

IN THE SUPREME COURT OF FLORIDA

**FILED**  
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KAREN JEANNE SMOLIC ASPEN, )  
f/k/a KAREN JEANNE SMOLIC, )  
 )  
Petitioner, )  
 )  
v )  
 )  
BROOKE T. BAYLESS, )  
 )  
Respondent. )

CASE NO. 75,107

PETITIONER'S INITIAL BRIEF ON THE MERITS

(On Certified Question From the Second District Court of Appeal)

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PRELIMINARY STATEMENT

This is a certified question proceeding. The Defendant in a personal injury accident appealed a final judgment of the trial court denying Defendant's Motion to Tax Costs. The Second District Court of Appeal affirmed the Final Judgment, and certified a question of great public importance to this Honorable Court.

Throughout this brief, Plaintiff, BROOKE T. BAYLESS, shall be referred to as "Plaintiff" or "Respondent". Defendant, KAREN JEANNE SMOLIC ASPEN, f/k/a KAREN JEANNE SMOLIC, shall be referred to as "Defendant" or "Petitioner".

The following symbols will be utilized;

"R" - Record on Appeal

"A" - Appendix to Brief

STATEMENT OF THE CASE AND FACTS

Plaintiff, on July 9, 1987, files her Complaint and on September 24, 1987 and her Amended Complaint seeking damages on account of injuries allegedly occurring on August 21, 1986, at or near the intersection of First Avenue South and 64th Street South, St. Petersburg, Pinellas County, Florida. Plaintiff alleged that Defendant negligently operated and/or maintained her motor vehicle so as to cause it to collide with Plaintiff's motor vehicle.

Plaintiff further alleged that she suffered bodily injury and resulting pain and suffering, disability, disfigurement and other damages arising out of the motor vehicular accident aforescribed. (R 1-2) (R 3-4)

Defendant filed her Answer and Defenses to Plaintiff's Amended Complaint on January 19, 1988 and denied negligence, affirmatively pleading the setoff defense, threshold defense, comparative negligence, and the seatbelt defense. (R 5-6)

On January 18, 1988, Defendant served her Offer to Take Judgment in the amount of \$9,001 plus taxable costs incurred to date and filed same with the court on November 22, 1988. (R 66 - 67) (A-IX)

Plaintiff on February 2, 1988 filed her Demand for Judgment pursuant to Florida Statute § 768.78 demanding judgment

in the amount of \$25,000.00. (R 7)

This cause was tried before a jury during the trial week of November 14, 1988 and on November 17, 1988 the jury returned its verdict in favor of Plaintiff in the amount of \$7,350.00 and finding the Plaintiff 25% comparatively negligent thereby resulting in a net verdict for the Plaintiff in the amount of \$5,412.50. (R 14) (R 50 - 52)

On January 19, 1988 the trial court entered final judgment in favor of the Plaintiff in the amount of \$5,412.50 pursuant to Plaintiff's Motion for Entry of Judgment pursuant to the jury verdict. (R 71 - 74) (R 87)

Defendant on December 8, 1988 filed her Motion to Tax Costs and Attorney's Fees and attached thereto Defendant's Offer to Take Judgment previously served upon Plaintiff on January 18, 1988. (R 75 -78) Plaintiff thereafter on December 16, 1988 filed her Motion to Strike Claim for Attorney's Fees and filing of Defendant's Offer of Judgment. (R 79 -80)

The trial court entered its order denying Defendant's Motion to Tax Costs and Attorney's Fees on February 7, 1989 and it was filed on February 8, 1989. (R 88 - 89) Defendant thereafter on March 1, 1989 filed her timely Notice of Appeal from the trial court's Order Denying Defendant's Motion to Tax Costs and Attorney's Fees. (R 90)

SUMMARY OF ARGUMENT

CAN A NONPARTY RECOVER COSTS IT HAS INCURRED ON BEHALF OF A NAMED PARTY UNDER THE RULE AND STATUTES REGARDING OFFER OF JUDGMENT, OR ARE COSTS RECOVERABLE UNDER THOSE PROVISIONS ONLY BY PARTIES WHO HAVE PAID COSTS OR INCURRED LIABILITY TO SO SO?

The trial court failed to follow the mandates of Florida Rule of Civil Procedure 1.442 when it denied Appellant's Motion to Tax Costs in light of the fact the jury returned a verdict less favorable to the Plaintiff than the Offer of Judgment made by the Defendant and the Order of the trial court should therefore be reversed.

The application given to the rule by the trial court renders the "rule" nugatory and rather than accomplishing the purpose and intent of the "rule", it fosters an incentive on the part of Plaintiffs to go forward with litigation with impunity. The trial court's ruling subverts the purpose and intent of Rule 1.442 which is designed to shift the burden to the Plaintiff once the Defendant has made an offer of judgment which is realistic based upon the facts of the case.

## A R G U M E N T

### 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 awardability of costs against a party refusing to accept a favorable Offer of Judgment is governed by Fla. R. Civ. P. 1.442, which provides in relevant part:

#### OFFER OF JUDGMENT

"At any time more than ten days before the trial begins a party defending against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or to the effect specified in his offer with costs then accrued. An offer of judgment shall not be filed unless accepted or until final judgment is rendered. If the adverse party serves written notice that the offer is accepted within ten days after service of it, either pay may then file the offer and notice of acceptance with proof of service and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence of it is not admissible except in a proceeding to determine costs. 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.. (emphasis added).

The common law rule regarding the awardability, vel non, of costs, should in the instant cause be held to be inapplicable in the context of Offers of Judgment, and Rule 1.442 should be amended to accomplish this purpose and avoid confusion in the future.

The common law rule prohibiting recovery of costs by a nonparty has been said to be bottomed upon the premise that costs are in the nature of indemnification and should not be awarded unless party seeking award has either paid items of cost or incurred liability to do so. (See City of Boca Raton v. Boca Villas Corporation, 372 So.2d 485 [Fla. 4th DCA, 1979]).

It has been suggested that one reason for the foregoing rule precluding nonparties from recovering costs is that if they are unsuccessful they are not available to respond for the other parties costs. (City of Boca Raton v. Boca Villas Corporation, supra). Such is not the case with regard to insurance carriers as they are compelled by contract to respond in both damages and costs if their insured is deemed to be liable by a court or jury. The insurance carrier therefore has a legal obligation to pay all costs on behalf of its insured and the insured is compelled to assist the insurance carrier in recovery of its costs if, indeed, it successfully defends the case.

Prior to Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969) it was universally accepted that in the event the insured successfully defended a case through its insurance carrier the insured would recover costs and pay them over to the carrier. The question of awardability of costs to a nonparty was never raised prior to Shingleton, supra, insofar as the awardability of costs on behalf of an insurance carrier nonparty was concerned.

Petitioner's search for the proverbial "spotted horse

case" has failed to turn up any case analogous to the case sub  
judice. The question of recoverability of costs by a nonparty  
insurance carrier during the post Bussey, supra, era prior to the  
enactment of the nonjoinder statute, F.S. § 627.7262 apparently  
did not arise since the insurance carrier was generally a party  
defendant in the action.

The stated purpose of Florida Rule of Civil Procedure  
1.442 Offer of Judgment is as follows:

"Rule requiring party obtaining a final judgment that is not  
more favorable than the settlement offer to pay costs  
incurred after offer is made and rejected is designed to  
induce or influence a party to settle litigation and obviate  
necessity of a trial."

See Hernandez v. Traveler's Insurance Company, 331 So.2d 329  
(Fla. 3d DCA 1976). See also Santiesteban, et al. v. McGrath,  
320 So.2d 476, (Fla. 3d DCA 1975) and United Services Automobile  
Association v. Noell, 372 So.2d 504 (Fla. 3d DCA 1979). The  
trial court's interpretation of the case law and Fla. R. Civ. P.  
1.442 renders impotent the purpose and meaning of the rule and is  
an unconstitutional application of the rule. The court creates  
a special class of people who do not have to pay costs regardless  
of their failure to undertake serious and meaningful settlement  
negotiations resulting in a verdict less favorable than the offer  
of judgment. The court's interpretation of the rule inures to  
the benefit of irresponsible citizens who choose not to carry  
liability insurance and who generally have no assets from which  
to respond in damages or costs in any event. The legislature  
certainly did not intend for the nonjoinder statute § 627.7262,  
supra, to penalize the insurer taking away its right to recover

costs in exchange for its nonjoinder. The obvious purpose of the legislative enactment of the nonjoinder statute, was to prevent any reference to liability insurance since it could unduly sway the jury's verdict, thereby resulting in substantial prejudice to the Defendant. The nonjoinder statute did not have the effect of changing the insurance carriers status as a real party in interest, but rather because of public policy reasons, it was determined that the existence of the insurance coverage should not come before the jury. Petitioner can state without fear of contradiction that in the majority of the personal injury lawsuits there is an insurance carrier involved but not named because of the nonjoinder statute. The insurance carrier is nonetheless the real party in interest in that it is the party with the actual financial "stake" in the outcome of the litigation and the responsibility for any payments to be made either for damages or costs or both.

The trial court in the instant cause found that Defendant had taxable costs in the amount of \$3,195.85 but declined to award those costs to Defendant. The trial court reasoned that the Defendant was not obligated to pay those costs and based its ruling upon City of Boca Raton v. Boca Villages Corporation, 372 So.2d 45 (Fla. 4th DCA) and Lafferty v. Tenannt, 528 So.2d 1307 (Fla. 2nd DCA 1988). The court went on to find that while the costs may have been incurred in the name of the Defendant, the Defendant did not ultimately pay for same. The court opined that any costs which where incurred in

Defendant's name were reimbursed to her counsel or paid for by the insurance carrier, State Farm Mutual Automobile Insurance Company. (R-90)(A-X).

The cases relied upon by the trial court as set forth in its order denying Defendant's Motion to Tax Costs are clearly not on point. City of Boca Raton and Lafferty, supra, did not involve entitlement to costs based upon Fla. R. Civ. P. 1.442 and therefore are clearly distinguishable.

The parties paying the costs in City of Boca Raton, supra, were mere volunteers and not required either by law or contract to pay the costs incurred. The issue in Lafferty, supra, involved the question of entitlement to recovery of attorneys fees with no statute or contract requiring payment of attorney's fees. Lafferty, supra, likewise, did not involve the Offers of Settlement Statute F.S. § 45.061 or Offer of Judgment Statute § 768.79.

The Senate staff in its analysis of Senate Bill 866, which ultimately became F.S. § 45.061 states as follows:

"This legislation is designed to encourage settlements, and as such could result in lower litigation costs."

"If this legislation is successful in encouraging out-of-court settlements, it should reduce the fiscal impact of litigation on the court system." (A-XIII)

The House of Representatives in its version of F.S. § 45.061 stated as follows:

"This legislation is designed to encourage settlements, and as such could result in lower litigation costs. Any imposition of sanctions under this act should have an equal negative and positive fiscal impact on the public.

"If this legislation is successful in encouraging out-of-court settlements, it should reduce the fiscal impact

of litigation on the court system. Whether the impact would be sufficient to affect the need for judges cannot be accurately determined at this time." (A-XVII)

Of the Florida Statute § 45.061 Offers of Settlement at paragraph (3)(b) makes it mandatory that any sanction imposed against the Plaintiff shall be set-off against any award to the Plaintiff and if the sanction is in an amount in excess of the award to the Plaintiff a judgment shall be entered in favor of the Defendant. A reading of the rule and the statutes in *pari materia* makes it abundantly clear that the pure intent and meaning of the rule and the statutes is to assess the costs of litigation against the party failing or refusing to accept a reasonable offer of judgment or settlement regardless of who actually paid the costs. Plaintiffs in the instant case made a decision to reject Defendant's Offer of Judgment thereby accepting the risk of a jury finding against them thereby resulting in the taxation of costs against the Plaintiff pursuant to Fla. R. Civ. P. 1.442. It is undisputed that costs in the amount of \$3,195.85 were incurred in Defendant's name and ultimately paid for by appellant's insurance carrier. The insurance policy was never placed in evidence in light of the ruling by the trial court and therefore is not and can not be a part of the record in this cause.

Petitioner can state without fear of contradiction that Petitioner paid a premium for the insurance provided and as such the costs of litigation were factored into that premium. This is so whether or not the insurance carrier covers the cost of

litigation or not.

Petitioner respectfully submits that even if it be determined there is no conventional subrogation right as referred to in Eastern National Bank v. Glendale Federal Savings & Loan Association, 508 So.2d 1323 (Fla. 3d DCA) Petitioner should still be entitled to equitable subrogation. The court in Eastern National Bank, supra, stated as follows:

"Equitable subrogation arises when person discharging obligation is under legal duty to do so or when person discharges obligation to protect interest in or right to, properties; it does not apply to mere volunteers."

Petitioner respectfully submits that the fears enunciated by the Second District Court of Appeal in the instant cause has to the chilling affect their decision will have upon Fla. R. Civ. P. 1.442 are well founded. Why would any defense counsel representing an insured through an insurance carrier make an Offer of Judgment when it would be to no avail?

The Second District in the case sub judice also cited as authority for its ruling, the case of Turner v. D.N.E., Inc., 547 So.2d 1245 (Fla. 4th DCA 1989). Petitioner respectfully submits that Turner, supra, is not on point in that Turner, supra, involved an attempt to recover costs following a voluntary dismissal of the case by the Plaintiff. Turner, supra, did not involve either Fla. R. Civ. P. 1.442 or Florida Statutes §§ 45.061 and 768.79 which of necessity are embroiled in the dispute sub judice.

Fla. R. Civ. P. 1.442 as noted by the Second District Court of Appeal does not specify by whom the awardable costs must be incurred. The stated purpose of Fla. R. Civ. P. 1.442 and the legislatures analysis of F.S. §§ 45.061 and 768.79 make it abundantly clear that it was intended that the antediluvian thought processes that predated enactment the nonjoinder statute ought to be left behind. The courts must recognize in these modern times the necessity of utilizing all machinery available to alleviate the crowded court dockets and curtail the cost of litigation.

CONCLUSION

The premises considered Petitioner respectfully submits that the trial court and the appellate court, albeit reluctantly, have by judicial fiat declared for naught Fla. R. Civ. P. 1.442 and Florida Statutes §§ 45.061 and 768.79 and should therefore be reversed.


Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by U.S. mail, this \_\_\_\_\_ day of January, 1990, to: T. PHILIP HANSON, JR., Esquire, Greenfelder, Mander, Hanson and Murphy, 103 North Third Street, Dade City, Florida 33525, Counsel for Respondent; BONITA L. KNEELAND, Esquire, 501 East Kennedy Blvd., Post Office Box 1438, Tampa, Florida 33601; JACK W. SHAW, JR., Esquire, 1 Enterprise Center, 225 Waters Street, Suite 1400, Jacksonville, FL 32202-5147 and ALAN E. McMICHAEL, Esquire, Post Office Box 1287, Gainesville, FL 32602.

  
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