O/a 11-5-85

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 66,160

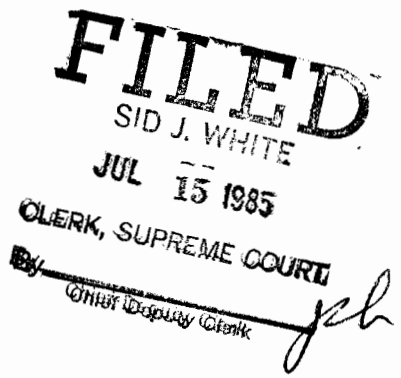
NANCY FINKELSTEIN and ALEXANDER FINKELSTEIN,

Petitioners,

vs.

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

Respondents.



BRIEF OF RESPONDENTS ON THE MERITS

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

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PREFACE

This Brief is submitted pursuant to Rule 9.120, Florida Rules of Appellate Procedure, and to this Court's Order of May 29, 1985, accepting jurisdiction of this cause based on Rule 9.030(a)(2)(iv). The appeal before this Court is from the August 29, 1984 decision of the Fourth District Court of Appeal which reversed the trial court's award of attorney's fees to Petitioners.

The parties to this appeal will be referred to as follows:

NORTH BROWARD HOSPITAL DISTRICT	NBHD, Defendant, Respondent.
JEANNIE POORE	POORE, Defendant, Respondent.
NANCY FINKELSTEIN and ALEXANDER FINKELSTEIN	FINKELSTEINS, Plaintiffs, Petitioners.

STATEMENT OF THE CASE AND OF THE FACTS

Respondents object to the argumentative tone of Petitioners' statement of the case and facts which implies that the February 22, 1983 final judgment is not final and to the misleading suggestion on page one of their brief that section 768.56, Florida Statutes (1981), "required that the fees be determined and awarded by the trial court after the main claims were tried to the jury and resolved." Section 768.56 does not contain the language suggested by Petitioners. Respondents believe the statement of the case and facts can be presented without the need to misinterpret the statute or to suggest that the unappealed final judgment in this case was anything less than a final judgment.

The important dates controlling this appeal can be set forth in a simple table:

→	June 1, 1981 -	Complaint filed for medical malpractice against various defendants, including Respondents. (R 1-18).
	February, 1983 -	Jury trial
	February 17, 1983 -	Jury verdict for Petitioners against Poore and NBHD. Other defendants found not guilty. (R 23-24).
	February 22, 1983 -	Final judgment entered against Poore and NBHD. Jurisdiction reserved to tax costs. (R 23-24).
	March 29, 1983 -	Petitioners file motion to assess attorney's fees. (R 25-26).

June 22, 1983 - Attorney's fees assessed against Poore and NBHD. (R 27-28).

July 21, 1983 - Notice of Appeal to Fourth District Court of Appeal filed by Poore and NBHD.

August 29, 1984 - Decision of Fourth District Court of Appeal reversing order assessing attorney's fees. North Broward Hospital District v. Finkelstein, 456 So.2d 498 (Fla. 4th DCA 1984).

November 13, 1984 - Notice Invoking Discretionary Jurisdiction in Supreme Court filed.

ISSUES ON APPEAL

ISSUE I

WHETHER THE TRIAL COURT LACKED JURISDICTION TO AWARD ATTORNEY'S FEES PURSUANT TO SECTION 768.56, FLA. STAT. (1981), WHERE ITS FINAL JUDGMENT DID NOT RESERVE JURISDICTION TO ASSESS ATTORNEY'S FEES AND WHERE PLAINTIFFS DID NOT MOVE TO ASSESS FEES UNTIL THREE DAYS AFTER THE JUDGMENT BECAME FINAL.

ISSUE II

WHETHER THE TRIAL COURT LACKED JURISDICTION TO AWARD ATTORNEY'S FEES AGAINST DEFENDANT POORE BECAUSE SHE IS NOT ONE OF THE ENUMERATED HEALTH CARE PROFESSIONALS AFFECTED BY SECTION 768.56.

SUMMARY OF ARGUMENT

ISSUE I

The problem for which Plaintiffs seek relief is not a problem created by rules of procedure or by common or statutory law, but rather is a self-inflicted problem caused by Plaintiffs' failure to follow established procedure. Plaintiffs failed to insure that the final judgment, entered five days after return of the jury verdict, included an award of section 768.56, Florida Statutes, attorney's fees or a retention of jurisdiction to award fees in the future. Jurisdiction to tax costs was reserved. Plaintiffs did not seek to amend or correct the final judgment pursuant to Rule 1.530, did not appeal the final judgment and have never even suggested that they could avail themselves of the provisions of Rule 1.540. Plaintiffs did nothing with regard to assessing section 768.56 attorney's fees until 33 days after final judgment was entered.

Not only do Plaintiffs fail to cite any case or statute which directly conflicts with the decision under review, the decision they most heavily rely on, Roberts v. Askew, 260 So.2d 492 (Fla. 1972), deals neither with attorney's fees nor with expansion of jurisdiction. Roberts provides instead that where a trial court has reserved jurisdiction to later tax costs, it has a reasonable time in which to determine the amount of the costs.

Florida has long maintained the finality of judgments by prohibiting trial courts from amending or correcting judgments outside the provisions of Rules 1.530 and 1.540. Plaintiffs did not seek relief under either rule. Plaintiffs can cite no decision of this Court or rule of procedure which supports their position, even by analogy to court costs, because section 57.041, Florida Statutes, requires that costs be included in the final judgment. Although there is no similar statutory provision dealing with attorney's fees, there is no logical reason to afford greater jurisdiction to award attorney's fees in a limited number of cases than is given court costs in all cases.

Very simply, this Court should not create additional rules of court or new decisional law merely to relieve Plaintiffs from the consequences of their own making. The decision of the Fourth District should be affirmed.

ISSUE II

The award of attorney's fees against defendant nurse Poore should be reversed even if attorney's fees are approved against NBHD. The award of attorney's fees here is authorized solely by the provisions of section 768.56 which specifically enumerates the health care providers to whom it applies. Nurses are not among them.

The Legislature enacted section 768.56 in response to this Court's decision holding the medical mediation panel statute, section 768.44, unconstitutional. Aldana v. Holub, 381 So.2d 231 (Fla. 1980). Like its successor statute, the mediation

panel statute excluded nurses from its provisions. Since attorney's fees statutes are in derogation of the common law they must be strictly construed and section 768.56 should be construed to apply only to health care providers specifically enumerated in the statute, as was its predecessor, section 768.44.

Even if this Court quashes the Fourth District's decision and approves the timing of the award of attorney's fees as to NBHD, it should reverse the trial court's order assessing attorney's fees against nurse Poore.

ARGUMENT

ISSUE I

THE TRIAL COURT LACKED JURISDICTION TO AWARD ATTORNEY'S FEES PURSUANT TO SECTION 768.56, FLA. STAT. (1981), WHERE ITS FINAL JUDGMENT DID NOT RESERVE JURISDICTION TO ASSESS ATTORNEY'S FEES AND WHERE PLAINTIFFS DID NOT MOVE TO ASSESS FEES UNTIL THREE DAYS AFTER THE JUDGMENT BECAME FINAL.

A. Introduction

Plaintiffs present no case to this Court which authorizes the imposition of attorney's fees against a prevailing party where the court lost jurisdiction as a result of the prevailing party's failure to assert its rights prior to the termination of jurisdiction. Although Plaintiffs' claim that the decisional law they rely on is bewildering, an analysis of the cases reveals a consistent pattern not to penalize those who cannot control a loss of jurisdiction and not to reward those who can.

Although Plaintiffs repeatedly complain they need relief from a judicially created problem, in fact any problem they envision is one of their own making, relief for which this Court does not need to create new law or clarify existing law. As a solution to their self-inflicted problem -- not the law's or this Court's -- Plaintiff's urge extension of the holding in Roberts v. Askew, 260 So.2d 492 (Fla. 1972). Plaintiffs' reliance on Roberts is misplaced, however, because that case did not deal with attorney's fees, did not deal with a litigant who allowed

the court to lose jurisdiction and did not extend the trial court's jurisdiction beyond that already provided by rules of procedure, statutes and earlier decisions; it merely established a time frame during which a motion for costs could be heard where the trial court had specifically reserved jurisdiction for that purpose.

This brief will deal in turn with the self-inflicted problem complained of, with the solution suggested by Plaintiffs, and with existing law which, without conflict, supports the decision of the Fourth District.

B. Plaintiffs should not be granted relief from their self-inflicted problem.

The strategy behind Plaintiffs' argument is to blame the Fourth District and what Plaintiffs refer to as perplexing decisional law for a problem they created for themselves. Although the complaint here included a demand for section 768.56 attorney's fees, the final judgment for Plaintiffs neither awarded attorney's fees nor retained jurisdiction to award them. Plaintiffs did nothing after return of the favorable verdict or after entry of the judgment to correct any oversight they perceived at that time. Once the judgment became final after 30 days, the trial court's power to rule on the untimely motion to assess attorney's fees was extinguished. See McCallum v. McCallum, 364 So.2d 97 (Fla. 4th DCA 1978), and Kitzmiller v. Southeast Services Inc., 358 So.2d 271 (Fla. 3rd DCA 1978).

This Court has long held that finality of judgments is an important part of Florida litigation procedure. The rationale

behind encouraging finality in judgments was set forth in Kippy Corp. v. Colburn, 177 So.2d 193, 197 (Fla. 1965), where this Court stated that if a trial court could

> ... prevent a final judgment from becoming absolute and continue its jurisdiction over the order and the cause, all of the provisions of rule and statute limiting the time for corrective action in a trial court would become subject to nullification at the whim of the trial court.

Lawsuits are not to go on and on simply because a litigant keeps remembering to raise issues which should have been put to rest. In other words, a litigant gets what a litigant asks for. If you do not request relief you do not get it and if you knowingly waive your right to relief you cannot later complain. See, Abell v. Town of Boynton, 95 Fla. 984, 117 So. 507 (1928); Rule 1.120(g), Fla.R.Civ.P.

A review of the important dates here will show that Plaintiffs had ample opportunity to claim section 768.56 attorney's fees but apparently decided not to do so until the trial court lost jurisdiction to award them. Even though it must be presumed that Plaintiffs were aware of their right to section 768.56 attorney's fees since the complaint demanded them, Plaintiffs did nothing to secure an award of attorney's fees after the verdict was returned on February 17, 1983 or after the judgment was signed on February 22, 1983. Although Plaintiffs had at least five days to make certain the court either included an award of attorney's fees in the final judgment or reserved jurisdiction to do so later, they did nothing. Plaintiffs'

apparently felt their right to tax costs later was important enough to include an appropriate reservation of jurisdiction in the final judgment; they did not place the same importance on an award of attorney's fees.

After the final judgment was entered, Plaintiffs had an additional five days to file appropriate motions to correct what according to Plaintiffs was an oversight of the trial court. Rule 1.530(b), Fla.R.Civ.P. Plaintiffs filed no motions, petitions or any other papers intended to protect their rights. Since no party filed a Rule 1.530 motion, Plaintiffs had until March 24, 1983 in which to file something with the trial court to insure that attorney's fees were awarded before the court lost jurisdiction. Plaintiffs did nothing.[1]

Finally, Plaintiffs could have sought relief under Rule 1.540 -- if they could show excusable neglect. Apparently Plaintiffs could not use Rule 1.540 in good faith, however, so they did nothing but file a motion for attorney's fees three days after the trial court lost jurisdiction to do anything but award costs.

It is clear that Plaintiffs are not here seeking relief from the result of someone else's negligent or dilatory actions. They are here because they failed to protect their rights -- not

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[1]The amount of attorney's fees was not contested. Defendants stipulated that if Plaintiffs were entitled to attorney's fees, then $25,000.00 was a reasonable fee. (R 27).

because someone else created their problem. The problem complained of, therefore, is not a problem of the judicial system, as Plaintiffs repeatedly urge, but rather a self-inflicted problem of Plaintiffs' own making. There is no need for this Court to fix a system which is neither broken nor perplexing.

C. The Solution

The simple solution to Plaintiffs' problem was for Plaintiffs to be more careful in protecting their rights and like any other litigant take the initiative to ask for what they sought. The solution Plaintiffs urge this Court adopt not only does not accurately represent the holding in Roberts upon which they rely, it is not a solution designed to insure finality of judgments in the explosion in litigation the Florida court system has been experiencing.

The central theme of Plaintiffs' proposed solution is to ask this Court to expand its ruling in Roberts to allow those who waive their right to attorney's fees by not timely applying for them to present a claim for attorney's fees at any reasonable time after judgment becomes final. Plaintiffs' reliance on Roberts is totally misplaced. To begin with, Roberts does not deal with attorney's fees, but with costs. Secondly, the trial court in Roberts specifically retained jurisdiction in the final judgment to tax costs upon motion. Thirdly, Roberts does not deal with a litigant's right to have costs, much less attorney's fees, assessed where there has been no jurisdiction retained to assess those costs. Instead it stands for the proposition that

where jurisdiction has been retained to assess costs, the act of assessing the amount of costs may be performed at any reasonable time in the future.[2]

The question before this Court is not whether the trial court assessed the amount of attorney's fees in a timely fashion as required by Roberts, but rather whether the trial court had jurisdiction to assess attorney's fees at all after the judgment became final. Applying the facts in this case to the holding in Roberts does not provide the clear test which Plaintiffs urge upon this Court. Instead, it supports the Fourth District's decision that the trial court should have denied the untimely request for attorney's fees.

In analyzing Plaintiffs' proposed solution to their self-inflicted problem, the difference between the time during which attorney's fees may be taxed and the right to tax attorney's fees in the first instance must be kept in perspective. Roberts deals with the time permitted for taxing costs and Defendant has no quarrel with that decision. Where a trial court has jurisdiction to do an act, giving it a reasonable time in which to perform is logical. Where a court does not have jurisdiction,

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[2]Plaintiffs cite Golub v. Golub, 336 So.2d 693 (Fla. 2d DCA 1976) as authority for ignoring the clear language of Roberts. If Golub is read to extend Roberts to mean that retaining jurisdiction to award attorney's fees is unnecessary, then the Golub reasoning should be rejected. In fact, Plaintiffs cite no case from this Court approving even the award of costs where jurisdiction was not retained. Research reveals that there is none. See also section 57.041, Florida Statutes, which requires inclusion of costs in the final judgment.

however, recreating jurisdiction to increase the time in which to reassert a right already waived is not consistent with Roberts, does not enhance finality in the law and creates unnecessary loopholes for dilatory litigants to squeeze through.

As final support for their proposed solution, Plaintiffs argue that rules concerning awards of attorneys fees are judicially created and therefore can be judicially recreated. As previously noted, this Court has already promulgated a rule of civil procedure specifically designed to deal with the problem Plaintiffs created for themselves -- Rule 1.540. Plaintiffs chose not to follow that rule, apparently because their circumstances did not fit within the relief intended to be provided by the rule. This Court should not create additional rules to reward litigants who do not protect themselves and cannot, or do not, even demonstrate a reasonable excuse for their own neglect.

D. The existing decisional law is neither broken nor bewildering.

In support of their search for judicial relief from their own error, Plaintiffs argue that current decisional law is a bewildering puzzle. When examined in light of the factual situation addressed in each case, there is nothing confusing or bewildering about current law. It can be summed up as providing that where a litigant did not create or acquiesce in a trial court's loss of jurisdiction, a litigant will not be penalized by being denied costs or attorney's fees, but where a party could have insured its rights to fees before the loss of jurisdiction, relief will not be granted.

The decisions cited by Plaintiffs as comprising the allegedly bewildering puzzle will be analyzed in three groups: 1) decisions which award fees after voluntary dismissal; 2) decision which generally deny fees in dissolution of marriage cases where jurisdiction is not reserved; and 3) miscellaneous decisions in which the prevailing party protected its rights to a subsequent determination of the amount of fees. In addition, Plaintiffs' reliance on White v. New Hampshire Department of Employment Security, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 375 (1982) will be examined in light of the special statute construed there and in light of several similar Florida statutes.

1. Voluntary Dismissal Cases

A number of decisions, including a recent decision of this Court, Wiggins v. Wiggins, 446 So.2d 1078 (Fla. 1984), provide that where a plaintiff takes a voluntary dismissal, the prevailing party cannot be denied its right to costs or attorney's fees where appropriate. See also, Dolphin Tower Condominium Association v. Del Bene, 388 So.2d 1268 (Fla. 2d DCA 1980); McKelvey v. Kismet, Inc., 430 So.2d 919 (Fla. 3rd DCA), pet. denied, 440 So.2d 352 (Fla. 1983); Reineke v. McKinstry, 445 So.2d 361 (Fla. 4th DCA 1984).

Neither Defendants nor the various appellate courts suggest that a party who has no control over the dismissal of a case should be penalized by losing rights it would have if the case were prosecuted to its conclusion. For instance, in Wiggins, where jurisdiction was lost because the plaintiff voluntarily

dismissed a dissolution of marriage action, this Court held that the prevailing party would not be penalized by an uncontrollable loss of jurisdiction and the trial court would retain its right to grant the equitable relief provided by Chapter 61. Whether based on Chapter 61 or some other statutory authority, the underlying principal of granting relief to the litigant who did not cause the loss of jurisdiction remains the same.

2. Dissolution of Marriage Cases.

The decisions involving dissolution of marriage have uniformly denied an award of attorney's fees once jurisdiction has been lost, except in the Wiggins circumstance. E.g., Frumkes v. Frumkes, 328 So.2d 34 (Fla. 3rd DCA 1976); Oyer v. Boyer, 383 So.2d 717 (Fla. 4th DCA 1980); McCallum v. McCallum, 364 So.2d 97 (Fla. 4th DCA 1978); Jackson v. Jackson, 390 So.2d 787 (Fla. 1st DCA 1980); Church v. Church, 338 So.2d 544 (Fla. 3rd DCA 1976), disapproved on other grounds, Duncan v. Duncan, 379 So.2d 949, 952 (Fla. 1980). Other decisions in this area deal with the timing of the award of attorney's fees where jurisdiction was retained as in Roberts. E.g., Bailey v. Bailey, 392 So.2d 49 (Fla. 3rd DCA 1981) and Smith v. Smith, 382 So.2d 1242 (Fla. 2d DCA 1980). Research reveals no case which awards attorney's fees to a complaining party who could have prevented the trial court's loss of jurisdiction.

3. Miscellaneous Decisions

Plaintiffs' selection of several of the decisions they rely on is confusing because the decisions stand not for the

proposition urged by Plaintiffs but rather for the position taken by the Fourth District. In each case the factual circumstances show that there was no intent to allow jurisdiction to be lost without awarding attorney's fees or costs or the final judgments specifically retained such jurisdiction. An example of the latter situation is Chipola Nurseries, Inc. v. Division of Administration, Department of Transportation, 335 So.2d 617 (Fla. 1st DCA 1976). Chipola approved the determination of the amount of interest to be assessed where jurisdiction to do so had been reserved. Interestingly, even though the appellant's post-judgment motion sought attorney's fees as well as interest, the decision only discusses the assessment of interest, perhaps because jurisdiction had been reserved as to that issue only.

The decision in Hartford Accident & Indemnity Company v. Smith, 366 So.2d 456 (Fla. 4th DCA 1978), also supports Defendants' position here and not Plaintiffs'. The court found that the statute relied on in Hartford required the trial court to either include attorney's fees in the final judgment or to "at least reserve jurisdiction to award the fees upon motion ..." 366 So.2d at 457.[3]

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[3]Plaintiffs rely on Autorico, Inc. v. Government Employees Insurance Company, 398 So.2d 485 (Fla. 3rd DCA 1981), and Ocala Music and Marine Center v. Caldwell, 389 So.2d 222 (Fla. 5th DCA 1980), to suggest that a complaint need not contain a demand for attorney's fees pursuant to Section 57.105, Fla. Stat. Defendants do not quarrel with that assertion except to suggest it has nothing to do with the issue before this Court. In neither Autorico nor Ocala Marine is there any suggestion that the motions for attorney's fees were filed after the trial court lost jurisdiction over the case.

Similarly, the decision in Law Realty, Inc. v. Harris, 428 So.2d 712 (Fla. 4th DCA 1978), does not answer the question before this Court because there the prevailing party filed its motion to assess attorney's fees within ten days of the entry of the final judgment when Rule 1.530 motions had also been filed. The trial court in Law Realty never lost jurisdiction to consider attorney's fees because the prevailing party there protected its rights by not allowing jurisdiction to be lost before determining that issue. The Plaintiffs here were not as concerned about their interests. Plaintiffs suggest that the holding in Law Realty encourages the filing of Rule 1.530 motions which are form over substance. If Plaintiffs had been as concerned about the form of the final judgment as they are about substance here, this appeal would have been unnecessary.

The next line of cases Plaintiffs rely on involves the award of attorney's fees specifically as part of the costs of litigation. Allen v. Estate of Dutton, 384 So.2d 171 (Fla. 5th DCA), pet. denied, 392 So.2d 1373 (Fla. 1980); Grasland v. Taylor Woodrow Homes, Ltd., 460 So.2d 940 (Fla. 2nd DCA 1984); Jeffcoat v. Heinicka, 436 So.2d 1042 (Fla. 2nd DCA 1983). The fees sought in Allen and Grasland were based on section 57.105, Fla. Stat., which is included in the chapter dealing with court costs and which have accordingly been construed as costs. In Grasland, moreover, the trial court reserved jurisdiction to award costs and was merely exercising that jurisdiction. In Allen there is no indication as to whether jurisdiction had been reserved to tax

costs, although there was apparently no appellate issue challenging jurisdiction as to costs. Allen is distinguishable, in addition, because the fees here have never been construed to be costs under chapter 57, and section 768.56 does not define them as such. Likewise, attorney's fees in Jeffcoat were awarded after entry of final judgment based on a specific statutory provision. Section 501.2105, Fla. Stat. Contrary to Plaintiffs' suggestion, there is no indication or implication by the courts in these decisions that they are creating "legal fictions." What the courts are doing is construing legislative intent based on statutory provisions not present here.[4]

Like several other decisions relied on by Plaintiffs, Young v. Altenhaus, 448 So.2d 1039 (Fla. 3rd DCA 1983), quashed, 10 F.L.W. 252 (Fla. May 2, 1985), supports the Fourth District's decision and not Plaintiffs' position. Although the decision in the Third District was reversed because Young was not entitled to recover attorney's fees since the cause of action accrued prior to enactment of section 768.56, Plaintiffs urge that the opinion of the Third District be relied on here. Plaintiffs' position is confusing because the Third District noted that Young sought his attorney's fees prior to entry of final judgment. Furthermore, the Third District noted that, in any event, under the circumstances of that case the trial court had intended to include

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[4]A significant difference between section 57.105 and section 768.56 is that section 57.105 applies to all litigation just as court costs do, while section 768.56 applies only to a limited number of medical malpractice cases. See Issue II, infra.

attorney's fees in its reservation of costs. Not even Plaintiffs have suggested that the trial court here intended to include attorneys' fees as costs. The record the Plaintiffs brought here shows only that Plaintiffs failed to protect their interest in attorney's fees prior to the trial court losing its jurisdiction.

The final two Florida cases relied on by Plaintiffs are Ruby Mountain Construction and Development Corporation v. Raymond, 409 So.2d 525 (Fla. 5th DCA 1982), and Lutsch v. Smith, 397 So.2d 337 (Fla. 1st DCA 1981). Again Plaintiffs' reliance on these decisions is perplexing because they do not provide the support alleged. For instance, in Lutsch the First District very clearly held that the parties stipulated to a determination of attorney's fees after judgment and that the court reserved jurisdiction on that issue. 397 So.2d at 341. Lutsch, therefore, is nothing more than a reaffirmation of this Court's holding in Roberts that where jurisdiction is reserved, costs can be awarded within a reasonable time after entry of final judgment. Ruby Mountain on the other hand dealt with the award of section 57.105 attorney's fees, for acts taken after final judgment. The attorney's fees were for post-judgment frivolous motions for rehearing filed only for delay purposes. The award was not part of the final judgment.

4. Federal Law.

Plaintiffs suggest that this Court adopt the ruling of the United States Supreme Court in White v. New Hampshire Department of Employment Security, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed. 2d 325 (1982). Plaintiffs' reliance is misplaced and their

suggestion should be rejected for several reasons. For instance, like the decisions holding that section 57.105, attorney's fees were to be construed as costs, Allen v. Estate of Dutton and Grasland v. Taylor Woodrow Homes, Ltd., the statute construed by the Supreme Court specifically provides that fees shall be awarded as part of costs.[5]

A second significant difference between White and this case is the Florida treatment of costs in its rules of civil procedure and statutes as compared to Federal procedures. Rule 58, Federal Rules of Civil Procedure, provides, for instance, that "entry of judgment shall not be delayed for the taxing of costs." Florida has no similar rule. In fact, section 57.041 specifically provides that "costs ... shall be included in the judgment." Florida has taken an opposite direction from the federal judiciary. If costs must be included in a judgment, or jurisdiction to tax costs reserved, no less diligence in protecting their interests should be expected of parties seeking section 768.56 attorney's fees.

A third difference between the federal procedure for taxing costs and Florida's procedure is the Federal rule providing that costs are taxed by the clerk and not by the judge. Rule 54(d), Fed.R.Civ.P. In Florida, costs are entered by the

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[5]Significantly, like Florida law, Federal law does not construe attorney's fees as part of costs unless so defined by statute. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975).

court or the clerk. Section 57.021. Florida has no rule similar to Federal Rule 54(d).

Florida law and procedure is significantly different from Federal law. This Court should not be persuaded to follow White merely to relieve Plaintiffs of the consequences of their own making. Florida should continue to enforce its policies which encourage finality of judgments and which require litigants to protect their own interests.

E. Summary

None of the Florida cases cited by Plaintiffs' support the position they urge this Court adopt. Their main support, Roberts v. Askew, deals neither with attorney's fees nor with the award of costs after a trial court loses jurisdiction. In fact, section 57.041 requires that costs be included within the final judgment and this Court has never construed it any other way. Numerous appellate decisions have held that a trial court does not have jurisdiction to award attorney's fees after a judgment becomes final if the court has not reserved jurisdiction to assess attorney's fees.

Long standing Florida common and statutory law should not be changed to relieve these Plaintiffs of the consequences of their failure to avail themselves of their opportunities to insure recovery of section 768.56 attorney's fees prior to the trial court losing jurisdiction. The importance of the finality of judgments, as well as the liberal rules of civil procedures provided for legitimately aggrieved litigants, was summed up by

this Court in Kippy Corp. v. Colburn, 177 So.2d at 196, where it stated:

> If the correction of error is not sought within the time and manner provided the court involved has no authority to act and insofar as that court is concerned the matters decided are finally ended ... Unless a proper motion or petition is filed within the alloted time the order becomes absolute and except as provided by the rules ... the trial court has no authority to alter, modify or vacate the substance of the order.

See also, Shelby Mutual Insurance Company v. Pearson, 236 So.2d 1 (Fla. 1970).

Plaintiffs have failed to demonstrate conflict between the decision of the Fourth District and any other appellate decision and this appeal should be dismissed. In any event, Plaintiffs also fail to show why this Court's long standing policies encouraging the finality of judgments should be waived for them. No public policy would be better served by the change in law proposed by Plaintiffs. The decision of the Fourth District should be affirmed.

ISSUE II

THE TRIAL COURT LACKED JURISDICTION TO AWARD ATTORNEY'S FEES AGAINST DEFENDANT POORE BECAUSE SHE IS NOT ONE OF THE ENUMERATED HEALTH CARE PROFESSIONALS AFFECTED BY SECTION 768.56.

Although the decision of the Fourth District Court of Appeal did not deal with whether the trial court had jurisdiction to award attorney's fees against Defendant Nurse Poore -- it did not have to since it reversed the entire award of attorney's fees -- and although Plaintiffs do not raise the question of the trial court's authority to assess attorney's fees against nurse Poore, this Court can consider this second issue because it has jurisdiction to decide all issues in a case once it accepts jurisdiction of any issue. Savoie v. State, 422 So.2d 308 (Fla. 1982); Marley v. Saunders, 249 So.2d 30 (Fla. 1971).

For the reasons which will be set forth below the trial court did not have jurisdiction to award attorney's fees against nurse Poore without regard to whether it could award section 768.56 attorney's fees against NBHD. Even if this Court reverses the decision of the Fourth District as to the timing of the post final judgment award of attorney's fees, therefore, it should reverse the trial court's award of attorney's fees against nurse Poore.

Because the award of attorney's fees in Florida is in derogation of the common law, Sheridan v. Greenberg, 391 So.2d 234 (Fla. 3rd DCA 1980), they can be awarded only under three circumstances: (1) where authorized by contract; (2) where authorized by statute; (3) and where an attorney's services

create or bring into court a fund or other property. Kittel v. Kittel, 210 So.2d 1, 3 (Fla. 1967). The award of attorney's fees against nurse Poore was not authorized by any of the three circumstances set out in Kittel.

The only arguable basis for the trial court's award of attorney's fees is section 768.56 which provides in pertinent part that:

> Except as otherwise provided by law, the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages . . . on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital or health maintenance organization . . .

Nurse Poore is not a medical or osteopathic physician, is not a podiatrist, is not a hospital and is not a health maintenance organization. Because nurse Poore is not a member of any of the classes of persons enumerated in section 768.56, the trial court erred in assessing attorney's fees against her.

Although there are no decisions directly interpreting the scope of the parties who may be taxed with attorney's fees under section 768.56, this Court in Roberts v. Carter, 350 So.2d 78 (Fla. 1977), held that statutes awarding attorney's fees must be strictly construed. In Roberts the trial court awarded fees to an injured third party beneficiary who had successfully sued to establish coverage under a homeowner's insurance policy. The trial court relied on section 627.428(1) Florida Statutes (1975), which authorizes an award of attorney's fees against "an insuror and in favor of an insured or the named beneficiary under a policy." Since the plaintiff was a third party beneficiary and

not the "insured or the named beneficiary" the Supreme Court reversed the decision below and reiterated the fundamental rule in Florida that the award of attorney's fees is in derogation of common law and statutes allowing for the award of such fees must be strictly construed.

The principle that the mention of one thing in a statute implies the exclusion of another, Thayer v. State, 335 So.2d 815 (Fla. 1976) and Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976), supports the legislative intent not to include nurses in the application of section 768.56. For example, an examination of other sections of Part II of Chapter 768, Medical Malpractice and Related Matters, and of the preamble to Chapter 80-67, Laws of Florida, the enacting provisions of Section 768.56, demonstrates that the Legislature intentionally excluded nurses from the attorney's fee statute.

In Part II of Chapter 768, the Legislature carefully defines the persons who are affected by each of the different subsections which establish various substantive rights and obligations. For instance in section 768.45, rather than specifically enumerating each type of medical professional included within the provision establishing standards of recovery for medical malpractice, the Legislature uses the term "health care provider" to establish the general class of persons regulated under the section. "Health care provider" is defined elsewhere to include physicians, podiatrists, osteopaths, nurses, naturopaths, chiropractors, physician assistants, clinical

laboratories, physical therapists and physicial therapist assistants, hospitals, health maintenance organizations and blood banks, among others. Section 768.50(2)(b).

Elsewhere in Chapter 768, the Legislature restricts the class of regulated persons for a specific subsection so as not to include all health care providers as defined in section 768.50(2)(b). The Florida Medical Consent Law, section 768.46, for example, applies only to physicians, osteopaths, chiropractors, podiatrists and dentists. Nurses are not included. In establishing the Florida Patients' Compensation Fund, the Legislature redefined "health care providers" to include only hospitals, physicians, osteopaths, podiatrists, health maintenance organizations, ambulatory surgical centers and a limited definition of "other medical facilities." Nurses are not included.

The most restrictive regulation occurs in section 768.56 which permits attorney's fees in medical malpractice actions only if the negligence involves a medical or osteopathic physician, a podiatrist, a hospital or a health maintenance organization. Nurses are not included. The fact that certain health care professionals are specifically enumerated in the attorney's fees statute while others are not, even though they are regulated in other sections of Part II, expresses the intent of the Legislature. The principle that the mention of one thing in a statute implies the exclusion of another coupled with the requirement of strict construction of an attorney's fees' statute mandates reversal of the trial court's order assessing attorney's fees against nurse Poore.

A review of the legislative history leading up to the enactment of section 768.56 provides even more support for a strict interpretation of the attorney's fee statute. Section 768.56 was enacted in response to this Court's decision in Aldana v. Holub, 381 So.2d 231 (Fla. 1980). The preamble to that statute, Chapter 80-67, Laws of Florida, indicates that the Legislature substituted the remedial aspect of the medical mediation statute, section 768.44, with the attorney's fee statute. Both statutes regulated the exact same class of medical personnel: medical and osteopathic physicians, podiatrists, hospitals and health maintenance organizations. Neither statute ever pretended to apply to nurses or other medical professionals regulated by other provisions of Chapter 768.

While no decisions address the scope of the class of persons to be regulated by section 768.56, there are several cases strictly construing the identical class in the predecessor medical mediation statute. For instance in Young v. Bramlett, 369 So.2d 652 (Fla. 1st DCA 1979), cert. denied, 379 So.2d 211 (Fla. 1980), the court held that dentists were not intended to come within the scope of the medical mediation statute. Although podiatrists were among the class of persons regulated by section 768.44, the Fourth District noted that they could not be members of a mediation panel because there was no provision to include them in subsection 768.44(2)(a). Morales v. Moore, 356 So.2d 829 (Fla. 4th DCA 1978). See also, Erhardt, One Thousand Seven

Hundred Days: A History of Medical Malpractice Mediation Panels in Florida, 8 FSU L. Rev. 168 (1980).

Although in this case NBHD is a defendant which comes within the class of persons regulated by section 768.56, its mere presence should not be sufficient to provide the means to assess attorney's fees against nurse Poore. Such an interpretation of the statute would lead to gross inequities never intended by the Legislature. For instance, a nurse providing allegedly negligent private duty care in a patient's home joined in a lawsuit for malpractice against a hospital not arising out of the same negligent act would be liable for attorney's fees even if the hospital were found not guilty. As a second example, the operator of an automobile initially causing injury to a plaintiff could be liable for attorney's fees if the action against him for negligent operation of his vehicle were joined in an action involving a hospital for subsequent negligent medical care, perhaps even if the hospital were ultimately found not to be negligent. As a last example, a manufacturer of medical equipment sued for a product defect along with a hospital being sued for malpractice could be liable for attorney's fees.

Nurse Poore should be in no different status with regard to section 768.56 than any other unenumerated defendant. There is nothing in section 768.56 to suggest that the Legislature intended to impose liability for attorney's fees on nurses. There certainly is no suggestion that the Legislature intended to apply a double standard to nurses. In fact, the Legislature is presumed not to have intended a harsh result such as the creation of

a double standard for assessing liability for attorney's fees against nurses. See, City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950).

Even if this Court quashes the decision under review, it should reverse the trial court's order assessing attorney's fees against nurse Poore because there is no statutory or common law basis for recovery against her.

CONCLUSION

This Court should dismiss this appeal as being improvidently granted since there is no Florida appellate decision expressly or directly in conflict with the decision under review. Alternatively the decision of the Fourth District should be affirmed. Finally even if the Court quashes the decision of the Fourth District with respect to NBHD, it should reverse the order of the trial court with respect to nurse Poore for the reason that the trial court did not have jurisdiction to assess attorney's fees against a party not specifically enumerated in section 768.56.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondents has been furnished by U.S. Mail, this 10 day of July, 1985, to: George E. Bunnell, Esq., BUNNELL, DENMAN & WOULFE, P.A., Counsel for Appellants, P.O. Drawer 22988, Fort Lauderdale, Florida 33335; Leonard M. Bernard, Jr., Esq., BERNARD & O'BRIEN, Counsel for Appellants, P.O. Drawer 14126, Fort Lauderdale, Florida 33302; Stuart Z. Grossman, Esq., SPENCE, PAYNE, MASINGTON, GROSSMAN AND NEEDLE, P.A., Suite 300, Grove Professional Building, 2950 S.W. 27th Avenue, Miami, Florida 33133; Joel D. Eaton, Esq., PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A., 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

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