IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

PETITIONER,

v.

BROOKE T. BAYLESS,

RESPONDENT.

CASE NO: **75,107**

BRIEF OF AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL LAWYERS
SUPPORTING POSITION OF RESPONDENT,
BROOKE T. BAYLESS

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On Behalf of the Amicus Curiae
THE ACADEMY OF FLORIDA TRIAL LAWYERS

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PRELIMINARY STATEMENT

The Academy of Florida Trial Lawyers (AFTL) pursuant, to Rule 9.370, Florida Rules of Appellate Procedure, submits this brief in support of the position of Respondent in this cause. This Court has previously granted AFTL's motion for leave to appear as an amicus curiae.

AFTL does not have access to the record in this cause, therefore will rely on the opinion of the District Court of Appeal as the basis of its understanding of the facts and proceedings.

STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers hereby adopts the statement *of* the case and facts of Respondent, Brook T. Bayless.

SUMMARY OF ARGUMENT

An award of costs, pursuant to the offer of judgment rule or the offer of settlement statutes, is an award of indemnification for costs actually paid by the prevailing party. If the prevailing party has paid no costs, there is nothing to indemnify. The offer of judgment rule and offer of settlement statutes, are expressly limited in their application to parties. There is no provision for the court to award costs to a nonparty insurance company which has paid the defense costs.

The offer of judgment rule and offer of settlement statutes did not change the indemnity nature of cost awards; they simply created an additional incentive to settle by expanding the circumstances under which a party is deemed to have "prevailed" and is thereby entitled to indemnification. The rule and statutes do not authorize indemnification of a nonparty who has paid the costs.

An insurer's subrogation rights do not confer upon a nonparty insurance company the right to a cost judgment, because an insurer cannot have a greater right than the insured through the remedy of subrogation. If the insured party cannot recover costs, then there is no right to costs that can be subrogated to the insurance company.

The insurance industry enjoys the protection of the nonjoinder statutes which precludes making the defendant's

liability insurance carrier a party to the action. Having secured protection from the burden of being a party, the insurance industry now seeks to avail itself of the benefits of being a party. Fairness demands that insurance companies be required to intervene as a party at the time of making an offer of judgment or offer of settlement, if they want to avail themselves of the benefits accruing to parties by the rule and statutes.

ARGUMENT

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?

"The right to an allowance of court costs springs from the prevailing party's right to indemnity.... Costs, as a compensatory, monetary award to the winning party, is a judicial attempt to make the winning party as whole as he was prior to the litigation. The theory being that the prevailing party should not lose anything, at least financially, by virtue of having established the righteousness of his claim.... Since costs are in the nature of indemnification, no award thereof should be made unless the party seeking the award has either paid the items or incurred liability to do so." City of Boca Raton V. Boca Villas Corporation, 372 So.2d 485, 486 (Fla. 4th DCA 1979).

Petitioner and her amici miss the point when they contend that the rule and statutes authorizing offers of judgment and offers of settlement entitle nonparty insurance companies to cost judgments against plaintiffs who fail to beat the offer. The development of the offer of judgment rule, Fla. R. Civ. P. 1.442, and the statutory offers of

settlement, Fla. Stat. s45.061 and s768.79, did not change the indemnity nature of cost awards; they merely created additional incentive to settle by expanding the circumstances under which a party is deemed to have "prevailed" and is thereby entitled to indemnification. Under the offer of judgment/settlement procedures, a plaintiff who nominally "prevails," by obtaining a judgment against the defendant, may still have to indemnify the defendant for costs incurred in defending the claim, if the plaintiff did not prevail by an amount sufficient to render the defendant's offer of judgment/settlement unreasonable.

Petitioner and amici are correct in stating that the offer of judgment rule and offer of settlement statutes are intended to create an incentive for the parties to settle and to discourage unreasonable settlement positions; however, the stimulus chosen by this Court and the legislature to supply the incentive is still an award of indemnification--to make the prevailing offeror whole by reimbursing him for costs he was forced to incur to defend the claim after making a reasonable settlement offer. An award of costs or attorneys fees to a prevailing offer is compensatory, not punitive. City of Boca Raton, supra; Gordon International Advertising, Inc. v. Charlotte County Land & Title Co., 170 So.2d 59 (Fla. 3d DCA 1964); Golub v. Golub, 336 So.2d 693 (Fla. 2d DCA 1976).

Although the offer of judgment rule and offer of

settlement statutes serve the commendable purpose of encouraging settlement by redefining "prevailing party," to reflect the practical realities of settlement strategy and litigation, they do not authorize the courts to award cost judgments to parties who suffered no costs. Nor do they create a special jurisdictional status for nonparty insurance companies which would enable them to enjoy all the benefits of being a party without having to bear all the burdens.

Before the Legislature enacted the nonjoinder statute, Fla. Stat. **627.7262,** a plaintiff could join the defendant's liability insurer as a party, subject to all of the benefits and burdens attendant to party status. As a party to the litigation, the insurance company could avail itself of the offer of judgment rule and obtain a cost judgment against the plaintiff in the event of a defense verdict. **As** Petitioner points out at page **6** of her initial brief, the issue of the recoverability of costs by a nonparty insurance company did not arise before the enactment of the nonjoinder statute because the insurance company was generally made a party to the action. The Legislature was persuaded to enact the nonjoinder statute for the protection of insurance companies, to allow them to hide behind the scenes and direct the insured's defense without having to expose themselves to the jury as the real party in interest.

The offer of judgment rule and the offer of settlement statute could not be more clear in limiting their

applicability to parties. Rule **1.442** provides:

> Any time more than ten days before trial begins a party defending against a claim may serve an offer on the adverse party to allow judgment to be taken...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.

Florida Statute Section **45.061** and **768.79** are also expressly limited in their application to parties. The legislative analyses which are appended to Petitioner's initial brief, as evidence of the legislative intent behind Sections **45.061** and **768.79,** are also expressly limited to parties. There is no indication that the Legislature intended the remedy to be available to nonparties.

The insurance industry asked for relief from the burdens of being a party, but now seeks to avail itself of the benefits of party status. The insurance company must take the bad with the good. If insurance companies wish to avail themselves of the offer of judgment rule and offer of settlement statutes, let them join the litigation as a party. An insurance company who wishes to make an offer of judgment or offer of settlement may intervene pursuant to Fla. R. Civ. P. **1.230** at the time the offer of judgment or offer of settlement is made. Petitioner's amicus Florida Association for Insurance Review agrees that an appropriate mechanism for an insurance company wishing to avail itself of the offer of judgment or offer of settlement statutes is to intervene as a party; however, amicus suggests that the insurance company be allowed to wait until after the final judgment before it

is required to intervene. It is well established that a nonparty wishing to intervene must do so before the final judgment. Dickinson v. Segal, 219 So.2d 435 (Fla. 1969). Fairness demands that the insurance company intervene at the time that the offer is made, so that the plaintiff can determine that any cost judgment awarded as a consequence of rejecting the insurance company's offer will likely result in an enforceable cost judgment; i.e., that the offeror is a party, the offeror has actually paid the costs and the offeror is otherwise entitled to indemnification if the plaintiff does not beat the offer.

In limiting the offer of judgment procedure to parties, Fla. R. Civ. P. 1.442 comports with the longstanding common law doctrine that costs are indemnified only to a party who has actually paid the costs. City of Boca Raton, supra, and cases cited therein. As to the offer of settlement statutes, the legislature must be presumed to have understood the implications of its action when it limited the remedy to parties. As the district court below concluded, "We find no evidence in the text of Rule 1.442 or Sections 45.061 and 768.79, of an intent on the part of the supreme court or the legislature to depart from the common law principles that costs are in the nature of indemnification or reimbursement, and that they are generally not awardable to nonparties." Aspen v. Bayless, 552 So.2d 298 (Fla. 2d DCA 1989). As the Fifth District Court of Appeal noted in

Hough v. Huffman, 15 F.L.W. 197 (Fla. 5th DCA 1990), insurance is a "business adventure." Insurance companies enter into contracts with their insureds whereby the company agrees to expend costs in defending the insured in the event of a law suit. As consideration, the insured pays premiums to the insurance company. As Petitioner states at page 9 of her initial brief, the potential costs of litigation are factored into the premium paid to the insurance company. The risk of incurring defense costs without any means of indemnification is a risk that the insurance company agrees to bear as part of its "business adventure." There is no logical distinction between the nonparty insurance and the incident case and the nonparty title insurance company who gratuitously contributed defense costs to the defendant in Laffertv v. Tennant, 528 So.2d 1307 (Fla. 2d DCA 1988). Both agreed, for whatever reason, to pay some or all of the party defendants' costs. Both did so without availing themselves of party status and are therefore precluded from availing themselves of the benefits of being the prevailing party.

The Fourth District Court of Appeal, in Turner v. D.N.E., Inc., 547 So.2d 1245 (Fla. 4th DCA 1989), reversed a cost award to a nonparty insurance company pursuant to F. R. Civ. P. 1.420(d). The Turner court held that where a party stipulated that it did not pay the defense costs and was not obligated under its insurance policy to reimburse the insurer, a cost award to the insured party was error.

Petitioner's sole basis for distinguishing the instant case from City of Boca Raton, supra, and Lafferty, supra, is that a liability insurance company has a contractual or equitable subrogation right to any right the insured may have against the plaintiff. The courts in Hough v. Huffman, supra, and Couch v. Drew, 14 F.L.W. 2808 (Fla. 1st DCA, 1989), also relied on the insurer's subrogation rights to justify affirming an award of costs to a nonparty insurance company, apparently on the grounds that the insurance company stands in the shoes of the insured for the purposes of collecting a cost judgment.

This argument must fail, because this Court held very recently, in Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Company, 15 F.L.W. 51 (Fla. 1990), that an insurer cannot have a greater right than the insured through the remedy of subrogation. In that decision this Court held that where the insured party defendant is barred from bringing a contribution claim against a joint tortfeasor, the insurer does not acquire by subrogation any right to obtain contribution from the other tortfeasor. Florida Patient's Compensation Fund, supra, at 52. As applied to the instant case, if the insured is not entitled to be indemnified for costs because he has not paid any costs, his insurance company cannot obtain a cost judgment by way of subrogation because the insurance company's subrogation rights are no greater that the rights of the

insured.

Petitioner and amici express concern that the lower court's ruling will result in a windfall to plaintiffs. If there is a risk of a windfall, it is the windfall that inure to the insurance industry if it is allowed to enjoy the benefits of its nonparty status, while at the same time enjoy the advantage of the offer of judgment rule and offer of settlement statutes which were intended to benefit only the parties. If the insurance companies want to be treated as parties, let them intervene for purposes of making an offer of judgment or offer of settlement.

CONCLUSION

A prevailing party who has paid no costs, nor incurred any liability to do so, is not entitled to indemnification under the offer of judgment rule or offer of settlement statutes. Nonparty insurance companies who have paid defense costs are not entitled to avail themselves of the benefits of the rule and statute which are expressly limited in their application to parties.

The insurance industry is protected from being made a party by the nonjoinder statute. Now the insurance companies want to have their cake and eat it too by enjoying all the advantages of being a party without all of the disadvantages. This Court should affirm the decision of the district court below.

Respectfully submitted,

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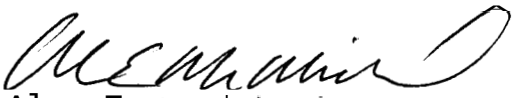
By: 
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