IN THE SUPREME COURT

OF THE STATE OF FLORIDA

RONALD VAN DEVENTER, ELIZABETH VAN DEVENTER and CHRISTINE VAN DEVENTER,

Petitioners,

v.

CHRISTINIA BROWN,

Respondent.

CASE NO. 76,229

BRIEF OF PETITIONERS ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW DIRECTED TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

In this negligence action against Petitioners/Appellants/Defendants, Ronald Van Deventer, Elizabeth Van Deventer and Christine Van Deventer, the jury returned a verdict finding that there was no negligence. (R 1). Defendants moved for the taxation of costs and attorney's fees against Respondent/Appellee/Plaintiff, Christinia Brown, based upon an offer of judgment under Fla. R. Civ. P. 1.442, an offer of judgment pursuant to Section 768.79, Florida Statutes (1987), and an offer of settlement under Section 45.061, Florida Statutes (1987). (R 4, 6-10). Petitioners sought to recover attorney's fees, costs and expenses incurred after the various offers were made. (R 4, 11-13). Based upon the decision of the Second District Court of Appeal in *Aspen v. Bayless,* 552 So.2d 298 (Fla. 2d DCA 1989), *review pending,* No. 75,107 (Fla. 1990), the motion was denied. (R 14).

Upon appeal to the Second District Court of Appeal, the denial of the motion was affirmed. (Appendix at 1-2). The Court certified the following question of great public importance:

> 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?
> (Appendix at 2).

The Court further noted that the Fifth District Court of Appeal in *Hough v. Huffman,* 555 So.2d 942 (Fla. 5th DCA 1990), has certified conflict to this Court on this identical issue. (Appendix at 2).

Based upon the certification by the District Court, the Petitioners seek discretionary review under Fla. R. App. P. 9.030(a)(2)(A).

SUMMARY OF ARGUMENT

The issue in this case has already been addressed in other arguments in other cases. The Petitioners adopt the arguments presented by similarly situated parties in the other pending cases.

The interpretation of the rule and statutes by the District Court is inconsistent with the reality of cases in which a defendant has had the foresight to provide for liability insurance. The holding of the District Court in this case would make Rule 1.442 very one-sided in favor of plaintiffs. Liability insurance, as a practical matter, is involved in most negligence suits. If the existence of liability coverage will preclude an award of attorney's fees, the purpose of the statute to require individuals seriously to evaluate the merits of proposed offers will be thwarted.

The District Court's holding also overlooks the economic reality of a plaintiff's personal injury practice. It is a simple fact that law firms which represent plaintiffs in personal injury cases usually advance costs on behalf of their clients. The reality of a plaintiff's practice is that these costs are written off in a losing effort as a cost of doing business. Petitioners suggest that if an insured is not able to recover the costs which have been advanced on the insured's behalf by the insurance

company, a prevailing plaintiff's law firm should not be able to recover costs which have been advanced but which have not been paid by the plaintiff/client.

ARGUMENT

> 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?

The manner in which the District Court has phrased the certified question does not accurately reflect the contractual realities of the situation in a case where a defendant has liability insurance. In the instant case, and in the other cases which have arisen in this context, no insurance company has attempted to recover costs or attorney's fees. The actual question presented in this case should have been phrased in the following manner:

> May a party recover costs and attorney's fees under the rule and statutes regarding offers of judgment where that party's fees and costs have actually been paid by the party's insurance carrier?

No non-party insurance carrier has attempted to interject itself into the litigation to recover costs or attorney's fees in these cases.

As this Court is well aware, the issue in this case has already been presented in *Aspen v. Bayless,* 552 So.2d 298 (Fla. 2d DCA 1989), *review pending,* No. 75,107 (Fla. 1990), and in *Hough v. Huffman,* 555 So.2d 942 (Fla. 5th DCA 1990), *review pending,* No. 75,559 (Fla. 1990). It may also be pending in other cases which are unknown to these Petitioners. The Petitioners in this case do not purport to

provide any extraordinary insight into this situation beyond the matters which have been considered in detail in those proceedings. The Petitioners adopt the argument raised by the petitioner in *Aspen* and by the respondent in *Hough.* However, the Petitioners would like to comment upon the issues briefly in the hope that it will be of some benefit to the Court in deciding these cases.

The Second District Court in its opinion in *Aspen* relies upon *Lafferty v. Tennant,* 528 So.2d 1307 (Fla. 2d DCA 1988), and *City of Boca Raton v. Boca Villas Corp.,* 372 So.2d 485 (Fla. 4th DCA 1979), in finding that the prevailing party is not entitled to attorney's fees or costs. An examination of these cases reveals that the reliance is misplaced.

In *City of Boca Raton v. Boca Villas Corp.,* non-party corporations had paid the majority of the prevailing party's costs. The payment of these costs was not pursuant to insurance coverage or in the expectation that such costs would be repaid. The Court reasoned that since awards of costs are in the nature of an indemnification, no award should be made unless the party seeking the award has either paid the costs or incurred liability for them. In *Lafferty v. Tennant,* 528 So.2d 1307 (Fla. 2d DCA 1988), the defendant was required to pay attorney's fees to the title insurer which had funded the litigation on behalf of the plaintiff. The District Court reversed the award of fees because the

plaintiff had not incurred any liability for attorney's fees. The title insurance company had funded the litigation on behalf of the plaintiff. When the trial judge was informed of this fact, he amended the order to direct that any attorney's fees should be paid directly to the title insurance company. Since the title insurance company was not a party to the action, the District Court held that it was error to direct that attorney's fees be paid to it.

In *Hough v. Huffman, supra,* the Court discusses the *Boca Raton* and *Lafferty* decisions in substantial detail. The positions taken by the Court are hereby adopted in order to avoid needless repetition.

The holding of the First District Court in *Couch v. Drew,* 554 So.2d 1185 (Fla. 1st DCA 1989), provides some guidance in this case. *Couch* involved the award of attorney's fees to a prevailing defendant in a medical malpractice case where that defendant's fees and costs had been paid by his malpractice carrier. The District Court held that the purpose of the statute awarding fees in a medical malpractice action was to impose a mandatory penalty in the form of reasonable attorney's 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 those activities. If the intent of the statute is to be implemented, the fee award must be based upon the reasonable value of the

services, not on whether or how much the prevailing party has actually paid. The payment of the fee by the defendant's insurance company was irrelevant to the deterrent effect intended by the legislature to result from the operation of the medical malpractice legislation.

The reasoning of the Court in *Couch* is also applicable to the situation in the instant case. The purpose of the various statutes and the rule is to impose a penalty upon the losing parties. There is no indication that this Court and the legislature intended to provide for the indemnity of the prevailing party. The purpose of the concept of offers of judgment would not be served by denying attorney's fees simply because a defendant was prudent enough to insure himself against liability claims. In fact, for all practical purposes, the holding of the District Court in this case would clearly make Rule 1.442 very one-sided in favor of the plaintiffs and would not encourage settlements. Liability insurance, as a practical matter, is involved in most negligence suits. If the existence of liability coverage will preclude an award of attorney's fees, the purpose of the statute to require individuals seriously to evaluate the merits of proposed offers will be thwarted.

The substance of the District Court's ruling renders the taxation of fees and costs a one-way street in all personal injury cases. For many years, costs have been recovered in personal injury cases by the prevailing

defendants, and the legislature has made no attempt to alter that practice. If the holding in the instant case is allowed to stand, some interesting situations will arise. It is a simple fact that law firms which represent plaintiffs in personal injury cases usually advance costs on behalf of their clients. The reality of a plaintiff's practice is that these costs are written off in a losing effort as a cost of doing business. The Petitioners suggest that if an insurance company is not entitled to recover costs advanced on behalf of its insureds, a plaintiff's law firm should not be able to recover costs which have been advanced but which have not been paid by the plaintiff/client. If an insurance company cannot recover costs advanced or attorney's fees on behalf of its insureds, a law firm should not be able to recover costs advanced on behalf of its plaintiffs/clients in personal injury cases.

As a final consideration, the Petitioners suggest that an insured defendant is at least secondarily liable for costs advanced on his or her behalf. In the instant case, the insurance company retained attorneys to represent its insureds. It was the insureds who were sued, and the attorneys have actually represented their interests in the case. If the insurer suddenly became insolvent, the attorneys arguably could turn to the named defendants for reimbursement for costs which have been advanced on their behalf. Similarly, the defendants may have a provision in

their insurance policy which provides for a contingent reimbursement of any costs which are assessed against the plaintiffs. If insurance policies generally do not contain such a provision, then policies will have to be amended to include such a provision. Otherwise, if the District Court's holding is allowed to stand, the rule and the statute will have to be amended to clarify their purpose. There is no indication that this Court and the legislature intended to require the insurance industry to bear the burden of all costs which were incurred in any action where a defendant has had the foresight to provide for insurance against liability.

CONCLUSION

The Petitioners request that the decision of the District Court be quashed, and that this case be remanded with instructions for the trial court to enter an award in favor of the Petitioners for costs and attorney's fees.

Respectfully submitted,

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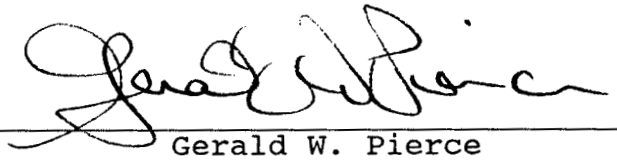
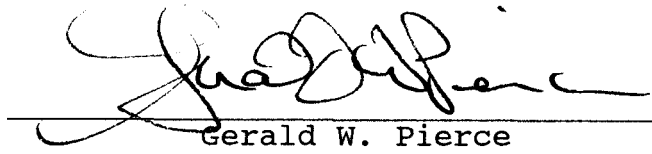
By 
Gerald W. Pierce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to RICHARD L. PURTZ, ESQUIRE, Post Office Box 2366, Fort Myers, Florida, 33902, by regular United States Mail this 19th day of July, 1990.



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