IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

BROOKE T. BAYLESS,

Respondent.

CASE NO. 75,107

# PETITIONER'S REPLY BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner expresses her gratitude unto this Honorable Court for agreeing to accept jurisdiction of this question of great public importance and in allowing the filing of amicus briefs in support of Petitioner's position.

## CERTIFIED QUESTION

CAN A NON-PARTY 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?*

## ARGUMENT IN REPLY

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

Respondent, at page 7 of her answer brief concedes, as she must, that Fla. R. Civ. P. 1.442 operates as a SANCTION. The definition of SANCTION as contained in Black's Law Dictionary, West Publishing Co., St. Paul, Minn., 1951, p. 1057, is as follows:

> "In the original sense of the word, a penalty or punishment provided as a means of enforcing obedience to a law."

This Honorable Court, in its amendment to Fla.R.Civ.P. 1.442, effective January 1, 1990, 550 So.2d 442 (Fla. 1989), made it abundantly clear that the rule, as well as F.S. 45.061 and 768.79 operate as sanctions against those who refuse to accept reasonable settlement offers and obtain a judgment less favorable. When costs are meant to be punitive as they are under Rule 1.442 and Florida Statutes 45.061 and 768.79, they are not purely indemnity.

Respondent, and the AFTL in its amicus brief, buttress their entire argument on the decision rendered by the Fourth DCA in **City of Boca Raton v. Boca Villas Corporation**, 372 So.2d 485 (Fla. 4th DCA 1979) [hereinafter **"Boca"**]. The First and Fifth District Courts of Appeal have refused to follow the **Boca** case and its progeny in the cases of **Couch v. Drew**, 14 F.L.W. 2808 (Fla. 1st DCA, December 7, 1989), ____ So.2d ____, and **Hough v. Huffman**, 555 So.2d 942, (Fla. 5th DCA January 18, 1990) respectively. The court, in **Boca**, supra, plucked from the judicial vineyard the very essence of Fla.R.Civ.P. 1.442, F.S. 45.061 and 768.79 and cast it to the four winds.

Respondent and amicus, AFTL, argue that if an insurance carrier chooses to avail itself of F.S. 627.7262, then it forfeits its right to recover costs and attorney's fees. Respondent's position is inequitable, unfair and can not be allowed to prevail. The argument advanced by Respondent and amicus, AFTL, was laid to rest in **Hough**, supra, in its discussion of the purpose of F.S. 627.7262, when it stated in part as follows:

> **"...we agree with appellee that the reason for that provision was to prevent undue prejudice to insurance companies and to avoid 'deep pocket' jury verdicts. Surely it was not intended to impact the award of costs to prevailing party under 57.041, or any other provision dealing with cost awards."**

The **Hough** court rejected the American Jurisprudence argument advanced in **Boca**, supra, stating it should have no application in the case of an insurance liability carrier as it would be liable to the prevailing party for any costs or

attorney's fees allowed under the rule or the statutes. The Hough court went on to state that 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. The Hough court further observed that the failure to allow a cost award to a prevailing defendant who is insured, because of the fact of insurance alone, gives the plaintiff and/or the plaintiff's insurance carrier an undeserved windfall.

The court, in Couch, supra, stated as follows:

> "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',"

The Federal Courts, as discussed at great length by amicus, Watersports, determined long ago that insurance is irrelevant to an award of costs or fees. In Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980), the court held that the fact that a defendant is insured is irrelevant to the purpose of awarding attorney's fees, The United States District Court, Northern District of Illinois, in Hernas v. City of Hickory Hills, 517 F.Supp. 592, (1981), a civil rights case, the court stated as follows:

> "Where civil rights complaint failed to make any specific allegations against defendant, and complaint against him was eventually dismissed, he was entitled

to an award of attorney's fees.

> "Fact that defendant in civil right's action was defended by insurance company was not relevant consideration in determining whether he was entitled to an award of attorney's fees."

Amicus, Watersports, went on to cite numerous federal cases, standing for the proposition that all that is required in order for a successful private litigant to recover attorney's fees under the Civil Right's Act is the existence of an attorney-client relationship.

Petitioner respectfully submits that if Respondent had obtained a judgment for costs, Respondent would be seeking to recover those costs from the insurance carrier, even though the cost judgment of necessity would have been entered against the Petitioner individually.

The Court, in the case of Ross V. Fay's Drug Company, 502 N.Y.S.2d 945, (Sup. 1986) as cited by amicus, Florida Association for Insurance Review, ordered reimbursement for defense costs and attorney's fees even though they had been paid by an insurer rather than the prevailing party. The court, in Ross, supra, stated as follows:

> "Those knowledgeable of negligence litigation are aware that the 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 the defense is often pure fiction. Of course, the named defendant is interested in the result, but the entity which stands to lose most in negligence litigation is usually the insurance carrier."

Respondent argues that the court in Ross, supra, created a legal fiction which the Second District Court of Appeal

in the instant cause was reluctant to follow. Petitioner respectfully submits that a legal fiction is not created by the awarding of costs and/or attorney's fees to the nominal party for and on behalf of the nonparty insurance carrier. Assuming arguendo, a legal fiction were created, it was given birth by F.S. 627.7262 and brought about due to the realities of negligence defense litigation. Plaintiffs do not hesitate to look to the insurance carrier at the conclusion of a trial in their favor in order to collect the judgment, but are now heard to argue that the insurance carrier can not look to them under the rule or the statutes for recovery of costs. This line of thinking as advanced by Respondent and fostered by Boca, supra, is seriously flawed by its unilateral application.

Petitioner respectfully submits that to require intervention in the lawsuit by the insurance carrier at any stage of the proceedings is an additional, unnecessary expenditure of the time of both court and counsel. Respondent would have this Honorable Court abolish the benefit of the nonjoinder statute in order for the insurance carrier to establish its rightful entitlement to recovery of costs. The Second District Court of Appeal, in the case sub judice, recognized the havoc that has been reeked by Boca, supra, and its decision in **Lafferty v. Tennant**, 528 So.2d 1307, (Fla. 2d DCA 1988) and certified the question to this Honorable Court.