

**NOT DESIGNATED FOR PUBLICATION**

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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 1035

**JASON CASHIO, INDIVIDUALLY AND ON BEHALF OF HIS MINOR  
CHILDREN, DAVID CASHIO, BION CASHIO AND  
CAROLINE CASHIO**

**VERSUS**

**ENCOMPASS INSURANCE COMPANY OF AMERICA  
AND BRENT H. STRUTHERS, III**

**Judgment Rendered: DEC 23 2014**

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**Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Docket Number 584,562**

**The Honorable Timothy Kelley, Judge Presiding**

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**Randall J. Cashio  
Baton Rouge, LA**

**Counsel for Plaintiffs/Appellants,  
Jason Cashio, Individually, and on  
behalf of his minor children, David  
Cashio, Bion Cashio, & Caroline  
Cashio**

**Scott G. Jones  
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**Counsel for Defendant/Appellee,  
Encompass Insurance Company of  
America**

**BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.**

## **WHIPPLE, C.J.**

This matter is before us on appeal by plaintiffs, Jason Cashio, individually, and on behalf of his minor children, David Cashio, Bion Cashio, & Caroline Cashio (collectively referred to as "Cashio"), from a judgment of the trial court awarding costs in favor of the defendant, Encompass Insurance Company of America ("Encompass"). For the reasons that follow, we vacate and remand.

### **FACTS AND PROCEDURAL HISTORY**

This suit arises from an automobile accident wherein Cashio was rear-ended by a vehicle driven by Brent H. Struthers, III. Cashio filed a petition for damages naming Struthers and his insurer, Encompass, as defendants therein, with instructions to serve Encompass, but to specifically "hold service" on Struthers.

On the morning the matter was to be heard before a jury, counsel for Cashio requested that the trial court prohibit counsel for Encompass from telling the jury that he represented Struthers, since Cashio specifically withheld service on Struthers, and since, as counsel for Cashio contended, Struthers was therefore not a party to the litigation. Counsel for Encompass then orally moved that Struthers be dismissed as a party defendant for Cashio's failure to request service on him within ninety days pursuant to LSA-C.C.P. art. 1201(C). Counsel for Encompass further sought dismissal of Cashio's claims against Encompass in the event that Cashio's claims against its insured, Struthers, were dismissed. The trial court dismissed Cashio's claims against Struthers due to their failure to timely request service of Struthers within ninety days. The trial court then noted that the direct right of action against the insurer is a procedural right, not a substantive right, and reviewed the six circumstances enumerated in the Direct Action Statute, LSA-R.S. 22:1269(B)(1), under which an action may be brought against the insurer alone. After finding that none of these circumstances applied, the trial

court concluded that since the insured had not been made a party, the procedural right to sue the insurer did not ripen to a substantive right. Thus, the trial court also granted the motion for dismissal of Cashio's claims against Encompass. A judgment dismissing Cashio's claims against Struthers and Encompass without prejudice was signed by the trial court on December 2, 2013.

The December 2, 2013 judgment on the merits was appealed by Encompass and Cashio. On review, we reversed the portion of the December 2, 2013 judgment dismissing Encompass and affirmed the portion of the December 2, 2013 judgment dismissing Struthers. On appeal, Encompass also sought review of a November 14, 2013 interlocutory judgment granting Cashio's motion for partial summary judgment and finding Struthers liable for the underlying accident. On review, we vacated the portion of the November 14, 2013 judgment granting Cashio's motion for partial summary judgment as to liability. See Cashio v. Encompass Insurance Company of America, LLC, 2014-0255 (La. App. 1<sup>st</sup> Cir. 9/19/14)(unpublished opinion).

On January 16, 2014, after appeals were taken from the December 2, 2013 judgment on the merits, Encompass filed a rule for the trial court to set costs.<sup>1</sup> The rule was heard by the trial court on April 14, 2014, after which the trial court awarded costs in the amount of \$4,741.52 to Encompass, as the prevailing party on the merits. A judgment was signed by the trial court on April 23, 2014.

Cashio filed a suspensive appeal from the April 23, 2014 costs judgment, contending that the trial court abused its discretion in assessing costs in favor of Encompass, where Encompass could have filed its motion to dismiss for failure to request service ninety-one days after suit was filed instead of incurring costs "pointlessly" after nearly four years of litigation. Alternatively, Cashio contends

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<sup>1</sup>After a judgment is appealed, the trial court retains jurisdiction to set and tax costs. LSA-C.C.P. art. 2088.

that in the event that the underlying judgment on the merits is reversed on appeal, the assessment of costs to the prevailing party below is premature.

### DISCUSSION

The court may render judgment for costs against any party, as it may consider equitable. LSA-C.C.P. art. 1920. The trial court is vested with great discretion to assess costs against any party as it may deem equitable, even against a party who prevails to some extent on the merits. Adams v. Rhodia, Inc., 2007-0897 (La. App. 1<sup>st</sup> Cir. 2/13/09), 5 So. 3d 288, 289. However, the general rule is that costs are to be paid by party cast in judgment. Stockstill v. C.F. Industries, Inc., 94-2072 (La. App. 1<sup>st</sup> Cir. 12/15/95), 665 So. 2d 802, 822, writ denied, 96-0149 (La. 3/15/96), 669 So. 2d 428.

While Cashio's appeal of the costs judgment was pending, on September 19, 2014, this court reversed the portion of the judgment on the merits dismissing Encompass, affirmed the portion of the judgment dismissing Struthers, vacated the grant of partial summary judgment as to Struthers's liability, and remanded the matter to the trial court for further proceedings. Thus, Encompass is no longer the prevailing party on all of its claims. Under these circumstances, and considering that the matter has been remanded to the trial court for further proceedings on the merits, we conclude that an assessment of costs would be premature at this point, given that a final judgment has not been rendered herein. Cf. Knapp v. State Farm Mutual Automobile Insurance Company, 2012-0032 (La. App. 1<sup>st</sup> Cir. 9/21/12)(unpublished opinion), writ denied, 2012-2584 (La. 1/18/13), 107 So. 3d 636. Thus, to the extent that Cashio contends that the award of costs is premature, given our opinion on the judgment on the merits, we agree.

Accordingly, the judgment of the trial court awarding costs to Encompass (as the prevailing party) will be vacated and the matter remanded to the trial

court for a determination of costs after a final judgment on the merits is rendered.

### **CONCLUSION**

For the above and foregoing reasons, the April 23, 2014 judgment of the trial court is vacated and this matter is remanded to the trial court for a determination of costs and the assessment of same by the trial court once a final judgment is rendered. The costs of this appeal are assessed one-half to defendant/appellee, Encompass Insurance Company of America, and one-half to plaintiffs/appellants, Jason Cashio, individually, and on behalf of his minor children, David Cashio, Bion Cashio, & Caroline Cashio.

**VACATED AND REMANDED.**