IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC16-935

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner,

v.

ALYSIA M. MACEDO AND ZACHERY R. LOMBARDO,

Respondents.
_____/

FIRST DISTRICT COURT OF APPEAL CASE NO.: 1D15-2896

FIRST JUDICIAL CIRCUIT CASE NO.: 2013-CA-003359



# AMICUS CURIAE BRIEF OF THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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## STATEMENT OF IDENTITY AND INTEREST IN THE CASE

The *Amicus Curiae*, the Property Casualty Insurers Association of America ("PCI"), is a diverse national trade association with nearly 1,000 member companies, both small and large, located in all fifty states. PCI members write $202 billion in annual premiums, which comprises 35 percent of the nation's property casualty insurance including 42 percent of the United States automobile insurance market, 27 percent of the homeowner's market, 33 percent of the commercial property and liability market, and 34 percent of the private worker's compensation market. PCI believes that its experience and broad membership provide it with a perspective that will serve as a useful supplement to the arguments presented by the parties.

The issues presented in this case are: (1) whether policy language providing coverage for "all investigative and legal costs incurred by us," and "all reasonable costs incurred by an insured at our request," is ambiguous so that it must be construed in favor of the insured and provide coverage for an adversary's attorneys' fees imposed pursuant to the offer of judgment statute; and (2) to the extent that attorneys' fees constitute taxable costs, whether the costs were incurred at the insurer's request.

PCI has an interest in this case because of its importance to the insurance industry, policyholders, and the marketplace. PCI advocates sound public policies

on behalf of insurers in legislative and regulatory forums at the federal and state levels, and files *amicus* briefs in significant cases before federal and state courts.

PCI offers this brief to assist the Court in resolving the conflict that the First District Court of Appeal certified in *Government Employees Ins. Co. v. Macedo*, 190 So. 3d 1155 (Fla. 3d DCA 2016), with the Second District Court of Appeal's opinion in *Steele v. Kinsey*, 801 So. 2d 297 (Fla. 2d DCA 2001). For the reasons articulated herein, PCI supports the position advanced by the Petitioner, Government Employees Insurance Company ("GEICO"), and suggests that the Court should resolve the conflict by adopting the better-reasoned opinion of *Steele*, and by quashing *Macedo.*[1]

## SUMMARY OF ARGUMENT

This case rests upon the application of two well-established legal doctrines. First, the established principle that attorneys' fees are separate and distinct from "costs," and do not constitute costs even when awarded pursuant to the offer of judgment statute. Second, that the unambiguous language of an insurance policy

[1] The Court should also express disapproval with the following opinions to the extent they are inconsistent with *Steele*: *New Hampshire Indemnity Co. v. Gray*, 177 So. 3d 56 (Fla. 1st DCA 2015) (certifying conflict with *Steele*); and *Florida Ins. Guaranty Ass'n v. Johnson*, 654 So. 2d 239 (Fla. 4th DCA 1995) (*Steele* certified conflict with *Johnson*).

must be applied as written, and an insurer cannot be required to pay costs or fees that it did not expressly authorize or agree to insure.

Respondents request the Court to reject the foregoing core principles and conclude that GEICO's policy language providing coverage for "all investigative and legal costs incurred by us," and "all reasonable costs incurred by an insured at our request," also provides coverage for attorneys' fees awarded pursuant to a proposal for settlement / offer of judgment. The Court should reject this contention and adhere to nearly a century's worth of its own precedent differentiating "costs" from attorneys' fees, and conclude that the unambiguous policy provisions at issue do not provide coverage for attorneys' fees imposed under an offer of judgment.

Moreover, expanding coverage for fees or costs under the policy language at issue is inconsistent with the principle that an insured cannot obtain more than he or she bargained for within the insurance agreement, and cannot impose an obligation on the insurer that was not contemplated by the policy. Since attorney's fees are not costs, let alone those incurred at GEICO's request as required within the policy, the Court should reject the Respondents' arguments which request the Court to find coverage in contravention of the policy's plain language.

Finally, adopting the position advanced by the Respondents may inhibit the ability of Florida residents and businesses to secure affordable insurance coverage. This is because insurance premiums are calculated based upon the risk assumed by

an insurer in any given policy, and requiring an insurer to pay for incalculable risks created by an offer of judgment statute or expanding coverage for "costs" to include attorneys' fees will require insurers to assume risks neither contemplated by the insurance contract nor considered in setting policy premiums. Thus, Floridians may encounter increased premiums as a direct result of the Court's decision in this case.

Accordingly, PCI respectfully suggests that the Court should interpret the policy provisions at issue to define "costs" consistent with the customary definition which permeates Florida jurisprudence which excludes attorneys' fees, conclude that there is no coverage under GEICO's insurance policy for attorneys' fees shifted pursuant to the offer of judgment statute, and quash the First District's opinion as inconsistent with these principles.

## ARGUMENT

### I. THE CLEAR AND UNAMBIGUOUS POLICY LANGUAGE DOES NOT PROVIDE COVERAGE FOR COSTS UNLESS INCURRED BY AN INSURED AT THE REQUEST OF THE INSURER.

The Court should reject the First District's holding and impose the clear, unambiguous policy terms which do not provide coverage for attorneys' fees awarded pursuant to an offer of judgment. This is because GEICO's policy makes clear that it provides coverage for "all investigative and legal **costs incurred by us,**" and "all reasonable **costs** incurred by an insured **at our request**." [*See*

Petitioner's App. 1, emphasis added]. The First District's holding necessarily rewrote the policy to impose a coverage obligation for attorneys' fees which does not exist in the policy's unambiguous language. Florida law does not allow for such a result, and the Court should quash the opinion.

The GEICO policy only obligates the insurer to pay "all reasonable costs incurred by an insured at [the insurer's] request." [*See* Petitioner's App. 1]. This is the same policy language at issue in *Steele* which the Second District deemed unambiguous. The *Steele* Court further concluded that the policy did not provide coverage for fees shifted by the offer of judgment statute, reasoning:

> The common meaning of 'request' is 'the act of asking, or expressing a desire, for something; solicitation or petition.' *Webster's New World College Dictionary* 1218 (4th ed. 2001). The legal meaning of the words is '[a]n asking or petition. The expression of a desire to some person for something to be granted or done, particularly for the payment of a debt or performance of a contract.' Black's Law Dictionary 1172 (5th ed. 1979). Both of these commonly understood definitions reinforce the clear use of the term within the context of the policy-that the insurer intended to pay for expenses that it had authorized and over which it had control, such as the selection for a service or product of known value and cost.

*Steele*, 801 So. 2d at 299.

Importantly, while the *Steele* court noted that "[i]t may be preferable, as a matter of public policy, for the entity that has the sole right to settle or litigate a damages claim to be ultimately responsible for paying the resulting extra expenses," it correctly concluded that:

> [W]e cannot enforce such a public policy in the face of a written contract with such a clearly contradictory meaning. **It is not the ultimate consequences, intended or unintended, of an insurer's decision to litigate that determine the meaning of a policy's plain language; it is the words themselves.** *Ross v. Savage*, 66 Fla. 106, 63 So. 148 (1913); *Paoli v. Natherson & Co.*, 750 So. 2d 46 (Fla. 2d DCA 1999). **When faced with an unambiguous provision, the trial court cannot give it any meaning beyond that expressed by the plain language and must construe the provision in accord with the ordinary meaning of the language.** The words at issue here, 'reasonable expenses incurred at our request,' can only mean that the insurer must request the product or service that incurs the expense. We see no need to construe them further.

*Steele*, 801 So. 2d at 300, emphasis added. As in *Steele*, the policy language at issue here – "reasonable expenses incurred at [the insurer's] request" – can only be interpreted to mean that GEICO must have requested a specified product or service which the insured procured at his or her expense. The coverage plainly contemplated is distinct from coverage for statutory fee shifting which is not a "product or service," let alone one incurred at the insurer's request.

This Court should adopt the well-reasoned logic espoused in *Steele.* Expanding coverage to include fees incurred pursuant to an offer of judgment will rewrite the clear, unambiguous policy terms which provide no such coverage. While the *Steele* Court recognized that the result may seem unjust, it properly concluded that "any remedy for that injustice is within the sphere of the legislature, not the courts." *Id.* (citing *Sparks v. Barnes*, 755 So. 2d 718, 720 (Fla. 2d DCA 2000) (Whatley, J., concurring, describing how Florida Statute section 768.79

creates an uneven playing field between insured and the insurer, and acknowledging that the legislature should review the statute). This Court should reach the same conclusion. Rather than interpret unambiguous policy language to find coverage when none was intended, the Court should defer to the legislature which is better suited to determine if any action is warranted.

## II. THE PRINCIPLE THAT "COSTS" DO NOT ENCOMPASS ATTORNEYS' FEES SHOULD BE PRESERVED.

The decision on review also blurs the established line distinguishing costs from attorney's fees. Florida follows the American Rule that attorneys' fees are not taxed against a party absent either statutory or contractual entitlement. *See Fla. Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985); *Hampton's Estate v. Fairchild-Florida Construction Co.*, 341 So. 2d 759 (Fla. 1976). This Court has held that attorney's fees are not "costs" and are only recoverable as "costs" when provided for by law or by contract. *See State ex rel. Royal Ins. Co. v. Barrs*, 99 So. 2d 168, 170 (Fla. 1924); *Shavers v. Duval*, 73 So. 2d 684, 686 (Fla. 1954) ("It is settled in this jurisdiction that attorney's fees cannot be taxed as costs in any cause unless provided for by contract or by statute.").

Importantly, this is not the first time this Court has been asked to expand policy language to provide coverage for attorneys' fees when none was intended. Indeed, the Court rejected a similar attempt in *Spiegel v. Williams*, 545 So. 2d 1360

(Fla. 1989), which interpreted policy language providing that "[w]e'll pay all **costs** of defending a suit, including interest on the part of any judgment that doesn't exceed the limit of your coverage." *Id.* at 1361-62 (emphasis added). As the Court explained:

> **While a policy could no doubt be written specifically to cover court-awarded attorneys' fees**, liability insurers are normally only responsible for the payment of the plaintiff's attorneys' fees where bad faith is involved or the insured prevails in a direct action against the company. 8A J. Appleman, *Insurance Law and Practice* § 4894.65 (1981); § 627.428, Fla. Stat. (1987). On the other hand, liability insurers have usually been responsible for the payment of taxable costs over and above the policy limits. 8A J. Appleman, *Insurance Law and Practice* § 4894 (1981); 15A M. Rhodes, Couch Cyclopedia of Insurance Law §§ 56:10, 56:16 (rev. ed. 1983). **Therefore, the result reached by the district court of appeal would be justified if the award of the plaintiff's attorneys' fees could be considered as a species of taxable costs. Yet, ever since this Court's decision in *State ex rel. Royal Insurance Co. v. Barrs*, 87 Fla. 168, 99 So. 668 (1924), attorneys' fees recoverable by statute are regarded as 'costs' only when specified as such by the statute which authorizes their recovery.** Accord *Prudential Ins. Co. of America v. Lamm*, 218 So. 2d 219 (Fla. 3d DCA), *cert. denied*, 225 So. 2d 529 (1969). **Indeed, there are some statutes which provide for an award of attorneys' fees to be taxed as costs. E.g., § 713.29, Fla. Stat. (1987). However, section 768.56, Florida Statutes (1981), did not specify that attorneys' fees could be taxed as costs.**

*Spiegel*, 545 So. 2d at 1361-62, emphasis added.

As a result, in *Spiegel* the Court "[did] not see how the statutory award of *plaintiff's* attorneys' fees [could] be construed to be a *cost* of *defending* a suit." *Id.* (emphasis in original). The Court found that the policy language was clear and

should not be altered, explaining that "[t]he policy requires [the insurer] to pay the costs of defending a suit as well as specified portions of interest on any judgment-nothing more, nothing less. It does not cover the payment of the *plaintiff's* attorneys' fees." *Id.* at 1362 (emphasis in original).

The same analysis previously applied by this Court in *Spiegel* applies with equal force here. Neither section 768.79, governing offers for judgment, nor Rule 1.442, which "applies to all proposals for settlement authorized by Florida law," authorizes attorneys' fees to "be considered as a species of taxable costs." *See Spiegel*, 545 So. 2d at 1362. To the contrary, both section 768.79 and Rule 1.442 distinguish "costs" from "attorneys' fees." *See* § 768.79, Fla. Stat. (differentiating the two no less than one-dozen times in a single statute); Fla. R. Civ. P. 1.442(h) ("(h) Costs and Fees. (1) If a party is entitled to costs and fees. . . an award of costs and attorneys' fees."). This is in stark contrast to Florida Statute Section 713.29, for example, which this Court cited to in *Spiegel* as an example of a statute that provides attorneys' fees to be taxed as costs. *See* § 713.29, Fla. Stat. ("In any action brought to enforce a lien or to enforce a claim against a bond under this part, the prevailing party is entitled to recover a reasonable fee for the services of her or his attorney for trial and appeal or for arbitration, in an amount to be determined by the court, **which fee must be taxed as part of the prevailing party's costs**, as allowed in equitable actions.") (emphasis added).

As this Court has explained time and again, "the legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act, but to the manner in which it is punctuated." *State v. Bodden*, 877 So. 2d 680, 685 (Fla. 2004). The legislature has made clear in section 768.79 – the specific statute at issue – that "costs" and "attorneys' fees" are separate and distinct, and unlike in section 713.29, the legislature has not mandated that attorneys' fees recoverable under the offer of judgment statute be taxed as costs.

The Court should adhere to its precedent, which is consistent with the plain language of the offer of judgment statute at issue, and reject the notion that costs can be construed to include attorneys' fees. *See Barrs*, 99 So. 2d at 170; *Shavers v. Duval*, 73 So. 2d at 686; and *Spiegel*, 545 So. 2d at 1362.

## III. PUBLIC POLICY SUPPORTS QUASHING THE FIRST DISTRICT AND ADOPTING *STEELE*

Compelling public policy reasons support this Court quashing the decision of the First District below and adopting *Steele*. This is because the insurance policy at issue in this case, as in *Steele*, only provides coverage for costs incurred at an insurer's request. Rewriting the unambiguous policy language to provide coverage for unintended attorneys' fees has far reaching consequences. It risks increasing

the exposure to insurance carriers throughout the state, including on countless policies which have already been issued and for which premiums have already been assessed. Because premiums are calculated based upon foreseeable risk, expanding coverage for costs to include attorneys' fees would disrupt this delicate balance, and potentially result in upward pressure on rates across the industry which would adversely affect millions of Floridians. Readily accessible and affordable insurance is crucial to Florida's economy, and the Court should protect the ability of Florida's citizens and businesses to purchase coverage at reasonable rates by declining to expand coverage to attorneys' fees, when it is clear from the plain policy language that it was only intended for costs.

Moreover, insurance companies, in calculating an insurer's premiums, evaluate various risk factors, including litigation risks. To the extent that plaintiffs are awarded attorneys' fees against an insurer above policy limits, this would create a limitless, unforeseeable, and incalculable risk for an insurer. Such a risk could potentially be passed on to policyholders who may see a resulting increase in their premium payments. For this reason, it is more appropriate for the legislature to examine and effectuate such a change if, after full investigation, such a change is deemed appropriate.

Finally, in every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which

will injure the right of the other to receive the benefits of the agreement. That, along with an existing body of Florida law that requires an insurer to advance the insured's interests as paramount, creates an incentive to resolve cases when it is in the best interest of its insured. On the other hand, imposing an additional obligation not agreed to by the insurer and which is inconsistent with Florida law establishing a distinction between costs and fees violates insurance policy language, public policy, and damages the relationship between an insured and its insurer.

## CONCLUSION

For the reasons asserted herein, PCI respectfully requests the Court to quash the First District's decision and adopt the reasoning of *Steele.*

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 28, 2016, I electronically filed the foregoing Property Casualty Insurers Association of America's Amicus Curiae Brief in Support of Petitioner with the Clerk of Court, and served a copy via e-mail upon the following counsel of record:

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## CERTIFICATE OF COMPLIANCE WITH RULE 9.210(A)(2)

I certify that the foregoing was prepared using Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Jack R. Reiter