IN THE SUPREME COURT OF FLORIDA

Case Number 75,107

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

Petitioner,

v.

BROOKE T.N. BAYLESS,

Respondent.

BRIEF OF

WATERSPORTS CLAIMS MANAGEMENT, LTD.

AMICUS CURIAE

DONNA E. ALBERT, ESQUIRE

On behalf of the Amicus Curiae
WATERSPORTS CLAIMS MANAGEMENT, LTD.
750 SE Third Avenue
Suite 200
Fort Lauderdale, Florida 33316

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

WATERSPORTS CLAIMS MANAGEMENT, LTD., pursuant to Rule **9.370,** Rules of Appellate Procedure and pursuant to this Court's Order granting leave to do so, hereby submits its brief as amicus curiae in support of Petitioner, KAREN JEANNE SMOLIC ASPEN'S position in this matter.

WATERSPORTS CLAIMS MANAGEMENT, LTD. would like to take this opportunity to thank this Court for permitting the filing of this brief and considering the arguments contained herein.

All emphasis has been supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

WATERSPORTS CLAIMS MANAGEMENT, LTD., adopts the statement of the case and facts presented by Petitioner, KAREN JEANNE SMOLIC ASPEN, as set forth in her initial brief on the merits.

This is an appeal from a denial of an award of costs to defendants under the Offer of Judgment rules and statutes based on the holding of City of Boca Raton v. Boca Villas Comoration, 372 So.2d 485 (Fla. 4th DCA 1979) and its progeny. As this Court's ruling will affect not only the Offer of Judgment rules and statutes but various attorney's fees statutes, the issue of attorney's fees will also be addressed.

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?***

SUMMARY OF ARGUMENT

In reaching its conclusion in the instant case, the trial court relied upon ill reasoned case law. The Court's reluctance to decide as it did in the case sub judice was well-founded. Left undisturbed, the trial court's interpretation of case law in this area would totally emasculate not only the Offer of Judgment rule and statutes, but also the various attorney's fees statutes.

Although a relatively novel issue in Florida, the issue of whether to award costs and fees to a party represented by insurance paid counsel is well settled in the Federal Courts. Consistently the Federal Courts have ruled that insurance is an irrelevant consideration to the fee issue. Moreover, the Federal Courts have gone a step further and have proclaimed it unnecessary for a party to have paid fees or costs or incurred liability to do *so* in order to recover fees or costs. Rather, the only criteria for consideration when determining whether a party is entitled to reimbursement for fees and costs is the existence of an attorney client relationship. Several state courts have followed the lead of the Federal Courts in confirming the issue of insurance is irrelevant when determining whether a party is entitled to be compensated for fees and costs.

In addition to the expansive body of case law still growing on this issue in the Federal Court system, public policy warrants a reversal of the trial court's holding in the case sub judice. The continuation of this newly created judicial trend would serve the impermissible goal of punishing the person who responsibly decides to carry liability insurance. In the case of frivolous lawsuits, it threatens to allow plaintiffs to abuse the system with impunity. Further, it creates a one-sided system whereby the plaintiff can recover costs and fees when just and the defendant cannot.

ARGUMENT

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

I.

THE FEDERAL COURTS HAVE DETERMINED INSURANCE IS IRRELEVANT TO AN AWARD OF COSTS OR FEES.

While this issue is relatively new in the Florida Courts, this matter has been considered by the Federal Courts as it relates to both costs and attorney's fees. The well settled law of the Federal Courts is that it matters NOT whether a party has paid costs or fees or incurred liability to do so, but rather whether an attorney/client relationship exists. The rationale of the Federal Courts is premised upon the goal of preventing frivolous or harassing litigation. This goal far outweighs the remote possibility of a windfall to defendant. 'Indeed, the possibility of a windfall to the plaintiff is far more likely.

---

1 The possibility of a windfall to defendant is unlikely due to the existence of the Doctrine of Equitable Subrogation. The Doctrine is well explained in the amicus curiae brief filed by the Florida Association for Insurance Review and as such, will not be reargued in this brief. WATERSPORTS CLAIMS MANAGEMENT, LTD. adopts the argument as set forth in the amicus curiae brief of FAIR as if set forth haec verba.

The logic employed by the Federal Courts is equally applicable to an award of attorney's fees under Florida Statute Section 57.105. The goal of encouraging settlement by litigants prior to jury trial and punishing those litigants who refuse to be reasonable **is** also served by this rationale.

Most of the Federal Circuit Courts have considered the issue of awarding fees to a party who has neither paid fees nor incurred liability to do so. In Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980), the Ninth Circuit Court of Appeal specifically addressed Appellant's contention that attorney's fees should not have been awarded to some appellees because their legal fees were covered by insurance. The Court, citing the United States Supreme Court, opined:

> This argument is not persuasive. Courts have upheld the award of attorney's fees in analogous situations where parties were represented by public interest law firms or foundations which would not charge them a fee. See Fairley v. Patterson, 493 F.2d 598, at 606-07 (5th Cir. 1974). The Supreme Court concluded in Christiansburg Garment Company v. EEOC, supra, 434 **U.S.** at 420, 98 S.Ct at 699, that the purpose of awarding attorney's fees to a defendant in a civil rights case is to deter frivolous or harassing litigation; **the fact that a defendant is insured is irrelevant to this purpose.** Further, it is unlikely that defendant will receive a windfall. Ellis, supra at 230.

The fact that a **defendant was defended by an insurance company was not a relevant consideration** in determining whether to award attorney's fees. Hernas v. City of Hickory Hills, 517 F.Supp. 592 (N.D. Ill. 1981).

In 1986, this issue was once again presented to the Federal Courts in the case of Camuana v. Muir, 786 F.2d 188 (3d Cir. 1986). In that case, the Campanas sought reversal of an Order awarding attorney's fees to the United States. The Campanas maintained there

was no legal justification for an award of counsel fees in favor of the United States in instances where the United States undertakes to (voluntarily)represent a Federal employee in his individual capacity. Like the court in the case sub judice, the Campanas incorrectly reasoned that because the **party** to the action had not incurred any expense, no award was proper. The Court disagreed. In supporting its position, the Court reasoned:

> Thus in an economic sense the United States is in the **same position as an insurer** who has undertaken by contract to provide defense services. **The fact that an insurance company is defending a lawsuit is no reason for relieving the party who brought it from the obligation of paying costs and fees properly assessed.** Campat 191.

One year later, in Fidelity Guarantee Mortgage Corporation v. Reben, 809 F.2d 931 (1st Cir. 1987), an award of attorney's fees to defense counsel was once again upheld even though the ultimate recipient of the fee was defendant's insurer. Fidelity attacked the award of attorney's fees arguing, among other grounds, it should not have been ordered to pay fees billed to an insurance company when the actual recipient of the fees had no expectation of recovering them. The Court of Appeal disagreed:

> We reject Fidelity's argument that because an insurance company is the ultimate recipient of the attorney's fee award, it should be treated differently than an award to an individual. We have found no cases making such a distinction. In fact, the only case we have found directly on point is to the contrary:
>
> > The Supreme Court concluded in Christiansburg Garment Co. v. EEOC, supra, that the purpose of awarding attorney's fees to a defendant in a civil rights case is to deter frivolous or harassing litigation; **the fact that a defendant is insured is irrelevant to this purpose.** (citations omitted), Ellis v. Cassidy, 625 F.2d 227, 230 (9th Cir. 1980). Cf. Dunkin v. Poythress, 750 F.2d 1540, 1543 (11th Cir. 1985). Fidelity, at 936.

Finally, the Court concluded:

> In a case such as this, where the plaintiff had no factual basis for the complaint and the only reason for persisting in prosecuting this suit was for harassment, an award of attorney's fees can and should be made to deter such conduct in the future and **it makes no difference that the recipient of the fee award is defendant's insurance carrier rather than the defendant individually.** Fidelity at 936.

Although not dealing specifically with the issue of insurance, there exists a large body of case law establishing the principle that parties need not be contractually obligated to pay fees in order to ultimately be entitled to an award of attorney's fees or costs. These cases are applicable to the instant case.

For example, in Doe v. Poelker, 527 F.2d 605 (8th Cir. 1976), the Court reversed the trial court's ruling that no fee should be allowed since the prevailing plaintiffs were not contractually obligated to pay any fee to their counsel. The trial court erroneously reasoned "where the plaintiff's contractual obligation to his lawyer was zero, defendant's obligation with respect to the Court imposed fee would also be zero." supra, at ***606.*** The United States Court of Appeal reversed. The issue of whether the parties were actually obligated to pay a fee was irrelevant.

The Fifth Circuit Court of Appeal has also addressed this issue.

> What is required is not an obligation to pay attorney's fees. Rather what-and-all that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation... Fairley v. Patterson, 493 F.2d 598 at 607 (5th Cir. 1974), citing Miller v. Amusement Enterprises. Inc., 426 F.2d 534 at 538 (5th Cir. 1970).

The Fairley Court adopted the philosophy of Clark v. American Marine Corporation,

320 F.Supp. 709 (E.D. La. 1970), stating "**Whether or not a litigant has agreed to pay a fee and in what amount is not decisive.**" Fairley at 607.

Recently, in Robinsonv. Arivoshi, 703F.Supp. 1412(D. Hawaii 1989), a Federal Court once again **upheld an award of attorney's fees to a party who had neither paid any fees nor incurred liability to do so.** Citing Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980), the Court noted "attorneys fees may be awarded**...** even though plaintiffs have been represented **without charge** by a legal services organization." Robinson at 1427.

Thus, it is well settled in the Federal Court system that an award of attorney's fees to a prevailing party **is not contingent upon an obligation to pay an attorney and is not effected by the fact that no fee was charged.** For additional cases, see Martin v. Heckler, 773 F.2d 1145, 1152 (11th Cir. 1985), citing Cornella v. Schweiker, 728 F.2d 978,986 (8th Cir. 1984);Mid-Hudson Legal Services, Inc. v. G & **V.** Inc., 578 F.2d 34 (2d Cir. 1978);and, Sellers v. Wollman, 510 F.2d 119, 123 (5th Cir. 1975).

This reasoning is not exclusive to the Federal Courts. The California Supreme Court upheld an award of attorney's fees to plaintiff's counsel, even though plaintiffs had neither paid their attorney nor incurred liability to do so. Folsom v. Butte County Association of Governments, 652 P.2d 437 (Cal. 1982). The defendants challenged the award, in **part,** on the ground that plaintiff's attorneys were not **parties** to the litigation, and as such could not recover fees. The Court was unpersuaded and upheld the award of fees. The Court reiterated the explanation given in Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974), wherein the Court wrote:

> "The fact that appellee's counsel was a legal services organization, partially supported by public funds, is irrelevant in determining whether an award is proper..." Folsom at 448.

Thus, the Court ruled it was no barrier to an attorney's fee award that the attorneys

involved were employed by publicly funded legal services organizations.

Similarly, the holdings of the Federal Courts should be applied to the Florida Offer of Judgment rules and attorney's fees statutes by this Court. The purpose of awarding fees to a defendant pursuant to Florida Statute Section 57.105 is clearly to deter frivolous or harassing litigation and to punish those who do not heed the statute's warning. Equally obvious is that the purpose of the Offer of Judgment rules is to encourage settlement and impose sanctions against parties who do not negotiate in good faith. Accordingly, there is no valid reason for applying the law in the case sub judice in a manner inconsistent with that which has already been dictated by our Federal Courts.

II.

TWO FLORIDA DISTRICT COURTS OF APPEAL HAVE PROPERLY DETERMINED INSURANCE DOES NOT PRECLUDE AN AWARD OFCOSTS OR FEES.

To prevent a perceived windfall to the defendant, the court in City of Boca Raton v. Boca Villas Corp., 372 So.2d 485 (Fla. 4th DCA **1979)** [hereinafter "Boca"] instead bestowed an undeserved immunity upon the plaintiff. The holding in Boca insulates the civil plaintiff's bar from the operation of the penalty provisions of the Offer of Judgment rules as well as the attorney's fees statutes.

The reasoning applied in Boca was faulty and, as such, efforts to distinguish it are unnecessary and misguided.

Public policy dictates that as between bestowing immunity upon the plaintiff who refuses a reasonable settlement offer or continues frivolous litigation, and bestowing a benefit upon the prevailing defendant, the Court should opt for the latter. Additionally, based upon the principle of equitable subrogation, it is unlikely that any such windfall would actually be harvested by a party defended pursuant to a policy of insurance. The Boca Court's reliance upon the voluntariness of the payments made to finance the defense was misplaced. The issue of whether and in what amount a party has incurred costs or fees is

not relevant if costs and fees are otherwise properly assessable.

Assuming arguendo that the specific facts of Boca justified the politically expedient result, reliance on Boca as precedent by the Second and Fourth District Courts of Appeal as well as countless Circuit Courts was unwarranted and unnecessary. Moreover, the extension of Boca has resulted in the nullification of the intent of the Offer of Judgment rules and attorney's fees statutes. This is exemplified in Lafferty v. Tennant, 528 So.2d 1307 (Fla. 2d DCA 1988) and Turner v. D.N.E., Inc., 547 So.2d 1245 (Fla. 4th DCA 1989).

In Lafferty, the Court followed the Boca court's lead in disallowing an award of attorney's fees to the prevailing party merely because he had incurred no liability to pay said fees. Further, the court ruled that since the ultimate (and proper) recipient of the fees was not a party to the litigation, the award could not stand. The decision ignored the intent of the presumed statute or contract providing for such an award. (The opinion does not make clear the grounds upon which the award was originally sought and granted. Presumably, the request was predicated upon either a statute or contract.)

Next, with virtually no analysis whatsoever, the court in Turner based its decision to reverse an award of costs on the ill-reasoned Boca decision. While conceding the defendant was essentially the prevailing party and thus entitled to costs, the Court held the fact that he had neither paid the costs nor incurred liability to do so entirely precluded such an award. The Court expressed no trepidations whatsoever in reaching its result, and, no mention was made of the unsettling trend it was helping to establish.

To its credit, although ultimately reaching an erroneous conclusion, the trial court in the case sub judice recognized serious problems with the recent trend and expressed extreme reluctance about following the law, newly rewritten by judicial fiat.

Fortunately, the First and Fifth District Courts of Appeal have refused to follow the

Boca case and its progeny. This refusal is consistent with the intent of the applicable rules and statutes.

Most recently, the Fifth District Court of Appeal in Hough v. Huffman, **15** F.L.W. D197 (January 18, 1990), was asked to determine the propriety of the trial court's award of costs to the defendant pursuant to Florida Statute Section **57.041.** Despite Appellant's best efforts to persuade the Fifth District Court to rely on the Boca line of cases and reverse the costs award, the court recognized the flaw in Boca and declined to do so.

Instead, the court recognized the contract relationship between an insurer and its insured and the resulting subrogation rights of the insurance company.

Judge Sharp distinguished Boca from the case before the court, noting that while Boca concerned itself with an award of costs to volunteers, an insurance company could not be said to fall within the same category. The rationale for precluding an award of costs in Boca, to-wit: the non-availability of the volunteers to pay plaintiff's costs, was not applicable to cases where defendant's liability carrier was fully liable for the plaintiff's costs and expenses in the event of a victory by the plaintiff.

The Fifth District Court of Appeal, in further distinguishing Houeh from Boca, noted insurance is a business venture and is not founded on any philanthropic or charitable principle. Thus, the voluntariness of the payments made by the special interest groups in Boca is not present where an insurance company finances the defense of its insured.

In accepting well settled principles of insurance law, the court noted:

> **After an insurance company has paid a loss on behalf of its insured, it is entitled to subrogation either by express contract rights or by equitable subrogation by operation of law.** Hough at 198.

Rather than continue the Boca trend, Judge Sharp, Writing for the court, concluded:

> The cases from our sister courts which deny costs in such a context, we submit, are flawed because they do not take into consideration the contract relationship between an insurer and its insured, and the resulting subrogation rights of an insurance company which defends its insured and pays costs and expenses of a lawsuit, as required by its contract of insurance. Hough at 198.

After reaching the conclusion required by law, the Court concluded its opinion by stating:

> Failure to allow a cost award to a prevailing defendant who is insured, because of the fact of insurance coverage alone, gives plaintiff, and/or the plaintiff's insurance carrier, an undeserved windfall. The defendant has paid premiums for such insurance coverage. Why should a non-prevailing plaintiff be afforded any fortuitous benefit from such circumstances? Hough at 198.

One month earlier, the First District Court of Appeal reached a similar conclusion. The Court in Couch v. Drew, 14 F.L.W. 2808 (Fla. 1st DCA December 7, 1989), reversed the trial court's Order denying fees to the prevailing defendant pursuant to Florida Statute Section 768.56 and costs pursuant to Florida Statute Section 57.041.

Plaintiff had successfully argued at the trial court level that payment of fees and costs by defendant's medical malpractice insurance carrier precluded an award to defendant. Plaintiff cited Lafferty, supra, and Boca, supra, in support of his position.

The First District Court of Appeal reversed the trial court on the issue of fees, relying upon the mandatory language of Section 786.56(1). Likening that section to Florida Statute Section 57.105, the court was mindful that the use of the word "shall" in Section 57.105 has been found to:

> "Evidence the legislative intention to impose a **mandatory penalty** in the form of a reasonable attorney's fee 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." Couch, supra at 2809 (emphasis in original), citing Wright v. Acierno, 437 So.2d 242,244 (Fla. 5th DCA 1983).

The First District Court, just as the Federal Courts have done, further reasoned if the intent of the statute were to be implemented, the fee award was required to be based on the reasonable value of services, and not on whether or how much a party has agreed to pay. The Court concluded **the payment of the fee by defendant's insurance company was irrelevant** to the deterrent effect intended by the legislature.

The Court further insisted on strict construction of the statute as it was **an** enactment providing for attorneys fees.

> Section 768.56 does not qualify the mandatory requirement of a fee award by any reference to insurance coverage of those fees... This is further evidence that **the statute was intended to apply regardless of the availability to the prevailing party of insurance coverage.** Couch at 2809.

Florida Statute 57.105 mandates its application where the Court finds a complete lack of a justiciable issue of law or fact **and makes no mention of insurance coverage.** Similarly, the language of the Offer of Judgment rule and statutes **omits any reference to insurance** and leaves no room for judicial discretion.

Finally, after reversing the trial court on the attorney's fee issue, the Couch court also reversed the lower court's Order denying costs. In so doing, the District Court properly relied upon the Doctrine of Equitable Subrogation. In recognizing the policy nightmare a contrary decision would create, the Court refused to extend the Boca holding to preclude an award of costs to a defendant merely because he happened to be insured.

In order to prevent any further contortion of the Offer of Judgment and attorney's fees Rules and Statutes, and in order to promote settlement and to deter frivolous litigation, this Court should adopt the holdings of the First and Fifth District **Courts** of Appeal.

CONCLUSION.

The issue of insurance in fees and costs cases is a non-issue, raised by clever counsel in an effort to obfuscate the real issue, to wit: whether a party has unreasonably refused to settle or whether that party has wasted the Court's time with frivolous litigation. Accordingly, this Court should adopt the position that insurance is irrelevant to a determination of whether costs and fees, otherwise properly assessable, should be awarded.

Respectfully Submited,

DONNA E. ALBERT
Attorney for WATERSPORTS CLAIMS MANAGEMENT, **LTD.**
Florida Bar No. **464376**

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true and correct copy of the foregoing BRIEF OF WATERSPORTS CLAIMS MANAGEMENT, LTD. amicus curiae, has been served by U.S. mail this 19th day of February, 1990 to all counsel of record as listed below:

H. SHELTON PHILIPS, ESQ.
Kaleel & Kaleel
P.O. Box 14333
St. Petersburg, FL 33733

T. PHILIP HANSON, JR., ESQ.
102 North Third Street
Dade City, FL 33525

ALLAN E. McMICHAEL, ESQ.
Stritling & McMichael
P.O. Box 1287
Gainesville, FL 32602

BONITA L. KNEELAND, ESQ.
P.O. Box 1438
Tampa, FL 33601-1438

JACK W. SHAW, JR., ESQ.
Mathews, Osborne, et al.
Suite 1400, 225 Water Street
Jacksonville, FL 32202-5147

DONNA E. ALBERT
Attorney for WATERSPORTS CLAIMS MANAGEMENT, LTD.