IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioner,

vs. CASE NO: 75,107

BROOKE T. BAYLESS,

Respondent.

RESPONDENT'S, BROOKE T. BAYLESS, ANSWER BRIEF
SUPPORTING POSITION OF APPELLEE

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PRELIMINARY STATEMENT

Respondent, BROOKE T. BAYLESS, would rely upon the preliminary statement as contained in Initial Brief of Petitioner, KAREN JEANNE SMOLIC ASPEN, f/k/a KAREN JEAN SMOLIC.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of case and facts as set forth by Petitioner in her Initial Brief.

In addition, Respondent would point out that Petitioner's Offer of Judgment was filed pursuant to Fla.R.Civ.P. 1.442. (R 66-67)

The hearing on the Motion to Tax Costs, at which time Petitioner presented to the Trial Court her justification for taxing costs in his case, was held January 19, 1989. (R 91-115)

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 RESPONDENT

THE COMMON LAW RULE REGARDING THE AWARDABILITY OF COSTS, IN THE CONTEXT OF OFFERS OF JUDGMENT, PROHIBITS THE AWARD OF COSTS TO A PARTY UNLESS THAT PARTY HAS PAID THE COSTS OR INCURRED LIABILITY TO DO SO AND ANY DEVIATION FROM THE COMMON LAW PRINCIPLES SHOULD BE INITIATED BY THE LEGISLATURE IN THE FORM OF A STATUTE OR THE SUPREME COURT IN THE FORM OF A RULE.

SUMMARY OF ARGUMENT

The Courts below adhering to well established case law and common law principles rendered a decision which comports with existing law and which protects the legal system from becoming involved in the quagmire of making awards to non-parties over whom the Court has no jurisdiction or control.

The decision of the Trial Court and Appellate Court in the case sub judice recognized recoverable costs, under Fla.R.Civ.P. 1.442, have always been awarded upon principles of indemnification. Fla.R.Civ.P. 1.442 does nothing more than to allow a party Defendant to recover its statutory costs, in the operative instance under the rule where judgment is ultimately obtained against that party Defendant. To allow Fla.R.Civ.P. 1.442 to be utilized to change the essence of what constitutes recoverable costs and who is entitled to those recoverable costs goes far beyond the scope of the rule.

The argument regarding equitable subrogation was not raised at the appellate level and should be deemed to have been waived.

Were the Court to permit argument as to the uses of equitable subrogation, it is the position of Respondent that equitable subrogation would not allow recovery of costs, absent a change in the Fla. Stat. 57.041 or Fla.R.Civ.P. 1.442 because Petitioner herself never had a right to recover costs from Respondent so there is no right of subrogation for the nonparty insurance carrier.

If nonparties, be they insurance companies or volunteers, wish to obtain affirmative relief from Courts of this State for cost expenditures pursuant to Rule or Statute, they should, at an early state of the litigation, make a Motion to Intervene, subject themselves to the jurisdiction of the Court and proceed accordingly.

ARGUMENT

THE COMMON LAW RULE REGARDING THE AWARDABILITY OF COSTS PROHIBITS AN AWARD OF COSTS UNLESS THE PARTY HAS PAID THE COSTS OR INCURRED LIABILITY TO DO SO AND ANY DEVIATION FROM THIS COMMON LAW PRINCIPLE SHOULD BE INITIATED BY THE LEGISLATURE IN A STATUTE OR BY THE SUPREME COURT IN A RULE.

It has long been established in Florida that recovery of costs is in the nature of indemnification. Hart v. Bostwick, 14 Fla. 62 (1872).

Costs as a compensatory monetary award to a winning party are a judicial attempt to make the winning party as he was prior to the litigation. Gordon International Advertising, Inc. v. Charlotte County Land and Title Company, 170 So.2d 59 (Fla. 3d DCA 1964).

Costs under Fla.R.Civ.P. 1.442 have been defined as statutory allowances in River Road Construction Company v. Ring Power Corporation, 454 So.2d 38 (Fla. 1st DCA 1984). It is clear, under Fla.R.Civ.P. 1.442, recoverable costs of a Plaintiff or Defendant are based upon statutory costs as set forth in Fla. Stat. 57.041. As stated in Golub v. Golub, 336 So.2d 693 (Fla. 2d DCA 1976) statutory costs are not a penalty. A Plaintiff who accepts an Offer of Judgment pursuant to Fla.R.Civ.P. 1.442 and a Defendant who "prevails" by virtue of holding an opposing Plaintiff to a judgment less favorable than a 1.442 Offer of Judgment

are both entitled to statutory costs, nothing less and certainly nothing more.

The argument of the Petitioner and Amici seems to be that recoverable costs under Fla.R.Civ.P. 1.442 are somehow of a different character or essence than statutory costs provided by Fla. Stat. 57.041 for a successful party Defendant. There is simply no basis for this assertion. Respondent would agree with the statement in Cheek v. McGowan Electric Supply Company, 511 So.2d 977 (Fla. 1987) that the rule acts as a sanction, but this in no way changes the underlying nature of costs recoverable under the rule from one of indemnification. The rule simply provides a method of indemnifying a Defendant who has judgment entered against it where that judgment is less favorable than the Offer of Judgment timely served by the Defendant. Prior to the enactment of the rule there was, of course, no such inducement available to a Defendant who wished to make an offer.

The nonparty insurance company in this case was not a party because of Fla. Stat. 627.7262. The nonjoinder statute provides an action may not be maintained against a liability insurer by a person not an insured until a judgment is obtained against the insured. Clearly, however, a liability insurer, as an interested party, can make a

Motion to Intervene in litigation from its inception, pursuant to Fla.R.Civ.P. 1.230. No such action was taken at any time by Petitioner's liability insurer in this case. In the absence of such action, a liability insurer should not be heard to complain it is improperly or unfairly being denied recovery of costs.

While Petitioner correctly argues at page 7 of her brief that the nonjoinder statue did not change the status of the nonparty insurance company as the real party in interest, the nonjoinder statute did change the fact that, jurisdictionally speaking, the nonparty insurance company is riot before the Court. As happened in Lafferty v. Tennant, 528 So.2d 1307 (Fla. 2d DCA 1988) for a Court to attempt to make awards to indemnify a nonparty is to place the Court in the position of rendering judgment without having full power to effectuate that judgment.

Petitioner's argument that Rule 1.442 does not contain mandatory language requiring that the costs in question be incurred by the party was addressed at length by the Appellate Court below which stated that while said language was not specific, the rule is unquestionably couched in terms of the "party making the offer" and the "adverse party." Aspen v. Bayless, 552 So.2d 298 (Fla. 2d DCA 1989) at 300. This commonsensical approach of interpreting the rule follows the long established common law principle of limiting the individual or entity who can recover costs as opposed to the vague approach of Petitioner and Amici

who seem to suggest that any volunteer, interested party, nonparty insurance company or even any stranger should be allowed to recover costs expended.

The argument of Amicus Florida Association for Insurance Review at p.12 of Amicus Brief that the language of Fla.R.Civ.P. 1.442 is mandatory and that an offeree must pay costs incurred after making of the offer does not lead to the result argued by Amicus. It is submitted such wording simply means that in the operative situation under the rule the non-prevailing party must pay "taxable costs". In order to constitute "taxable costs", the costs must be incurred by the party. City of Boca Raton v. Boca Village Corp., a Florida corporation, 372 So.2d 485 (Fla. 4th DCA 1979). The express language of Fla.R.Civ.P. 1.442 does indicate that taxable costs incurred by a party must be awarded. Here there were no obligations incurred by Petitioner and therefore no taxable costs properly awarded under the rule.

The Amicus Brief Florida Defense Lawyers Association argues that definitionally speaking the insured Petitioner had, in fact, "incurred" liability for costs and fees. [Brief of Amicus Florida Defense Lawyers Association p. 12] The argument regarding technical definitions overlooks the argument presented to the Second District Court in this case.

As pointed out by the Second District Court in deciding this case:

> It is undisputed that costs in the amount of $3,195.85 were incurred in Appellant's name and ultimately paid for by Appellant's insurance carrier without any obligation on Appellant's part to reimburse the carrier.
>
> Bayless v. Aspen, 552 So.2d 298 (Fla. 2d DCA 1989) at 299.

If, in fact, Petitioner incurred any obligation for the costs of the nonparty insurance carrier, this was a matter which should have been brought to the attention of the Appellate Court. Respondent would submit that Petitioner was not obligated or liable for payment of any of the costs attempted to be recouped by the nonparty insurance carrier and no document or express or implied oral agreement exists evidencing such obligation or liability.

Turner v. D.N.E. Inc., 547 So.2d 1245 (Fla. 4th DCA 1989), involved an attempt to recover costs in the content of a voluntary dismissal where the costs had been expended by a nonparty insurance company. The Appellate Court held that where a party stipulated it did not have to pay the expenses and was not obligated under its insurance policy to reimburse its insurer, the award of costs to the insured party was error. Although Turner involved Fla.R.Civ.P. 1.420(d) the rationale is applicable to the case sub judice.

If the nonparty insurance carrier did not or could not pay for some of the costs incurred at trial in this cause, Respondent would submit that there would clearly be no cause of action by the Petitioner's attorney against

Petitioner for payment of these costs because Respondent at no time and in no way became obligated for the payment of said costs.

The Brief of Amicus Florida Association for Insurance Review cites the case of Ross v. Fay's Drug. Co., 502 N.Y.S. 2d 945 (N.Y. Sup. Ct. 1986) for the proposition a nonparty can recover costs. As indicated in that decision, the Appellate Court in Ross was forced to construe the award of defense costs by the Trial Court in favor of codefendant, Fay, against the other codefendant, Aragona, as an order requiring codefendant Aragona to reimburse the defense costs of the Fay's nonparty liability insurance company Crum and Forster. Respondent would agree with the New York Superior Court which decided Ross when it stated that in awarding costs to the codefendant, Aragona, the Trial Court was maintaining a legal fiction. The Second District Court of Appeals in this case was wisely apprehensive about the problems that awarding costs in the context of a legal fiction can create and for purposes of recovery of costs and legal fees this legal fiction should not be approved by this Court.

The Amicus Briefs of the Florida Association for Insurance Review and Florida Defense Lawyers Association both rely

on the case of Couch v. Drew (Fla. 1st DCA 1989 [14 FLW 2808 December 15, 1989]) which specifically dealt with an award of costs pursuant to Fla. Stat. 57.041. It is clear that costs under this statute are in the nature of indemnification. While the Couch Court did hold a party was entitled to recover costs incurred by that party's insurance company under the doctrine of equitable subrogation, it is submitted that on this issue the case was wrongly decided and should be disapproved.

It is Respondent's position that this argument of equitable subrogation was not presented to the Appellate Court and has thereby been waived.

Realizing that this is an important issue which has, at this point, been raised and without relinquishing the issue of waiver, Respondent would assert that there is no right of subrogation which would be impaired by a denial of costs because Petitioner, at no time, had any right to recover costs since she did not in anyway become obligated for payment of same. The Petitioner's argument regarding equitable subrogation assumes that Petitioner had the right to recoup costs from Respondent when, in fact, no such right ever came into existence.

The Couch v. Drew holding that a prevailing party's right to statutory costs is nullified by possession of an insurance policy misconstrued the effect

of the City of Boca Raton holding. The First District Court of Appeals failed to recognize that even if a party Defendant has liability insurance if the party Defendant itself pays or becomes obligated for payment of costs the party Defendant would be entitled to recover costs and the insurance company would have a right of subrogation. The insurer can take nothing by subrogation except by the rights of the insured and it is subrogated only to such rights as the insured possessed. 31 Fla. Jur 2d Insurance §950. Since Petitioner never became obligated or incurred liability for payment of any of the costs at issue Petitioner's right to recover said costs never came to fruition and there is nothing for the nonparty insurance company to be equitably subrogated to.

The Amicus Brief of Watersports Claims Management, LTD cites Hough v. Huffman, _____, So.2d _____ (Fla. 5th 1989 [15 FLW 197 January 26, 1990]) which held that it is because of the nature of the relationship between the insurer and its insured and the essence of insurance itself that a prevailing Defendant who is insured is entitled to recover costs even though that Defendant did not incur or become obligated for payment of the costs. The Hough case relied on subrogation as the vehicle by which a prevailing party is entitled to an award of costs where the party did not become obligated for the payment of costs. Hough

involved an attempt by a nonparty insurance company to recover costs pursuant to 57.041 which provides:

> 57.041 Costs; recovery from losing party.
> (1) The party recovering judgment shall recover all his legal costs and charges which shall be included in the judgment; but this section shall not apply to executors and administrators in actions when they are not liable for costs.

The language in the statute in question in Hough, Fla. Stat. 57.041, clearly authorizes the party to recover his legal costs not a nonparty insurance carrier. The use of equitable subrogation under such a circumstance is an attempt to do indirectly that which is contrary to the wording of the statute.

Deltona v. Kipnis, 194 So.2d 295 (Fla. 2d DCA 1966) involved an attempt by one of the parties to have the trial court to tax costs in a partition proceeding on equitable principles in contravention of the applicable statute setting forth the method of taxing costs in a partition proceeding. In affirming the Trial Court's denial of taxing costs other than as directed in the applicable statute the Second District Court of Appeals stated that to allow taxation of costs on equitable principles in contravention of the applicable statute would allow doing indirectly that which the statute prohibits doing directly and would be improper. The claim for equitable subrogation was denied. In Hough, the rationale

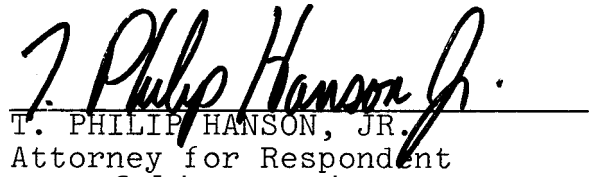
of Deltona v. Kipnis should have precluded equitable subrogation from being utilized as justification for allowing recovery of costs by a nonparty where the statute specifically authorizes only the party to recover his costs.

The nonjoinder statute allows liability insurers to avoid becoming joined as parties to litigation which the liability insurer would not otherwise have been able to do under Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969). The liability insurer is without question entitled to utilize the protection of the nonjoinder statute. However, in utilizing the protection of the nonjoinder statute, the liability insurer is placed outside of the jurisdiction of the Court during the vast majority of the proceedings and long standing principles regarding who is entitled to indemnification of costs should not be altered or receded from unless such action is taken by the legislative enactment or by rule change from this court clearly setting forth an intent to deviate from long established common law principles.

CONCLUSION

The decisions of the Trial Court and Appellate Court in not permitting recovery of costs because the party had not become obligated for payment of those costs followed well established legal principles and should be approved by this Court.

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this ____ day of March, 1990 to all counsel of record as listed below:

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