IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,160

NANCY FINKELSTEIN and ALEXANDER FINKELSTEIN, her husband,

Petitioners,

vs.

NORTH BROWARD HOSPITAL DISTRICT d/b/a BROWARD GENERAL MEDICAL CENTER, and JENNIE POORE, CRNA,

Respondents.

DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENTS' BRIEF ON JURISDICTION

ELLEN MILLS GIBBS
Gibbs & Zei
224 S.E. 9th Street
Fort Lauderdale, Florida 33316
(305) 463-0631

WILLIAM D. RICKER, JR.
FLEMING, O'BRYAN & FLEMING
P.O. Drawer 7028
1415 East Sunrise Boulevard
Fort Lauderdale, Florida 33338
(305) 764-3000

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS

AUTHORITIES

I.

STATEMENT OF THE CASE AND FACTS

Petitioners' statement of the case and facts basically recites the pertinent facts controlling in this Appeal. Respondents object, however, to the implication that the trial court was responsible for omitting a reservation of jurisdiction to assess attorneys fees in the final judgment. Final judgment was entered in this medical malpractice action on February 22, 1983 after a jury verdict for Petitioners was returned on February 17, 1983. The final judgment reserved jurisdiction only to tax costs. No one filed any motions for rehearing or to alter or amend the final judgment pursuant to Rule 1.530. No one filed any motions of any kind until more than thirty days after February 22, 1983. No one appealed the final judgment.

Petitioners filed a motion to assess attorneys fees on March 29, 1983. The order granting the motion was entered on June 22, 1983. Respondents timely appealed the order on attorneys fees to the Fourth District Court of Appeal. The Fourth District issued its opinion on August 29, 1984 and on October 18, 1984, denied Petitioners motions for rehearing, for rehearing en banc and for certification. North Broward Hospital District v. Finkelstein, 456 So.2d 498 (Fla. 4th DCA 1984).

Petitioners served their notice to invoke the discretionary jurisdiction of this Court on November 13, 1984.

II.

ISSUE ON JURISDICTION

WHETHER THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THIS COURT OR A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

III.

ARGUMENT

THE FOURTH DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR ANY DECISION OF ANY OTHER DISTRICT COURT OF APPEAL.

This Court does not have jurisdiction to grant the petition for writ of certiorari because there is no conflict between the decision of the Fourth District Court of Appeal and any decision of this Court or of any other district court of appeal. When the cases relied on by Petitioners as creating conflict are examined, it is obvious that none of them answer, nor claim to answer, the question which was before the Fourth District: Can Section 768.56 attorney's fees be awarded where the final judgment does not reserve jurisdiction to award attorney's fees and no request to award them is made until after the judgment becomes final by passage of time.

The central facts controlling the disposition of this petition are that Petitioners 1) did not request a reservation of jurisdiction to award attorney's fees, 2) did not seek reconsideration of the final judgment to include a reservation under Rule 1.530, Fla.R.Civ.P., 3) did not request the trial court to

reopen the final judgment under Rule 1.540, Fla.R.Civ.P., and 4) did not appeal the final judgment. Simply stated, Petitioners did nothing in the trial court to recover attorney's fees until more than 30 days after entry of the final judgment.

In each of the five cases incorrectly construed by Petitioners as being in conflict with the decision below, the party seeking relief had protected its rights to have costs or attorney's fees assessed after the final judgment was entered or had no control over the trial court's losing its jurisdiction. For instance, in Young v. Altenhaus, 448 So.2d 1039 (Fla. 3d DCA 1983), the case Petitioners argue is most similar to this case, the plaintiffs' motion to assess attorney's fees and costs was filed after the jury verdict but prior to entry of final judgment. As is noted by the Third District in Young, the application for attorney's fees was timely -- unlike the application here which was not made until after the judgment became final. Petitioners' attempt to find conflict between the decision here and the decision in Young fails on the face of both decisions and is nothing more than an attempt to excuse their own failure to timely file their motion for attorney's fees. While courts may construe mislabeled pleadings to effectuate their real purpose, no decision known to Respondents has permitted a trial court to create a pleading out of thin air.

If there were any doubt as to the proper interpretation of Young, the Third District's recent decision in Patin v. Popino, 9 F.L.W. 2450 (Fla. 3d DCA November 20, 1984) clearly

indicates that that court will not authorize the award of attorney's fees after a judgment is final where there was no reservation of jurisdiction to award them. Like Petitioners here, the plaintiff in Patin was careful to have jurisdiction reserved for certain specified purposes -- but not for taxation of attorney's fees. In reversing an untimely award of attorney's fees, the Patin court, like the Fourth District here, realized that a litigant does not get what he does not ask for.

Petitioners next rely on this Court's decision in Wiggins v. Wiggins, 446 So.2d 1078 (Fla. 1984), as suggesting that a prevailing party which waives its right to attorney's fees is in the same position as a defendant in a dissolution of marriage action against whom a voluntary dismissal is taken. The two situations are clearly not the same and this Court's decision in Wiggins does not create the conflict envisioned by Petitioners. To begin with, by its own words, Wiggins limits its holding to dissolution actions based on Section 61.16, Fla.Stat., where the Legislature created continuing jurisdiction specifically to award attorney's fees. Secondly, the decision in Wiggins reiterates the proposition set forth by the Fourth District that attorney's fees are not to be construed as costs except in special circumstances. 446 So.2d at 1079. Finally, this Court reemphasized that Rule 1.420(d) dealing with costs does not contemplate the assessment of attorney's fees.

Petitioners next rely on Allen v. Estate of Dutton, 384 So.2d 171 (Fla. 5th DCA 1980), to suggest a conflict which does

not exist. The question answered in Allen was whether Section 57.105 attorney's fees are to be construed as costs. The court found that Section 57.105 was uniquely located in Chapter 57, Court Costs, Fla. Stat., and therefore were intended to be construed as costs. The case under consideration is not in conflict with Allen because it does not involve Section 57.105 attorney's fees but rather Section 768.56 attorney's fees, which have not been construed as costs by any appellate court.

Petitioners' final suggestion of conflict is based on Ruby Mountain Construction and Development Corp. v. Raymond, 409 So.2d 525 (Fla. 5th DCA 1982), and Lutsch v. Smith, 397 So.2d 337 (Fla. 1st DCA 1981). Neither case is on point with the decision below nor in conflict with it. To begin with, the opinion in Ruby Mountain clearly states that the final judgment retained jurisdiction to assess costs. 409 So.2d at 527. Attorney's fees were awarded in addition under Section 57.105 because a motion for rehearing was apparently frivolous and filed solely for the purpose of delay. The question answered in Ruby Mountain was when costs and attorney's fees could be awarded, not, as here, whether they could be awarded in the first instance. Unlike this case an appeal was taken in Ruby Mountain prior to the award of costs and fees. In this case nothing was pending before the trial court when the untimely motion to award attorney's fees was filed.

The decision in Lutsch is similarly inapposite to the situation presented by these Petitioners. In Lutsch the parties

had stipulated that evidence regarding attorney's fees, provided for by contract, would be admitted into evidence at a later date. Since the trial court had reserved jurisdiction to assess costs and the parties had agreed to deal with attorney's fees later, both the trial court and the appellate court found that the parties intended to assess fees later when costs were to be taxed. Petitioners here neither stipulated to assess fees later nor sought to reserve jurisdiction to assess attorney's fees.

Petitioner's most egregious misinterpretation of law involves this Court's decision in Roberts v. Askew, 260 So.2d 492 (Fla. 1972). The question answered by this Court in Roberts dealt with when costs could be taxed where the trial court had retained jurisdiction over them. Although Petitioners rely on Golub v. Golub, 336 So.2d 693 (Fla. 2d DCA 1976) to support their opinion that this Court did not consider the retention of jurisdiction important in Roberts, this Court clearly, and presumably for a reason, noted that the final judgment there provided "that costs may be taxed upon motion." 260 So.2d at 493. Respondents can find no decision of this Court which permits the award of costs -- much less attorneys fees -- after the trial court has lost jurisdiction over the matter. Roberts is not in conflict with the decision below because neither case dealt with the loss of jurisdiction to tax costs.

IV.

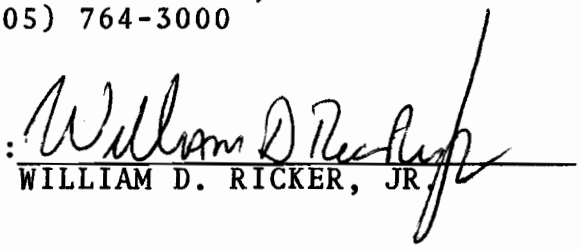
CONCLUSION

This Court should not accept jurisdiction of this matter because Petitioners have failed to cite any case which directly and expressly conflicts with the decision of the Fourth District Court of Appeal. In none of the decisions cited by Petitioners has the complaining party completely failed to preserve the jurisdiction of the court to assess attorney's fees. None of the factual situations cited by the Petitioners is similar to that presented in this case. The petition for writ of certiorari should be denied.

Respectfully submitted,

ELLEN MILLS GIBBS
Gibbs & Zei
224 S.E. 9th Street
Fort Lauderdale, Florida 33316
(305) 463-0631

FLEMING, O'BRYAN & FLEMING
Attorneys for Respondents
P.O. Drawer 7028
Fort Lauderdale, Florida 33338
(305) 764-3000

By: 
WILLIAM D. RICKER, JR.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by U.S. Mail this 14th day of December, 1984, to: JOEL D. EATON, ESQ., 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; SPENCE, PAYNE, MASINGTON & GROSSMAN, P.A., 801 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; GEORGE E. BUNNELL, ESQ., P.O. Drawer 22988, Fort Lauderdale, Florida 33335; ELLEN MILLS GIBBS, ESQ., 224 S.E. 9th Street, Fort Lauderdale, Florida 33316; and LEONARD M. BERNARD, JR., ESQ., P.O. Drawer 14126, Fort Lauderdale, Florida 33302.

FLEMING, O'BRYAN & FLEMING
Attorneys for Respondents
P.O. Drawer 7028
Fort Lauderdale, Florida 33338
(305) 764-3000

By: William D Ricker Jr
WILLIAM D. RICKER, JR.

jer/1649e