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.

_____/

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

PETITIONERS' BRIEF ON JURISDICTION

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I.
STATEMENT OF THE CASE AND FACTS

The petitioners were plaintiffs in a medical malpractice action below, entitled to attorney's fees under 768.56, Fla. Stat. (1983), if they prevailed. Because the statute authorizes an award of fees only to a "prevailing party", it necessarily requires that the fees be determined and awarded by the trial court after the main claims are tried and resolved. The main claims were tried and resolved; the petitioners prevailed; and a judgment was entered on the main claims in their favor. The judgment reserved jurisdiction to tax costs, but it omitted a reservation of jurisdiction to award attorney's fees. No parties appealed, and the judgment therefore became "final" (for appeal purposes at least) 30 days after its recordation.

Shortly thereafter, the petitioners filed a motion for prevailing-party attorney's fees.[1/] The trial court granted the motion, and awarded the petitioners an attorney's fee in the amount of $25,000.00. The respondents appealed, contending that the trial court lost all jurisdiction over the cause 30 days after recordation of the judgment on the main claims, and that it therefore had no jurisdiction to award prevailing-party attorney's fees. Although the District Court noted that the petitioners were clearly entitled to attorney's fees as a matter of substantive law, it agreed with the respondents that the trial court lost jurisdiction to award them, and reversed the order awarding attorney's fees. *North Broward Hospital District v. Finkelstein*, 456 So.2d 498 (Fla. 4th DCA 1984). This proceeding followed.

[1/] Although the District Court's decision does not say so, the motion was filed only three days after the judgment had become "final" for appeal purposes.

II.
ISSUE ON JURISDICTION

WHETHER THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL WHICH HOLD THAT A TRIAL COURT WHICH HAS LOST JURISDICTION OVER THE MAIN CLAIM IN SUIT NEVERTHELESS HAS JURISDICTION TO AWARD STATUTORY PREVAILING-PARTY ATTORNEY'S FEES.

III.
ARGUMENT

THE DISTRICT COURT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THIS COURT AND DECISIONS OF OTHER DISTRICT COURTS OF APPEAL WHICH HOLD THAT A TRIAL COURT WHICH HAS LOST JURISDICTION OVER THE MAIN CLAIM IN SUIT NEVERTHELESS HAS JURISDICTION TO AWARD STATUTORY PREVAILING-PARTY ATTORNEY'S FEES.

Unlike the *commencement* of a trial court's subject matter jurisdiction, which is governed by the Constitution and by statute, the *termination* of a trial court's jurisdiction is governed purely by the rules and decisions handed down by the judiciary. Although the termination of a trial court's jurisdiction to act upon the main claims contained in the complaint is fairly well settled by Rule 1.530, Fla. R. Civ. P., and Rule 9.020(g), Fla. R. App. P., the problem of jurisdiction to award "prevailing-party" fees--which can only be determined after the primary claims in suit have been resolved--has never been reasonably or definitively resolved in this state. Instead, there is a bewildering variety of approaches to the problem in the decisional law. We will demonstrate that to the Court if we are allowed to argue the merits of this proceeding. For the moment, however, we will limit ourselves to a decision of this Court and four decisions of other District Courts of Appeal--all of which hold that even though a trial court has lost jurisdiction over the primary claims in suit it nevertheless has jurisdiction to award statutory prevailing-party attorney's fees--and all of which are therefore in express and direct conflict with the decision sought to be reviewed.

Before we turn to those decisions, however, it is worth noting that the jurisdictional problem presented here was neatly and cleanly resolved with respect to prevailing-party *costs* in *Roberts v. Askew*, 260 So.2d 492 (Fla. 1972). The question presented in *Roberts* was whether prevailing-party costs could be taxed upon motion filed after a judgment had become "final" by the passage of time. Although the judgment contained the words, "that cost [sic] may be taxed upon motion", this Court did not view that provision as relevant in any way to the question presented for determination.[2/] Instead, it noted that "[t]here is no statute, nor is there any rule of this Court, which specifies the time when the motion for taxation of costs must be filed" (260 So.2d at 493)--and it held as follows:

> We now hold that costs may be adjudicated after final judgment, after the expiration of the appeal period, during the pendency of an appeal, and even after the appeal has been concluded. However, the motion to tax costs should be made within a reasonable time after the appeal has concluded.

260 So.2d at 494.

Like costs, there is no statute and no rule which specifies the time when a post-trial motion for prevailing-party attorney's fees must be filed. To the extent that any rule or rules exist (and it is not clear that any such rule exists at all, as we shall demonstrate), the rules are judge-made. It is therefore well within this Court's province to fashion a logical rule based upon *Roberts v. Askew*, as we will urge it to do if we are given an opportunity to brief the merits. In our judgment, no sensible distinction can be drawn between prevailing-party costs and prevailing-party attorney's fees, and jurisdiction to award both should be the same. Unfortunately, this Court has not had an opportunity to take that logical next step, and many of the District Courts to which the ques-

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[2/] *See Golub v. Golub*, 336 So.2d 693, 694 (Fla. 2nd DCA 1976) ("Admittedly, the judgment entered in [*Roberts*] prudently included a provision 'that cost may be taxed upon motion,' but the opinion does not suggest such a reservation as being necessary to jurisdiction."); *Maas v. Maas*, 440 So.2d 494 (Fla. 2nd DCA 1983) (same).

tion has been presented, like the District Court below, have declined to take that logical next step. That step has been taken in several recent decisions, however, in one form or another--and it is those decisions which present the express and direct conflict which finally gives this Court the opportunity to take the logical next step itself, and resolve a very confusing area of the law.

A. The decision is in express and direct conflict with *Young v. Altenhaus*, 448 So.2d 1039 (Fla. 3rd DCA 1983), *review granted*, Case No. 64,504.

The most direct conflict is represented by the Third District's recent decision in *Young v. Altenhaus*, 448 So.2d 1039 (Fla. 3rd DCA 1983), *review granted*, Case No. 64,504. That case, like this case, was a medical malpractice action in which an award of prevailing-party attorney's fees was available under §768.56. In that case, as in this case, the final judgment entered on the primary claims in suit reserved jurisdiction to tax costs, but did not reserve jurisdiction to award attorney's fees. The only difference between that case and this case was that a motion for attorney's fees was filed before the final judgment on the primary claims was entered. The trial court ultimately entered a post-trial order awarding attorney's fees against the defendant, and the defendant appealed, contending that the trial court was without jurisdiction to enter the judgment on attorney's fees because its jurisdiction had lapsed on the primary claims, and because the judgment on the primary claims did not specifically reserve jurisdiction to award attorney's fees. The District Court disagreed:

> We next briefly address appellant's additional argument that the trial court was without jurisdiction to enter a separate judgment on attorney's fees because the judgment entered on the jury verdict did not specifically reserve jurisdiction to award attorney's fees. We find this argument to be without merit, for the following reasons. First, the language of section 768.56(1) is mandatory: ". . . the court shall award a reasonable attorney's fee to the prevailing party . . ." Second, application for attorney's fees was timely, having been made even before entry of the final judgment, and necessitated a hearing, both to determine the amount of the fees and to allow appellants to argue the unconstitutionality of the statute. Third, the lan-

> guage in the final judgment stating that the court reserved jurisdiction to tax costs indicates, in the context in which the order was entered, the court's recognition of the pending motion for attorney's fees and costs and the need for a ruling thereon. Finally, "the purpose of the statute [is] remedial and . . . it should be construed liberally to effectuate that purpose." [citation omitted]. We conclude, therefore, that the jurisdiction of the trial court continued until the determination of the motion for attorney's fees by entry of the final judgment awarding such fees to appellee.

448 So.2d at 1041.

The first, third and fourth "reasons" given by the Court in *Young* exist on the record in this case. The second does not, because (although the plaintiffs' complaint contained a prayer for attorney's fees) the plaintiffs' motion for attorney's fees was not filed before entry of the final judgment on the primary claims below. However, a motion for attorney's fees does not suspend rendition of a final judgment under any rule of civil or appellate procedure, so the judgment in *Young* clearly became final for appellate purposes notwithstanding the pendency of the motion for attorney's fees--and the distinction between *Young* and the instant case is therefore clearly a distinction without a difference. At best, the third reason given in *Young* is simply a "fiction"--and all of the legally sufficient reasons stated in *Young* therefore exist in this case.

Clearly, if the instant case had been decided by the Third District rather than the Fourth District, *Young* would have necessitated a different result in the instant case. It is also apparent that the Fourth District recognized this fact, because *Young* is cited in its decision after a "*But see*" introductory signal. According to the Harvard Law Review Association's *A Uniform System of Citation* (13th Ed. 1983)--which is prescribed for use in Florida courts by Rule 9.800, Fla. R. App. P.--the introductory signal "*But see*" is defined to mean: "Cited authority directly contradicts the proposition". In short, the District Court recognized on the face of the decision sought to be reviewed that its conclusion was directly contradicted by *Young*. Given that express recognition of con-

flict, we think it is perfectly clear that this Court has jurisdiction to review the District Court's decision.

B. The decision is in express and direct conflict with *Wiggins v. Wiggins*, 446 So.2d 1078 (Fla. 1984).

We also believe that the District Court's decision is in express and direct conflict with this Court's recent decision in *Wiggins v. Wiggins*, 446 So.2d 1078 (Fla. 1984). In *Wiggins*, the issue was whether a trial court has jurisdiction to award statutorily authorized attorney's fees after the voluntary dismissal of a dissolution action. The issue was a difficult one because of this Court's prior decision in *Randle-Eastern Ambulance Service v. Vasta*, 360 So.2d 68 (Fla. 1978)--which holds that a voluntary dismissal divests the trial court of all jurisdiction, exactly as if a final judgment had been rendered and become final with the passage of time: "The effect [of a voluntary dismissal] is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of 'jurisdiction'." 360 So.2d at 69. In *Wiggins*, this Court adhered to this principle of *Randle-Eastern*, but it authorized an award of post-dismissal attorney's fees notwithstanding the trial court's loss of jurisdiction over the primary claims, on the ground that continuing jurisdiction to award attorney's fees was implicit in the statute authorizing them:

> In an action for dissolution of marriage, the trial court is authorized by statute to order one party to pay the other's attorney's fees "from time to time after considering the financial resources of both parties." §61.16, Fla. Stat. (1981). We therefore hold that when a dissolution of marriage action is terminated upon the filing of a voluntary dismissal by the petitioner, the court has the authority to enter an order assessing not only costs, but also a reasonable attorney's fee. [citation omitted].

446 So.2d at 1079.

The statute at issue in *Wiggins* and the statute at issue in this case are not distinguishable in any relevant respect. The *only* difference between *Wiggins* and the instant case is that the trial court in *Wiggins* lost jurisdiction over the primary claims because of

a notice of voluntary dismissal, and the trial court in this case lost jurisdiction over the primary claims by the passage of time. In our judgment, that is a distinction without a difference. Jurisdiction is jurisdiction, and there is no logical or legal basis for holding that the post-dismissal jurisdiction of a trial court in a dissolution proceeding is somehow different than the post-judgment jurisdiction of a trial court in a medical malpractice action. Moreover, any effect to draw such a distinction would clearly be prohibited by this Court's observation in *Randle-Eastern* that "[t]he effect [of a voluntary dismissal] is to remove completely from the court's consideration the power to enter an order, *equivalent in all respects* to a deprivation of 'jurisdiction'." 360 So.2d at 69 (emphasis supplied).

Because the loss of jurisdiction by way of voluntary dismissal and the loss of jurisdiction by way of the passage of time are "equivalent in all respects", the result in *Wiggins* clearly does not turn upon the fact that jurisdiction was lost because of a notice of voluntary dismissal; it turns upon the fact that a statute authorized the award of attorney's fees. In the instant case a similar statute authorizes an award of attorney's fees to the "prevailing party", who can only be determined *after* judgment is entered--and this statute therefore provides the same type of continuing jurisdiction to award attorney's fees as the statute involved in *Wiggins*. The decision sought to be reviewed simply cannot be squared with *Wiggins*; *Wiggins* requires a different result in this case; and the decision sought to be reviewed is therefore in express and direct conflict with *Wiggins*.

C. The decision is in express and direct conflict with *Allen v. Estate of Dutton*, 384 So.2d 171 (Fla. 5th DCA), *review denied*, 392 So.2d 1373 (Fla. 1980).

We also believe that the decision sought to be reviewed is in express and direct conflict with *Allen v. Estate of Dutton*, 384 So.2d 171 (Fla. 5th DCA), *review denied*, 392 So.2d 1373 (Fla. 1980). At issue in that case was whether a trial court had jurisdiction to

award attorney's fees under §57.105, Fla. Stat. (1978), when it had otherwise been divested of jurisdiction on the primary claims by an appeal. Citing *Roberts v. Askew*, *supra*, the District Court held that the trial court had jurisdiction to award attorney's fees under §57.105, because they were in the nature of "costs". The word "costs" does not appear in §57.105, however. Section 57.105 begins: "The Court shall award a reasonable attorney's fee to the prevailing party in any civil action in which . . .". Section 768.56, the statute at issue in this case, begins: "Except as otherwise provided by law, the court shall award a reasonable attorney's fee to the prevailing party in any civil action which . . .". In other words, the language of the two statutes is nearly identical. Logically, if a trial court has post-judgment jurisdiction to award attorney's fees under one, it should have post-judgment jurisdiction to award attorney's fees under the other.

The respondents will argue here, however, that the only reason given by the *Allen* Court for reading §57.105 to allow attorney's fees to be taxed as "costs" is that the statute was included by the legislature in Chapter 57, entitled "Court Costs". It is true that the *Allen* Court bottomed its ruling upon that placement of the statute in the Florida Statutes, but once again, we think that is a distinction without a difference. The title of a Chapter in the Florida Statutes is a slim (and clearly artificial) reason for treating two nearly identically worded statutes differently, as the *Allen* Court and the District Court below have done. If the language of both statutes is identical, a trial court's jurisdiction to award attorney's fees under either of them should be the same.

D. The decision is in express and direct conflict with *Ruby Mountain Construction & Development Corp. v. Raymond*, 409 So.2d 525 (Fla. 5th DCA 1982), and *Lutsch v. Smith*, 397 So.2d 337 (Fla. 1st DCA 1981).

Finally, we believe the District Court's decision is also in express and direct conflict with *Ruby Mountain Construction & Development Corp. v. Raymond*, 409 So.2d 525 (Fla. 5th DCA 1982), and *Lutsch v. Smith*, 397 So.2d 337 (Fla. 1st DCA 1981)--because

both decisions apply the reasoning of *Roberts v. Askew*, *supra*, to the question of the trial court's post-judgment jurisdiction to enter an award of attorney's fees. In *Ruby Mountain*, a "final judgment" was entered and appealed. During the pendency of the appeal, the trial court entertained and granted a post-trial motion for prevailing-party attorney's fees. This order was appealed, the appellant asserting that the trial court had no jurisdiction to make the award. The District Court disagreed, and cited only *Roberts v. Askew* for its conclusion.

Similarly, in *Lutsch*, the trial court entered a final judgment and reserved jurisdiction only to tax "costs". Notwithstanding the absence of a reservation of jurisdiction to award attorney's fees, the District Court authorized a post-judgment award of attorney's fees "within a reasonable time":

> . . . The entry of the judgment without the lower court acting on the reasonableness of fees does not later preclude the court from considering the question within a reasonable time after the appeal has been concluded. See *Roberts v. Askew*, 260 So.2d 492, 493 (Fla. 1972). Such an opportunity will be afforded.

397 So.2d at 341.

Of course, if *Roberts v. Askew* applied to a trial court's post-judgment jurisdiction to award prevailing-party attorney's fees, the petitioners' award of attorney's fees in the instant case would not have been reversed by the District Court. Because *Roberts v. Askew* has been applied to the issue in *Ruby Mountain* and *Lutsch*, the petitioners' award of attorney's fees clearly would not have been reversed in the Fifth and First Districts. The conflict should be readily apparent. Which brings us back to where we began--*Roberts v. Askew*, *supra*. *Roberts* solved a very perplexing problem with respect to prevailing-party costs, and it should be evident that the same perplexing problem exists with respect to prevailing-party attorney's fees. An extension of *Roberts* to the situation presented in this case would be a perfectly logical next step; it would resolve a number of conflicts in a perplexing area in a very salutary way; and we respectfully urge this

Court to allow us an opportunity to urge that salutary resolution of the problem on the merits.

IV.
CONCLUSION

It is, in our judgment, contrary to fundamental notions of fairness (and clearly an elevation of form over substance) for a litigant's substantive right to prevailing-party attorney's fees to be sacrificed in every case in which a trial court forgets to utter the magic words "jurisdiction is reserved". As our discussion of the conflicting decisions should have amply demonstrated, several courts have refused to do so in contexts which are indistinguishable from the context presented in the instant case, without doing any violence whatsoever (just as *Roberts v. Askew* did no violence) to the settled notion that final judgments on the primary claims must become "final" at some point in time in order to achieve an end to litigation. The result in the instant case clearly would have been different if the case had been decided in another court. Even the District Court recognized the direct conflict by its "*But see*" citation to *Young v. Altenhaus, supra*--and the decision sought to be reviewed is therefore precisely the type of decision for which and upon which this Court's constitutional jurisdiction depends. We respectfully urge the Court to grant review of the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 26th day of November, 1984, to: William D. Ricker, Jr., Esq., FLEMING, O'BRYAN & FLEMING, Co-counsel for Respondents, P.O. Drawer 7028, Ft. Lauderdale, Fla. 33338; George E. Bunnell, Esq., BUNNELL, DENMAN & WOULFE, P.A., Counsel for Respondents, P.O. Drawer 22988, Ft. Lauderdale, Fla. 33335; Ellen Mills Gibbs, Esq., GIBBS & ZEI, P.A., Attorneys for Respondents, 224 Southeast Ninth Street, Ft. Lauderdale, Fla. 33316; and to Leonard M. Bernard, Jr., Esq., BERNARD & O'BRIEN, Counsel for Respondents, P.O. Drawer 14126, Ft. Lauderdale, Fla. 33302.

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