, see e.g., Section 324.021 Fla. Stat. (1977), this mandatory coverage -- at least for property damage -- has been resurrected by the legislature. See Section 324.022 Fla. Stat. (1988).

a claim, this Court would have made note of that fact. It seems highly improbable that this court intended to reward the irresponsible owner of a motor vehicle who chose to violate the provisions of the financial responsibility law and penalize the citizen who complied with that legislative mandate. The decisions which allow recovery of costs only when a vehicle owner is financially irresponsible not only lead to an absurd result, but act to frustrate Florida's expressed public policies rather than furthering those interests.

The twin purposes of the rule and statutes -- to encourage settlement and to impose a penalty on those who will not pay or accept a reasonable settlement -- have been severely diminished by the opinion below. Public policy alone necessitates a reversal.

The opinion below also ignores the fact that the offer of judgment statutes and the rule assess a penalty in mandatory terms. §768.79 states that "the court shall enter judgment for the defendant against the plaintiff for the amount of costs and fees...". Section 45.061(3) Fla. Stat. states that "in determining the amount of any sanction to be imposed under this section, the court shall award: (a) the amount of the party's costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, (etc.)." So too, the offer of judgment rule, Fla.R.Civ.P. 1.442, at issue below, states that

"[i]f 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."[2] See also Santiesteban V. McGrath, 320 So.2d 476 (Fla. 3d DCA 1975) (holding that a reading of the case along with its genesis, Rule 68 of the Fed.R.Civ.P., leads to a determination that "the express language of the rule leaves no doubt that reasonable costs must be awarded.. ." as "[t]he rule itself is couched in mandatory terms and is designed to induce or influence a party to settle litigation and obviate the necessity of a trial.")

Such was the sensible interpretation of a similar statute contained in Couch V. Drew, ___ So.2d ____ (Fla. 1st DCA 1989) [14 FLW 2808 December 15, 19891 The Couch case dealt with the recovery of attorneys' fees pursuant to 768.56 Fla. Stat. (1983) (since repealed) and statutory costs pursuant to 857.041, Fla. Stat. (1983). In that medical malpractice action, final judgment was entered on behalf of the doctor, who filed his motion for the recovery of attorneys' fees and costs. The parties stipulated that the doctor's fees and costs had been paid by his medical malpractice insurance carrier pursuant to the terms of his

---

[2] Although Rule 1.442, Fla.R.Civ.P. as amended, states that "the court may impose sanctions equal to reasonable attorneys' fees and all reasonable costs of litigation," the language makes clear that a sanction and not a right of indemnification, is the purpose of the rule. Furthermore, the rule has now been expanded to include attorneys' fees as well as costs, presumably making it necessary for this court to adopt language that could allow the lower court to impose only costs rather than both costs and attorneys' fees.

coverage. Relying on the holdings in Lafferty and City of Boca Raton, the trial court denied the doctor's motion.

The First District Court of Appeal wisely reversed. The Couch court found that the trial court's reliance on those cases were misplaced. The court stressed that section 768.56(1) provided that "the court shall award a reasonable attorneys' fee to the prevailing party in any civil action..." in cases of malpractice. Id. at 2809. The court determined that its interpretation was consistent with the use of the word "shall" in section 57.105 Fla. Stat., which had been found to "evidence the legislative intention to impose a mandatory penalty in the form of a reasonable attorneys' fees," in order to "discourage baseless claims, stonewall defenses, and sham appeals... by placing a price tag through attorney's fees awards on losing parties who engage in these activities." (citing Wriaht V. Acierno, 437 So.2d 242, 244 (Fla. 5th DCA 1983). Id. The Couch court observed that the Wriaht court also held that in order for the intent of the Fla. Stat. 57.105 to be implemented, the fee award "must be based only on the reasonable value of the services, not on whether or how much the prevailing party has actually paid." Wriaht at 244. Id.

The First District in Couch then logically looked to the legislative intent of section 768.56 Fla. Stat., which was to screen out meritless malpractice claims. The Court reasoned that in order to implement the legislative goal, and under the rational

set forth in Wright, the fee award should be based on reasonable value of services "not on whether or how much the prevailing party has actually paid." Couch at 2809. Therefore, the Couch court concluded, "the payment of the fee by Couch's insurance company would be irrelevant to the deterrent effect intended by the legislature to result from the operation of section 768.56." Id. Furthermore, turning toward the trial court's denial of Dr. Couch's motion for statutory costs pursuant to §57.041 Fla. Stat. (1983), the court reasoned that this result was not mandated by the holding in Boca Raton, where volunteers had paid the prevailing party's costs, not pursuant to insurance coverage or an expectation of repayment. Id.

Most significantly, the Couch court recognized the realities of insurance coverage in today's world by acknowledging an insurance carrier's right to subrogation, either through contract or through equity:

> 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." 31 Fla. Jur.2d Insurance §949 (emphasis supplied by the court).
>
> By holding as a matter of law that a prevailing party's "absolute" right to statutory costs, Drasstrem v. Butts, 370 So.2d 416, 417 (Fla. 1st DCA 1979), is nullified by his possession of an insurance policy covering those costs, the insurance company's entitlement by operation of law to subrogation to that right is also destroyed. We decline to extend the Boca Raton holding so far.

Id. The Couch court also distinguished the Turner case, noting that in the instant case, unlike Turner, there was no stipulation that the insured was not obligated to reimburse the carrier. Id. Obviously, the doctrine of "equitable subrogation" was completely overlooked in the Turner case, as discussed more fully below.

It only makes sense that a carrier should be permitted to recover costs paid on behalf of its insured not only under the offer of judgment rule and statutes, but also under section 57.105 Fla. Stat., which awards attorneys' fees in frivolous suits, and under section 57.041 Fla. Stat., which awards costs to a prevailing party. To rule otherwise completely ignores the realities of litigation. In Maseda v. Honda Motor Co., Ltd., _____ F. Supp. ____ (S.D. Fla. 1989) [3 FLW Fed. D412 September 29, 1989] Honda argued that it was not required to pay attorneys' fees and costs because the opposing party's insurance carrier retained the law firm. The law firm's billing statements were submitted directly to the insurance company. Therefore, Honda argued that Packer should not be entitled to recover attorneys' fees and costs it never paid. The Maseda court determined that no Florida case was exactly on point, but that the reasoning in Ross v. Fay's Drug, Co., 502 N.Y. S.2d 945 (N.Y. Sup. Ct. 1986) was persuasive in its common sense approach to the situation:

> Those knowledgeable of negligence litigation are aware that a party denominated the defendant is very often not the real party in interest. The notion that a defendant

> in a negligence suit is bearing the burden of defense is often pure fiction. Of course, the named defendant is interested in the result, but the entity which stands to lose the most in negligence litigation is usually the insurance carrier. In an attempt to minimize its liability, and to provide competent representation for the named defendant, the defense attorney is retained and compensated by the insurer. The decision and order [requiring reimbursement of fees] were surely issued with the fundamental knowledge that requiring payment of [the defendant's] defense costs was tantamount to requiring reimbursement of the insurance company's defense clause. Given the realities of negligence defense litigation, this Court will not accept the contention that [the presiding judge] intended to issue an empty order only benefiting the nominal defendant. By ordering payment of defense costs to [the defendant] [the court] was merely maintaining a legal fiction. Ross at 946.

Id. The Maseda court also found support for its holding in the case of Bravo Electric Co., Inc. V. Carter Electric Co., 532 So.2d 698 (Fla. 5th DCA 1988) in which the majority opinion rejected the argument that the insurance carrier had neither a right of indemnification or subrogation for the recovery of attorneys' fees. Bravo at 699. The Maseda court concluded that "[g]iven the realities of negligence litigation in which the real party in interest is often the insurance carrier, the better view is that espoused by the court in Ross, a view implicitly adopted by the [Eleventh Circuit] in this case" which had earlier ruled that the attorneys' fees were recoverable. Id. at D413. (referring to Maseda V. Honda Motor Co., Ltd., 861 F.2d 1248, 1257 (11th Cir. 1988)).

Thus, in order to comply with the purpose behind the offer of judgment rule and statutes, and to pay deference to the mandatory

provisions of 557.105 and §57.041 Fla. Stat., as well as to recognize the reality of the role insurance coverage plays in tort litigation in today's world, a "prevailing party" under any of the statutes and the rule should be entitled to recover costs expended on its behalf by a nonparty insurance carrier. Indeed, any other conclusion could seriously jeopardize the application of this Court's own provisions for sanctions for disobedience of its procedural rules. See, e.g., Fla.R.Civ.P. 1.380 (sanctions, including costs and attorneys' fees, for failure to make discovery in civil proceedings); Fla.W.C.R.P. 4.150 (sanctions, including costs and attorneys' fees, for violations of workers' compensation rules); Fla.R.Juv.P. 8.070(i) (sanctions for failure to make discovery in juvenile proceedings); and Fla.R.App.P. 9.410 (sanctions, including costs and attorneys' fees, for violating appellate rules).

C. To preserve the integrity of the offer of judgment rule and statutes, along with sections 57.105 and 57.041 Fla. Stat. and this Court's own rules imposing sanctions, this Court should fashion a method through equitable subrogation, through the intervention of the carrier, or through a combination of the two to insure that costs and fees are recovered.

The doctrine of subrogation has been defined by this Court as "based upon the principle of natural justice and ... created to afford relief where one is required to pay a legal obligation which ought to have been met, either wholly or partially, by another. Trueman Fertilizer Co. v. Allison, 81 So.2d 734 (Fla. 1955). Conventional subrogation is based on a right flowing from a contract. When the contract clearly fixes the terms, there is no

need to resort to equity. Eastern National Bank v. Glendale Federal Savings and Loan Association, 508 So.2d 1323 (Fla. 3d DCA 1987). Equitable subrogation, on the other hand, is founded on principles of equity and justice and is applied to prevent forfeiture and unjust enrichment. Id. at 324. It arises from a legal duty to discharge a debt for another and does not apply to mere volunteers. Id. It is generally invoked when one person has satisfied the obligations of another so that the person discharging the debt "stands in the shoes of the person whose claim has been discharge." Id.

The right of subrogation "has been sustained in almost every conceivable type of transaction" where the party invoking it has been required to pay a debt for which another is primarily answerable. Ulery v. Asphalt Pavina, Inc., 119 So.2d 432, 436 (Fla. 1st DCA 1960) (emphasis added). See also, Price v. Scharps, 405 So.2d 1043 (Fla. 3d DCA 1981) (holding that "equitable subrogation affords relief to essentially every situation in which a non-volunteer pays a debt or discharges and obligation which in good conscience should have been made by another.") (emphasis added) As explained in Allstate Insurance Company v. Metropolitan Dade County, 436 So.2d 976 (Fla. 3d DCA 1983) rev. denied, 447 So.2d 885 (1984):

> Both subrogation and indemnification may be either contractual or equitable in origin. The two doctrines remain distinct when they have their source in contract. Contractual subrogation presupposes a contract between the subrogor and the subrogee; that is, between the injured and the paying parties. Contractual

> indemnification requires a contract between the paying party and the injuring party. In equity, however, the distinction between subroaation and indemnification mav blur. A court may emphasize either or both of the doctrines "when necessary to bring about equitable adjustment of a claim founded on right and natural justice". Id. at 978 (citing Rebozo v. Royal Indemnity Co., 369 So.2d 644, 646 (Fla. 3d DCA), cert. denied, 379 So.2d 209 (Fla. 1979) (emphasis added)).

In many cases, the insurance carrier may be entitled to recover costs paid out by way of contractual subrogation. In cases where the carrier's insured has prevailed under an offer of judgment rule or statute, or indeed under 557.105 and 557.041, the insurance contract or policy entered into between the parties may provide sufficient basis for the carrier's recovery. Specifically, the typical insurance policy contains, in the insuring agreement, the following language:

> In addition to our limit of liability, we will pay all defense costs we incur.

See S. Miller and P. Lefebvre, Miller's Standard Insurance Policies Annotated, Vol. I. (1986) (Amicus Curiae's Appendix A). This same typical ISO policy contains the following language as well:

> If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:
>
> 1. Whatever is necessary to enable us to exercise our rights;
>
> 2. Nothing after loss to prejudice them.

Id. (Amicus Curiae's Appendix B).

Certainly there should be no need to be concerned, as the court below appeared to be, that the award of costs would not enure to the benefit of the insurer. First, the prevailing party is entitled to those costs regardless of whether he has expended them himself, because they are awarded as a penalty. Second, even if the insurance contract does not contain the type of language quoted above, the principle of "equitable" subrogation would step in to fill any gap. That is so because equitable subrogation is a "legal fiction which arises by operation of law" as long as the party invoking it establishes "(1) that he paid the debt; (2) that he had a liability, right or fiduciary relationship which equated a direct interest in discharging the debt or lien; and (3) that no injustice is visited on the other party by applying equitable subrogation." In re Munzenrieder Corporation, 58 B.R. 228 (M.D. Fla. 1986) (following North v. Albee, 20 So.2d 682, 683 (Fla. 1945)). It hardly seems necessary that policies be redesigned to accomplish this result, or that the insured sign a subrogation agreement.

If this Court believes that, in order to invoke either contractual or equitable subrogation, the insurance carrier must be joined in the suit, this joinder should be permitted by way of the carrier invoking the court's permission to intervene for purposes of the entry of a cost judgment or judgment for attorneys' fees. This method would go hand-in-hand with the application of the nonjoinder statute which disallows the joinder of a carrier

until there is a final judgment entered on the merits. 8627.7262 Fla. Stat. (1987)

If, on the other hand, this Court feels that it would be sufficient simply to permit the amendment of the style of the case for purposes of a final cost judgment or attorneys' fees judgment so that it is brought by the insured for the "use and benefit" of his carrier, the principles of contractual or equitable subrogation would be given recognition through this action by the insured himself. Equity surely requires that defense costs which were made available through the "use and detriment" of the insurance carrier should also be returned to the carrier for its "use and benefit."

From a practical standpoint, either method should suffice to allow the trial court to enter the cost judgment in the name of the carrier. This result would be just, fair, and equitable, and would not prejudice the opposing side beyond that which the statutes and rule intended. This result would preserve the legislative purpose behind the statutes cited in this brief, as well as the purpose behind the rules established by this Court. This result would also recognize the realities of litigation and insurance coverage in today's world.

Before the "joinder" versus "nonjoinder" tug-of-war was set in motion by the decision of Shinaleton v. Bussey, 223 So.2d 713 (Fla. 1969) the courts and litigants appearedto recognize that the

insurance carrier "stood in the shoes" of its insured to its detriment and to its benefit. Cases like Boca Raton, Laffertv, and Turner were non-existent. The Boca Raton case was unusual in that it involved a volunteer, to whom equitable subrogation may not have been available. However, both the Laffertv and Turner cases blindly followed this atypical case without deference to the doctrine of equitable subrogation and without exploring the problems which its decisions would engender. It is crucial that this Court reexamine this issue and hold that a nonparty may recover costs and attorneys' fees incurred on behalf of a named party, not only under the rule and statute regarding offers of judgment, but also under similar statutes and rules.

CONCLUSION

The court below unreasonably and unnecessarily followed questionable Florida precedent, to reach a decision which totally disregards the purpose of the rules and statutes regarding offers of judgment. This Court should reverse the opinion below and adopt the sensible stance set out in Couch v. Drew, ____ So.2d _____ (Fla. 1st DCA 1989) [14 FLW 2808 December 15, 19891, which recognized that the imposition of costs and attorneys' fees are in the nature of the penalty, that the real party in interest, given the realities of litigation, is often an insurance carrier, and that this should not negate the awarding of costs and fees. This Court should fashion a method under the doctrine of "equitable subrogation" to allow this result in all cases where statutes or rules impose such a penalty.

Respectfully submitted,

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

By: _____
Bonita L. Kneeland, Esquire

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to T. PHILIP HANSON, JR., ESQUIRE, Greenfelder, Mander, Hanson and Murphy, 103 North Third Street, Dade City, Florida 33525, Counsel for Respondent, H. SHELTON PHILIPS, ESQUIRE, Kaleel & Kaleel, P.A., Post Office Box 14333, St. Petersburg, Florida 33733, Counsel for Appellant, JACK W. SHAW, JR., ESQUIRE, 1 Enterprise Center, 225 Waters Street, Suite 1400, Jacksonville, Florida 32202-5147 and ALAN E. McMICHAEL, ESQUIRE, Post Office 1287, Gainesville, Florida 32602 this 17th day of January, 1990.

BONITA L. KNEELAND, ESQUIRE
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
Attorneys for Amicus Curiae
Florida Association for Insurance
Review