O/G 11-5-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,160

FILED
SID J. WHITE
JUN 20 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

NANCY FINKELSTEIN and ALEXANDER FINKELSTEIN,

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 THE MERITS

SPENCE, PAYNE, MASINGTON, GROSSMAN & NEEDLE, P.A.
Suite 300 Grove Professional Bldg.
2950 S.W. 27th Avenue
Miami, Fla. 33133
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

Attorneys for Petitioners

BY: JOEL D. EATON and Joel D. Perwin
S.

gb add

TABLE OF CONTENTS

PAGE

LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE

LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE

TABLE OF CASES

PAGE

AUTHORITIES

I.
STATEMENT OF THE CASE AND FACTS

This proceeding arises out of an action for medical malpractice, in which the petitioners were plaintiffs. The plaintiffs' complaint contained a demand for attorney's fees, to which they were entitled if they were ultimately determined to be "prevailing parties" by virtue of §768.56, Fla. Stat. (1981) (R. 1, 17). The statute required that the fees be determined and awarded by the trial court after the main claims were tried to the jury and resolved. The main claims were tried to a jury, which returned a verdict for the plaintiffs against the two defendants who are respondents here. A "final judgment" was entered against the defendants on the main claims for the amount of the jury's verdict, and the "final judgment" was "rendered" by recordation on February 24, 1983 (R. 23). The "final judgment" did not dispose of the plaintiffs' claim for attorney's fees. Neither did the "final judgment" expressly "reserve jurisdiction" to award the attorney's fees to which the plaintiffs were indisputably entitled; it stated instead simply that "[c]osts will be taxed at a later date upon appropriate motion" (R. 23).

Apparently because neither the plaintiffs nor the defendants were unhappy with the result on the main claims, neither side filed any "authorized" post-trial motions pursuant to Rule 1.530, Fla. R. Civ. P.. The defendants also did not appeal the "final judgment" within 30 days from the date of its recordation. Three days after the appeal time had expired, the plaintiffs filed a motion seeking recovery of the attorney's fees claimed in their complaint and not disposed of in the "final judgment" (R. 25). The motion was granted (R. 27). The defendants appealed, and contended that--notwithstanding that the complaint sought attorney's fees, that the "final judgment" did not dispose of that aspect of the plaintiffs' claims, and that the attorney's fees could only be awarded in a post-trial proceeding--the trial court lost "jurisdiction" to entertain the motion for attorney's fees three days before it was filed, and that the order granting the motion was void for lack of jurisdiction. The District Court of Appeal, Fourth District, agreed with that conten-

tion and reversed the order awarding the plaintiffs attorney's fees. *North Broward Hospital District v. Finkelstein*, 456 So.2d 498 (Fla. 4th DCA 1984). This proceeding followed.

II.
ISSUE PRESENTED

WHETHER THE TRIAL COURT LACKED JURISDICTION TO ENTERTAIN THE PLAINTIFFS' MOTION FOR "PREVAILING-PARTY" ATTORNEY'S FEES, FILED PURSUANT TO §768.56, FLA. STAT. (1981)--WHERE THE PLAINTIFFS' COMPLAINT CONTAINED A DEMAND FOR ATTORNEY'S FEES, WHERE THE "FINAL JUDGMENT" ON THE MAIN CLAIMS DID NOT DISPOSE OF THE CLAIM FOR ATTORNEY'S FEES, AND WHERE THE PLAINTIFFS' MOTION FOR ATTORNEY'S FEES WAS FILED THREE DAYS AFTER THE "FINAL JUDGMENT" ON THE MAIN CLAIMS BECAME "FINAL".

III.
SUMMARY OF THE ARGUMENT

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" attorney's 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--some of which are consistent with the District Court's decision below, and many of which are inconsistent with it.

Our proposed solution to the present mess in the decisional law is this Court's decision in *Roberts v. Askew*, 260 So.2d 492 (Fla. 1972). In that case, this Court held that trial courts have continuing jurisdiction to tax prevailing-party "costs" within a reasonable time after the "final judgment" on the main claims has become final by the passage of time. In our judgment, no sensible distinction can be drawn between prevail-

ing-party costs and prevailing-party attorney's fees, and jurisdiction to award both should be the same. We therefore urge this Court to extend its holding in *Roberts v. Askew* to apply to prevailing-party attorney's fees as well.

Until recently, the decisional law on this question in the federal system was also a mess. A three-way conflict between the various courts of appeals was resolved, however, by the 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), in which the Court held that, like "costs", a post-judgment motion for prevailing-party attorney's fees raises a "collateral and independent claim" which a trial court has continuing jurisdiction to entertain within a reasonable time, notwithstanding that the litigation of the main claims may have been concluded with finality. *White* therefore reaches essentially the same conclusion with respect to prevailing-party attorney's fees that this Court reached with respect to prevailing-party costs in *Roberts v. Askew*--and *White* therefore fully supports our request here that *Roberts* be extended to prevailing-party attorney's fees as well.

This Court may also have recently extended the principle of *Roberts v. Askew* to the question of prevailing-party attorney's fees in *Wiggins v. Wiggins*, 446 So.2d 1078 (Fla. 1984). In that case, the issue was whether a trial court has jurisdiction to award statutorily authorized attorney's fees after the voluntary dismissal of a dissolution action. Notwithstanding that the trial court had been deprived of jurisdiction to enter any orders on the main claims in suit by the voluntary dismissal, this Court held that it nevertheless had continuing jurisdiction to award statutorily authorized attorney's fees. The only difference between *Wiggins* and 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, however, that is a distinction without a difference, because the loss of jurisdiction by way of voluntary dismissal and the loss of jurisdiction by way of

LAW OFFICES, PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET, MIAMI, FLORIDA 33130-1780

the passage of time are "equivalent in all respects". *Wiggins* is consistent with both *Roberts v. Askew* and *White v. New Hampshire Department of Employment Security*, and clearly points the way to extension of *Roberts v. Askew* to the problem presented by the instant case.

The District Court's apparent concern over the "finality" of judgments was misplaced for three reasons. First, if an individual trial court can retain jurisdiction to award prevailing-party attorney's fees on a case by case basis, without doing any violence to the concept of "finality", then a general judicial rule creating post-judgment jurisdiction in all cases without the need for recitation of the magic words, "jurisdiction is reserved", would do no violence to the concept of "finality". Second, the trial court's continuing jurisdiction to award prevailing-party "costs" under *Roberts v. Askew* has done no violence to the concept of "finality", so simply including prevailing-party attorney's fees within the trial court's continuing jurisdiction to award costs will do no violence to the concept of "finality". Third, as the United States Supreme Court recognized in *White v. New Hampshire Department of Employment Security*, the concept of "finality" with respect to the judgment on the main claims is simply not implicated, because a claim for prevailing-party attorney's fees (like costs) is considered to be a "collateral and independent claim" which can be entertained independently of the main claims in suit. There is therefore no reason why the concept of "finality" with respect to judgments on the primary claims in suit should prevent this Court from extending *Roberts v. Askew* to the collateral and independent claim for attorney's fees at issue in this suit.

Although the foregoing constitutes the bulk of our argument here, we have devoted the remainder of our brief to exploration of the numerous conflicting and confusing decisions on this point which have been rendered by the District Courts of this state. Our purpose in doing so is twofold. First, we hope to convince the Court that it could neatly and cleanly resolve numerous conflicts in a very confusing area of the law by

taking the simple, salutary step of extending the principle of *Roberts v. Askew* to prevailing-party attorney's fees. Second, we have explored the numerous conflicting and confusing decisions with a view toward obtaining the benefit of one of them, in the event that this Court is unwilling to extend the principle of *Roberts v. Askew* to prevailing-party attorney's fees. Because exploration of the numerous conflicting and confusing decisions is necessarily tedious, we will not summarize our discussion of each of the decisions at this point in the brief.

We urge the Court in conclusion to replace the procedural minefield which confronts the litigants of this state seeking post-judgment prevailing-party attorney's fees with a simple general rule, based upon *Roberts v. Askew*, which gives the trial courts of this state continuing jurisdiction to award prevailing-party attorney's fees without the need to recite the magic words, "jurisdiction is reserved". Such a rule would be perfectly consistent with *Roberts v. Askew*; it will follow the federal rule announced in *White v. New Hampshire Department of Employment Security*; it will be consistent with this Court's recent decision in *Wiggins v. Wiggins*; it will do no violence to the concept of "finality" with respect to final judgments entered on the primary claims in suit; it will ensure that substantive rights are not sacrificed by missteps in form; and it will cleanly and neatly resolve a very confusing area of the law with a simple rule which is perfectly logical and makes eminently good sense. If the Court adopts our suggestion, the decision of the District Court under review should be quashed.

IV.
ARGUMENT

THE TRIAL COURT DID NOT LACK JURISDICTION TO ENTERTAIN THE PLAINTIFFS' MOTION FOR "PREVAILING-PARTY" ATTORNEY'S FEES, FILED PURSUANT TO §768.56, FLA. STAT. (1981)--WHERE THE PLAINTIFFS' COMPLAINT CONTAINED A DEMAND FOR ATTORNEY'S FEES, WHERE THE "FINAL JUDGMENT" ON THE MAIN CLAIMS DID NOT DISPOSE OF THE CLAIM FOR ATTORNEY'S FEES, AND WHERE THE PLAINTIFF'S MOTION FOR ATTORNEY'S FEES WAS FILED THREE DAYS AFTER THE "FINAL JUDGMENT" ON THE MAIN CLAIMS BECAME "FINAL".

A. The Problem.

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" attorney's 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.[1/]

One of the approaches is represented by the decision under review. According to the District Court, because there is no rule of civil procedure generally governing the filing of post-judgment motions for prevailing-party attorney's fees, a trial court must write its own rule on a case-by-case basis, and create continuing jurisdiction to award prevailing-party fees by reciting the magic words "jurisdiction is reserved" in the "final judgment" disposing of the main claims. If it fails to do so, then the party entitled to fees must attack the omission in the order by a Rule 1.530 (or Rule 1.540) motion and obtain inclusion of the magic words, or appeal the favorable final judgment for its mere failure to reserve jurisdiction--all for the sole purpose of buying time to prevent the trial court's jurisdiction from lapsing, so that substantive rights granted by statute can be protected. All of that seems to us to be a poor use of judicial resources and a terrible elevation of form over substance, and would be entirely unnecessary if this Court announced a simple general rule of procedure--that a trial court has post-judgment jurisdiction to entertain a motion for prevailing-party attorney's fees filed within a reasonable time after judgment.

[1/] One court recently described this area with some frustration as "troubled waters". *Grasland v. Taylor Woodrow Homes, Ltd.*, 460 So.2d 940, 942 (Fla. 2nd DCA 1984).

The District Court was apparently reluctant to make such an announcement itself because of its perception that the "final judgment" on the main claims should be the "final" order on all claims. That makes no sense to us, however. If a trial court can itself sever out issues for resolution after entry of a "final judgment" by simply reciting three magic words, then there is no reason why a general rule of procedure cannot do the same thing. In addition, the rules of procedure already contemplate continuing jurisdiction to entertain various types of collateral post-judgment motions, and adding one more motion to that continuing jurisdiction by a general rule can certainly do no violence to the concept of "finality" with respect to the "final judgment" on the main claims. In our judgment, no good reason can be advanced why a claim for prevailing-party attorney's fees cannot be treated as a "collateral and independent claim" which a trial court may entertain post-judgment, notwithstanding that the "final judgment" on the main claims has become final, and without affecting the "finality" of that judgment in any way. As noted above, there are many decisions which are in disagreement with the decision under review, and which reach this logical conclusion in a bewildering variety of ways.

B. The Solution.

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 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

[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), *review denied*, 451 So.2d 849 (Fla. 1984) (same).

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 been 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 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*, and we urge it to do so. 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. This Court may already have done that in a recent decision, which we will discuss in a moment. For the moment, however, we think it would be helpful to the Court as background to know how the federal courts have approached the problem under the federal rules, upon which Florida's rules of procedure have consistently been bottomed.

C. The Federal Solution.

Until recently, the several federal courts of appeals had split three ways on the problem presented by the instant case. One line of authority had held that prevailing-party attorney's fees had to be sought by a "motion to alter or amend judgment" filed within 10 days after entry of judgment, and a motion filed outside that period was untimely. Another line of authority had held that prevailing-party attorney's fees were in the nature of "costs", and that trial courts had continuing jurisdiction to entertain motions for prevailing-party attorney's fees made within a "reasonable time". A third

line of authority had held that a post-judgment motion for prevailing-party attorney's fees raises a "collateral and independent claim" which a trial court has continuing jurisdiction to entertain within a reasonable time, notwithstanding that the litigation of the main claims may have been concluded with finality. This three-way conflict was recently resolved by the 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). *White* adopts the third position noted above, and holds that, like "costs", a post-judgment motion for prevailing-party attorney's fees raises a "collateral and independent claim" which a trial court has continuing jurisdiction to entertain within a reasonable time, notwithstanding that the litigation of the main claims may have been concluded with finality. *White* therefore reaches essentially the same conclusion with respect to prevailing-party attorney's fees that this Court reached with respect to prevailing-party costs in *Roberts v. Askew*--and *White* therefore fully supports our request here that *Roberts* be extended to prevailing-party attorney's fees as well.

D. This Court's Most Recent Decision on the Point.

As noted previously, this Court may already have extended the principle of *Roberts v. Askew* to the question of prevailing-party attorney's fees. In *Wiggins v. Wiggins*, 446 So.2d 1078 (Fla. 1984), 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 effort 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*.[3/] *Wiggins* is consistent with both *Roberts v. Askew* and *White v. New Hampshire Department of Employment Security*, and clearly points the way to extension of *Roberts v. Askew* to the problem presented by the instant case.

E. The District Court's Apparent Concern.

The District Court was apparently concerned below that a "final judgment" should be a "final judgment", and fearful that open-ended jurisdiction to award prevailing-party attorney's fees would somehow compromise the notion that all litigation must come to an end at some time. The concern was misplaced, however, for three reasons. First (as the District Court recognized), an individual trial court can retain jurisdiction to award prevailing-party attorney's fees, without doing any violence to the concept of "finality" with respect to the judgment on the main claims, merely by reciting the magic words "jurisdiction is reserved" in the final judgment on the main claims.[4/] If a trial court can do that on a case-by-case basis without doing any violence to the concept of "finality" with respect to the judgment on the main claims, then a judicial rule creating post-judgment jurisdiction in all cases without the need for recitation of the magic words

---

[3/] It is also worth noting that the three decisions relied upon by the District Court below involve dissolution proceedings. Because this Court's decision in *Wiggins* interprets the dissolution attorney's fee statute, it would appear that *Wiggins* has implicitly overruled the three decisions relied upon by the District Court below.

[4/] And it is clear that a trial court may award attorney's fees, notwithstanding that its judgment on the primary claims has become "final" because of the passage of time, where the "final judgment" reserves jurisdiction for their award. *See, e. g., Smith v. Smith*, 382 So.2d 1242 (Fla. 2nd DCA), *dismissed*, 392 So.2d 1379 (Fla. 1980); *Fernandez v. Alonso*, 375 So.2d 8 (Fla. 3rd DCA 1979); *Chipola Nurseries, Inc. v. Division of Administration, Department of Transportation*, 335 So.2d 617 (Fla. 1st DCA 1976). *Cf. First Development, Inc. v. Bemaor*, 449 So.2d 290 (Fla. 3rd DCA 1983).

would do no violence to the concept of "finality" with respect to the judgment on the main claims, because it amounts to exactly the same thing. One is merely a case-by-case approach (which creates a potential trap for the unknowledgeable or unwary); the other a general rule covering all cases (which ensures that substantive rights are not sacrificed to improper form).

Second, the trial court's continuing jurisdiction to award prevailing-party "costs" under *Roberts v. Askew* has done no violence to the concept of "finality" with respect to the judgment on the main claims, so simply including prevailing-party attorney's fees within the trial court's continuing jurisdiction to award costs will do no violence to the concept of "finality". Third, as the United States Supreme Court recognized in *White v. New Hampshire Department of Employment Security*, the concept of "finality" with respect to the judgment on the main claims is simply not implicated, because a claim for prevailing-party attorney's fees (like costs) is considered to be a "collateral and independent claim" which can be entertained independently of the main claims in suit. There is therefore no reason why the concept of "finality" with respect to judgments on the primary claims in suit should prevent this Court from extending *Roberts v. Askew* to the collateral and independent claim for attorney's fees at issue in this suit.[5/]

F. The Bewildering Puzzle of the Decisional Law.

Although we could probably end our argument at this point, we think we would be remiss in our duty to this Court if we did not explore the Florida case law on this point at

---

[5/] Adoption of the rule we propose will have an additional salutary effect. It will eliminate the current confusion concerning whether a trial court has jurisdiction to award attorney's fees during the pendency of an appeal of the "final judgment" on the main claims, or whether the prevailing party must obtain a relinquishment of jurisdiction for that purpose. That is a common problem, because an extended hearing is ordinarily necessary to determine the amount of prevailing-party fees, and it is unusual to obtain such a hearing before the losing party must file his notice of appeal of the "final judgment" on the main claims. Adoption of the rule we propose would therefore simplify a very confusing area of transition between trial courts and District Courts and reduce motion practice in the District Courts considerably.

least briefly. For the Court's edification, we will therefore examine some of the decisions which have grappled with this problem. We think the Court will find them puzzling at best--illogical and irreconcilably inconsistent at worst. Some of them will arguably support the defendants' position here (although unenthusiastically, and in circumstances legally distinguishable from the type of prevailing-party attorney's fee award in issue here). Others will support our position here. The picture which will emerge will be in considerable disarray, and no clear answer to the issue presented here will appear.

The reason for the disarray, we think, is that appellate courts have recognized that a trial court *ought* to have post-trial jurisdiction to entertain a motion for statutory prevailing-party attorney's fees, since the matter can only be decided post-trial, and that its jurisdiction should not depend upon formal recitation of the magic words "jurisdiction is reserved"--but that the period following entry of a so-called "final judgment" on the primary claims in suit is a legal "limbo" (or perhaps more appropriately, a procedural minefield), in which no clear rules have been devised to allow such an announcement with comfort. As a result, appellate courts have given lip service to the propositions advanced by the District Court below, and have sometimes applied them; for the most part, however, the Courts have strained to avoid the result reached by the District Court below, and have avoided that result by a number of artificial and illogical devices, some of which can only charitably be described as legal "fictions". In short, and to be frank, the decisional law in this area is a mess.

Our primary purpose in reviewing the decisions on the point is to convince this Court that it could neatly and cleanly resolve numerous conflicts and a very confusing area of the law by taking the simple, salutary step of extending the principle of *Roberts v. Askew* to prevailing-party attorney's fees, as we have suggested (and as the United States Supreme Court did in *White v. New Hampshire Department of Employment Secur-*

ity). There is a secondary purpose in our intended exploration of the decisional law, however. If this Court is unwilling to extend the principle of *Roberts v. Askew* to prevailing-party attorney's fees and simplify the entire mess in that fashion, we respectfully urge it to adopt at least one of the legal "fictions" which have been utilized in the past to reach essentially the same result. Whichever course is adopted, the decision sought to be reviewed should be quashed.

In one of the decisions relied upon by the District Court, *Oyer v. Boyer*, 383 So.2d 717 (Fla. 4th DCA 1980), the final decree in a dissolution action did not reserve jurisdiction for an award of attorney's fees. The wife moved for an award of attorney's fees after the decree had become "final". The District Court held that jurisdiction had lapsed, and that in the absence of a reservation of jurisdiction, the trial court had no jurisdiction to award the wife attorney's fees. The decision was bottomed upon *Frumkes v. Frumkes*, 328 So.2d 34 (Fla. 3rd DCA 1976), upon which the District Court in this case also relied.

Although both *Oyer* and *Frumkes* appear to support the District Court's conclusion at first blush (provided, of course, that *Wiggins* does not overrule both of them), there is a significant difference between those cases and this case. In a dissolution proceeding, attorney's fees are intended to equalize the relative positions of the parties, and they are part of the "property" to be distributed in the final decree. Unlike the fees awarded in the instant case, they are not awarded to the "prevailing party", and their award therefore does not depend upon the outcome of the main claims. As a result, they cannot be analogized to "costs", and they arguably belong in the final decree. The "prevailing party" attorney's fees involved in this case *can* be analogized cleanly and neatly to "costs", however, and they cannot be included in the final judgment on the main claims (unless entry of the judgment is delayed for resolution of post-trial motions which will determine the "prevailing party" and for the attorney's fee claim--an unattractive and

detrimental option, since interest begins to run only when the judgment is entered).

We therefore think that *Oyer* and *Frumkes* involve quite a different problem then the one presented here--and we are not alone in that belief:

> The purpose of an award of attorneys' fees in proceedings for dissolution of marriages or enforcement or modification of proceedings attendant upon the marital relationship, . . . is to equalize the abilities of the parties to secure competent legal counsel. [Citation omitted]. The award is not predicated upon being the successful party in the litigation and is thus not dependent on the ultimate outcome of the appeal. In the latter case, the attorneys' fees award is inextricably tied to the pending appeal. While it cannot be accurately said that the fee award interferes with the appellate jurisdiction under these circumstances, *but see Wilson Realty, Inc. v. David*, 369 So.2d 75 (Fla. 2nd DCA 1979), it can be said that the fee award is premature.
>
> The holding in *Wilson Realty, Inc. v. David, supra* is suspect in light of *Roberts v. Askew supra*, n. 3. In *Roberts*, the court stated that the trial court has jurisdiction to enter a cost award during the pendency of an appeal. Since the recovery of costs, even as the recovery of attorneys' fees, where provided for, is dependent (in a non-matrimonial matter) on the recovery of a favorable judgment, . . . it would appear that both costs and attorneys' fees can be awarded during the pendency of an appeal . . . .

Bailey v. Bailey, 392 So.2d 49, 52 n.7 (Fla. 3rd DCA 1981).[6/] If the Third District is correct that fees in dissolution proceedings are different than prevailing-party fees which depend upon recovery of a favorable judgment, there is good reason for distinguishing the type of fee awards involved in *Oyer* and *Frumkes* from the type of fee award involved in this case; there is good reason for finding *Oyer* and *Frumkes* inapposite here; and there is good reason for holding that the rule announced in *Roberts v. Askew* is both more logical and more sensible where prevailing-party attorney's fees are concerned.

[6/] Incidentally, the Second District has been forced to recede somewhat from *Wilson Realty*. *See Smith v. Smith*, 382 So.2d 1242 (Fla. 2nd DCA), *dismissed*, 392 So.2d 1379 (Fla. 1980), receding from *Judge v. Judge*, 370 So.2d 833 (Fla. 2nd DCA 1979), which followed *Wilson Realty*. That trilogy of cases, in itself, is demonstration enough of the terrible confusion which is endemic to this area of the law.

McCallum v. McCallum, 364 So.2d 97 (Fla. 4th DCA 1978), upon which the defendants may also rely, arises out of another dissolution of marriage proceeding. In that case, the wife's petition for modification of a dissolution decree "did not include . . . a request for attorneys' fees". 364 So.2d at 97. A decree was entered in the modification proceeding in April, which was not appealed. A motion for attorney's fees was filed in August, which the trial court refused to entertain. The District Court affirmed that determination on the ground that the trial court had no jurisdiction to entertain the motion, relying once again upon *Frumkes*. If *Frumkes* is distinguishable from this case for the reasons urged above, then *McCallum* is distinguishable from this case for the same reasons.

McCallum does not really hurt our position here, however, because the District Court's conclusion in *McCallum* was rested on a single (and singular) ground: ". . .the absence of a request for the fees [in the petition for modification] left the Court without jurisdiction to order same". 364 So.2d at 98. In other words, because the petition contained no prayer for attorney's fees, the decree adjudicated *all* the claims in suit and was therefore clearly a "final" decree. The clear implication of this holding is that the trial court would have had jurisdiction to entertain the motion for attorney's fees if the petition *had* sought attorney's fees, because then the decree would not have adjudicated *all* the claims and would not have been "final". In the instant case, the plaintiff's complaint *did* contain a prayer for attorney's fees, and the so-called "final judgment" did *not* adjudicate that claim. *McCallum* is therefore not inconsistent with the trial court's determination in the instant case that it had jurisdiction to entertain the plaintiffs' motion for attorney's fees.

Other courts have resorted to a similar device to avoid the result reached by the District Court in this case. In *Chipola Nurseries, Inc. v. Division of Administration, Department of Transportation*, 335 So.2d 617 (Fla. 1st DCA 1976), for example, the trial

court entered a "final judgment" which did not adjudicate the plaintiff's costs, attorney's fees, or interest. After this order became "final", the plaintiff moved for interest and attorney's fees. The trial court refused to entertain the motion on the ground that it had lost jurisdiction over the cause. The District Court reversed, holding, in essence, that the so-called "final judgment" was not really a final judgment, but was merely an interlocutory order--since it did not dispose of all of the issues in the case, leaving nothing further to be done but the execution of the judgment.[7/] A number of decisions were cited for the well-settled proposition that an order is not a "final judgment" unless it adjudicates all of the issues in the case, and leaves nothing further to be done but the execution of the judgment. *See, e. g., Howard v. Ziegler*, 40 So.2d 776 (Fla. 1949); *Gore v. Hansen*, 59 So.2d 538 (Fla. 1952); *Chan v. Brunswick Corp.*, 388 So.2d 274 (Fla. 4th DCA 1980). A similar conclusion was reached in *Hyman v. Hyman*, 310 So.2d 378 (Fla. 2nd DCA 1976), *cert. discharged*, 329 So.2d 299 (Fla. 1976).

The same thing can be said in the instant case, of course. The plaintiffs' complaint sought attorney's fees, and that issue was not adjudicated in the "final judgment". It remained for disposition post-trial--and, we remind the Court, it could only be determined post-trial. If *Chipola Nurseries* is correct, the so-called "final judgment" entered below is not a *final* judgment at all, because it did not dispose of all the issues in the case, leaving nothing further to be done but execution upon the judgment. If that so-called "final judgment" is not really a final judgment, then the trial court clearly had jurisdiction to entertain the plaintiffs' motion for attorney's fees. We think application of the rule announced in *Roberts v. Askew*, would be more logical and much simpler than the technical device resorted to by the First District in *Chipola Nurseries*, but if this

---

[7/] Although the "final judgment" at issue in *Chipola Nurseries* contained a "reservation of jurisdiction", it is reasonably clear from the Court's opinion that its decision was not rested on those magic words, but was rested solely upon the ground discussed in the text.

Court thinks otherwise, at the very least, the rule in *Chipola Nurseries* (which appears to be supported by the District Court's decision in *McCallum*) should be applied here.

There are several other decisions relevant to the issue. In *Hartford Accident & Indemnity Co. v. Smith*, 366 So.2d 456 (Fla. 4th DCA 1978), for example, the District Court reversed a post-trial award of attorney's fees for essentially the reasons advanced by the District Court below. Once again, however, it based the reversal on a single (and singular) ground:

> Since the statute which provides attorneys fees in cases such as this requires the award of attorneys fees to be included in the judgment the court had to make the fees a part of the judgment or at least reserve jurisdiction to award the fees upon motion and proof.

366 So.2d at 457. Although the result in *Hartford Accident* is consistent with the defendants' position here, the ground upon which that result is based is perfectly consistent with our analysis of *Oyer* and *Frumkes*, where the attorney's fees *belonged* in the final decree.

The ground upon which the result in *Hartford Accident* is based is also perfectly consistent with our position that prevailing-party attorney's fees, which can only be awarded post-trial, deserve different treatment than attorney's fees which belong in the final judgment. In this case, §768.56 does *not* require the "attorney's fees to be included in the judgment"--and the clear implication of *Hartford Accident* is therefore that the trial court *did* have jurisdiction to entertain the plaintiffs' motion for attorney's fees. Once again, we think application of the rule announced in *Roberts v. Askew* would be more logical and much simpler than the technical distinction drawn in *Hartford Accident* between statutes requiring an award of attorney's fees to be included in the judgment, and statutes which contain no such requirement--but if this Court is not persuaded that *Roberts v. Askew* should be applied to this case, at the very least, the distinction drawn in *Hartford Accident* should save the attorney's fee award under attack here.

Hartford Accident also intimates that the result urged by the defendants here will not obtain in a case where a motion for attorney's fees is filed within the time provided for a motion for rehearing under Rule 1.530, Fla. R. Civ. P. It makes that intimation because it had to distinguish its prior decision in *Washington v. Rodgers*, 201 So.2d 636 (Fla. 4th DCA 1967), *cert. denied*, 211 So.2d 556 (Fla. 1968). In *Washington*, a "final judgment" was entered on August 12. On August 14, the plaintiff filed a motion for attorney's fees. No "authorized" Rule 1.530 motion was filed which would have prevented rendition of the judgment, and no appeal was taken from the final judgment. The final judgment in *Washington* should therefore have become "final" sometime before September 13, and the trial court should have lost jurisdiction on that date at the latest. The trial court entered an order on September 16, however, denying the plaintiff's motion for attorney's fees because the complaint had contained no prayer for attorney's fees. The District Court reversed, holding that the plaintiff was not required to plead his entitlement to prevailing-party attorney's fees, and it remanded for entry of an award of attorney's fees.[8/] Implicit in this conclusion is a determination that the trial court did have jurisdiction to grant the plaintiffs' motion for attorney's fees, because the motion had been filed within 10 days following entry of the judgment--and that implicit determination was explicitly recognized in the District Court's later decision in *Hartford Accident*.

With all due respect to the Fourth District, we think that conclusion is, at best, a legal "fiction", with no support in the law, and designed primarily to reach a reasonable

---

[8/] Other courts have also recently concluded that the pleadings need not contain a prayer for prevailing-party attorney's fees. *See, e.g., Autorico, Inc. v. Government Employees Ins. Co.*, 398 So.2d 485 (Fla. 3rd DCA 1981); *Ocala Music & Marine Center v. Caldwell*, 389 So.2d 222 (Fla. 5th DCA 1980). This development is an additional compelling reason for application of the rule announced in *Roberts v. Askew* to prevailing-party attorney's fees, since it would be silly to require a trial court to "reserve jurisdiction" to decide an issue not raised in the pleadings in order to have jurisdiction to rule on a post-trial motion for prevailing-party attorney's fees.

and practical conclusion which the Court apparently thought could be reached no other way. We say the conclusion is a "fiction", because only "authorized" Rule 1.530 motions suspend rendition of a judgment. *See* Rule 9.020(g), Fla. R. App. P. Motions for prevailing-party attorney's fees are not expressly "authorized" anywhere in the Rules of Civil Procedure, and they most certainly do not prevent a final judgment from becoming final. *See, e. g., State v. Mann*, 290 So.2d 1 (Fla. 1974); *Colin v. State Department of Transportation*, 423 So.2d 1020 (Fla. 4th DCA 1982); *Chan v. Brunswick Corp.*, 388 So.2d 274 (Fla. 4th DCA 1980). *Hartford Accident* and *Washington* therefore represent nothing more than the invention of a legal "fiction" to avoid the unreasonable and illogical result reached by the District Court in this case. We think application of the rule announced in *Roberts v. Askew* to the circumstances presented in cases like *Hartford Accident*, *Washington*, and this case would be much simpler, more logical, and clearly less "fictional".

A similar avoidance of the result reached by the District Court here can be found in its recent decision in *Law Realty, Inc. v. Harris*, 428 So.2d 712 (Fla. 4th DCA 1983). In that case, within 10 days after final judgment had been entered, the prevailing party filed a motion for attorney's fees, and the losing party filed a Rule 1.530 motion for rehearing. The District Court held that, "[u]nder these circumstances, we conclude that the trial court was possessed of jurisdiction to rule on the issue of attorney's fees". 428 So.2d at 712. That conclusion was undeniably correct, because the existence of the timely-filed Rule 1.530 motion suspended rendition of the final judgment. The Court did not bottom its holding on that single motion, however, and its conclusion appears to have been bottomed upon the motion for attorney's fees as well. As we have pointed out above, however, the motion for attorney's fees, by itself, could not suspend rendition of the judgment--and if the District Court meant to say in *Law Realty* that the motion for attorney's fees preserved the trial court's jurisdiction until it was determined, it clearly

resorted to the same legal "fiction" previously resorted to in *Hartford Accident* and *Washington.*

We have another observation to make about *Law Realty* which is pertinent to the issue presented here. Undoubtedly, the plaintiffs in the instant case could have delayed rendition of the "final judgment", as *Law Realty* suggests, by filing their motion for attorney's fees within 10 days of entry of the "final judgment", and by filing a Rule 1.530 motion directed to the "final judgment". However, a rule which requires a litigant to challenge a judgment with which he does not disagree, simply to delay its rendition in order to preserve its motion for attorney's fees, is clearly illogical, and represents form elevated to substance at its worst. Application of the rule announced in *Roberts v. Askew* would obviate the need to file an insincere Rule 1.530 motion simply to preserve a trial court's jurisdiction to consider a post-trial motion for prevailing-party attorney's fees, and we therefore commend it to the Court as a much simpler, more logical, eminently more reasonable method of dealing with the particular problem presented by the circumstances in this case.

There is another line of decisions in which the courts of this state have avoided the result reached by the District Court below by applying the rule of *Roberts v. Askew.* The rule has not been applied directly, however; it has been applied circuitously by first construing the attorney's fee statute in issue to equate attorney's fees with the "costs" of an action, and by then holding that *Roberts v. Askew* provides the necessary jurisdiction for their award. *See, e.g., Allen v. Estate of Dutton,* 384 So.2d 171 (Fla. 5th DCA), *review 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). While that is a fairly logical (but tortured) way to avoid the result reached by the District Court below, it would be far more logical and much simpler to apply the rule of *Roberts v. Askew* directly--and hold simply that a court which has post-trial jurisdiction

to tax prevailing-party costs without a formal "reservation of jurisdiction" also has post-trial jurisdiction to award prevailing-party attorney's fees without formal recitation of those magic words. The result in any given case would therefore not depend upon whether the legislative draftsmen couched the attorney's fee statute in the language of "costs", or wrote the statute without reference to the concept. That, in our judgment, would make much more sense, since the two things are perfectly analogous in every respect (except, as noted previously, where the attorney's fees sought are part of the main action, and ought to be adjudicated at the final hearing). We commend that course to this Court in this case.

Even if this Court is not persuaded that the rule announced in *Roberts v. Askew* ought to be applied directly to the instant case, at the very least, the circuitous routes taken by the *Allen*, *Grasland*, and *Jeffcoat* courts should be taken here, because §768.56 is susceptible of the type of construction given the statutes at issue in all three cases. The statute at issue in *Allen* and *Grasland*--§57.105, Fla. Stat. (1981)--does not *equate* attorney's fees with "costs". Instead, it is couched in the *identical* language contained in the statute at issue here, §768.56.[9/] The *only* reason given in *Allen* and *Grasland* for reading this statute 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". In our judgment, that is a slim (and clearly artificial) reason for treating two identically worded statutes differently, as the defendants in this case insist they must be treated.

Similarly, the *Jeffcoat* court did not equate attorney's fees with "costs". Indeed, it could not, because §501.2105, Fla. Stat. (1981), treats the two concepts separately, stating that "the prevailing party, after judgment in the trial court and exhaustion of all

---

[9/] 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 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 . . .".

appeals, if any, shall receive his reasonable attorney's fees and costs from the non-prevailing party". The District Court held that, because the statute expressly granted the trial court the power to award a prevailing party attorney's fees after entry of final judgment, it had jurisdiction to award attorney's fees in circumstances similar to those presented in this case.[10/] In our judgment, the statute at issue in *Jeffcoat* is legally indistinguishable from the statute at issue in this case. Although §768.56 does not contain the words "after judgment", it is perfectly clear from §768.56 that it is meant to apply only "after judgment", because it can only be implemented after determining which party is the "prevailing party".[11/]

Moreover, unlike the statutes at issue in *Allen*, *Grasland*, and *Jeffcoat*, §768.56 is much more susceptible to a construction that attorney's fees awarded under the statute are in the nature of "costs", because §768.56 states three times that the attorney's fees authorized by the statute are to be "taxed" against the non-prevailing party. In our legal lexicon, at least, attorney's fees are normally "awarded", and only "costs" are "taxed". If that is true, then §768.56 contemplates that the attorney's fees which it authorizes are in

---

[10/] A subsequent conclusion of the *Jeffcoat* court reinforces our conviction that the rule announced in *Roberts v. Askew*, makes much more sense in this context:

> Of course, this is not to say that a trial court automatically retains jurisdiction under section 501.2105 until the motion and affidavit are finally filed. Instead, it means that a trial court may assume jurisdiction again once the motion and affidavit are filed.

436 So.2d at 1044. This curious legal tap-dance would have been altogether unnecessary if it were simply acknowledged that the rule announced in *Roberts v. Askew* applies to prevailing-party attorney's fee awards as well.

[11/] That is clearly the case when an action is tried non-jury. We think it is also the case when an action is tried to a jury, because the jury's verdict does not necessarily determine the "prevailing party" in the action. The real "prevailing party" can only be known after all post-trial motions have been determined, and the "final judgment" is therefore the only true arbiter of which party prevailed in the action. A prevailing-party attorney's fee award must therefore necessarily be entered "after judgment".

the nature of "costs", subject to being "taxed" under the rule announced in *Roberts v. Askew*. If we are unable to persuade this Court to apply the rule announced in *Roberts v. Askew*, at the very least, *Allen*, *Grasland*, and *Jeffcoat* fully support reversal of the District Court's decision below.[12/]

The most recent decision on the question is no less confusing than its predecessors, but it comes closer to applying the rule announced in *Roberts v. Askew* directly than any of the decisions discussed above. We quote the relevant portion of the decision in its entirety:

> 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 language 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."

12/ It is apparent in *Allen* and *Grasland* (and implicit in *Jeffcoat*) that the courts were reluctant to apply the rule announced in *Roberts v. Askew* directly to attorney's fee awards only because of the principle of *State ex rel. Royal Insurance Co. v. Barrs*, 87 Fla. 168, 99 So. 668 (1924), upon which the defendants will no doubt rely here. *Barrs* dealt with an altogether different subject, however, and holds only that attorney's fees cannot be considered as "costs" for purposes of determining whether a claim meets or exceeds the monetary jurisdictional limits of a court (which are defined by excluding "costs"). Our proposal that the rule announced in *Roberts v. Askew* be applied to attorney's fees as well as "costs" is not, in our judgment, inconsistent with *Barrs* in any respect. We are not suggesting that prevailing-party attorney's fees and prevailing-party "costs" are the same thing; we are only suggesting that the post-trial jurisdiction of the trial court ought to be the same with respect to both of them--and that suggestion is not pretermitted by *Barrs* in any way. We therefore think the apparent reluctance of the *Allen* and *Grasland* courts (and the implicit reluctance of the *Jeffcoat* court), because of *Barrs*, was unnecessary.

> *Theodorou v. Burling*, 438 So.2d 400 (Fla. 4th DCA 1983). 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.

Young v. Altenhaus, 448 So.2d 1039, 1041 (Fla. 3rd DCA 1983), *quashed on other grounds*, 10 FLW 252 (Fla. May 2, 1985).[13/]

The first, third and fourth "reasons" given by the court in *Young* exist on the record in this case. The second does not, because the plaintiffs' motion for attorney's fees was not filed before entry of the "final judgment" below. However, it we are correct that a motion for attorney's fees does not suspend rendition of a final judgment, then this second reason is simply a "fiction", not a legally sufficient reason--and all of the legally sufficient reasons stated in *Young* therefore exist in this case. We think it would have been far more logical and straightforward for the *Young* court to have simply applied the rule announced in *Roberts v. Askew* to prevailing-party attorney's fee awards, since it did so in practical effect--and we urge that course upon this Court to clear the clutter and confusion which presently obscures this area of the law. If this Court is unpersuaded to do that, however, at the very least, *Young v. Altenhaus* requires reversal of the decision challenged here, and we will accept that resolution of this controversy if necessary.

Finally, to complete the spectrum, we offer two recent decisions of the Fifth and First Districts. In *Ruby Mountain Construction & Development Corp. v. Raymond*, 409 So.2d 525 (Fla. 5th DCA 1982), a "final judgment" was entered and appealed. During the pendency of the appeal, the trial court entertained and granted a post-trial motion for

---

13/ This passage does not hold that any one of these "reasons", by itself, would be sufficient to create post-trial jurisdiction to award "prevailing party" attorney's fees. However, the passage also does not hold that all four of these "reasons" must exist before a court has such jurisdiction. We are therefore unable to explain exactly what the court meant, and we leave the unravelling of that enigma to the Court. At the very least, however, this peculiar aspect of *Young* does emphasize our point that courts recognize that the result urged here by the defendants makes no sense, and that they will strain to avoid it by whatever means seem handy at the time.

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 v. Smith*, 397 So.2d 337 (Fla. 1st DCA 1981), 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. In short, it would appear that both the Fifth District and the First District have found *Roberts v. Askew* applicable to prevailing-party attorney's fee awards--and, once again, we urge this Court to do so as well.

G. Conclusion.

It should be apparent at this point that, unless a trial court inserts the magic words "jurisdiction is reserved" in its "final judgment" (or a litigant files an insincere and frivolous Rule 1.530 motion to prevent the judgment's rendition),[14/] a litigant is faced with nothing but confusion in the decisional procedural law when determining how to collect the prevailing-party attorney's fees to which he has become entitled by the "final judgment" in his favor. Neither the Rules of Civil Procedure nor the statutory law provide the litigant with any assistance in how to proceed. The slightest misstep may or may not

---

14/ The filing of such a motion, of course, would subject the movant to an award of attorney's fees under §57.105, Fla. Stat. (1981) (the "frivolous claim" statute). *See Ruby Mountain Construction & Development Corp. v. Raymond, supra.* The trial court clearly could not "reserve jurisdiction" to entertain the §57.105 motion. Must the §57.105 motion be filed and determined before the Rule 1.530 motion is determined? The answer is "yes" (which means the frivolity of the Rule 1.530 motion must be decided before it is ruled upon), unless the more sensible rule announced in *Roberts v. Askew* applies.

sacrifice those substantive rights, depending upon the willingness of an appellate court to invent some artificial device or create a legal "fiction" to save those substantive rights. In our judgment, the litigants and attorneys of this State deserve a more logical approach to the problem and a simple rule to govern their conduct and the trial court's jurisdiction.

We imagine that the litigants of this state were once faced with the same hodge-podge of conflicting rationales and cases when seeking the taxation of prevailing-party "costs". This Court resolved those problems and simplified the entire matter of "costs" cleanly and neatly in *Roberts v. Askew*, and the matter of prevailing-party attorney's fees (which is at least a twin sister of prevailing-party "costs") is badly in need of the same cure. There is nothing in *Roberts v. Askew* (or in any other Supreme Court decision we have been able to find) which prevents application of the same rule to prevailing-party attorney's fee awards. The rule announced in *Roberts v. Askew* has done no violence to the concept of "jurisdiction" in the area of taxation of "costs", and it will do no violence to the concept of "jurisdiction" in the area of prevailing-party attorney's fees. The outer limit of the trial court's post-trial jurisdiction is, after all, a creature of judicial decision or rule only, and this Court is therefore fully empowered to bring some sense to this illogical and confused area of the law.

We therefore respectfully urge this Court to do both the litigants and the courts of this state a tremendous favor by announcing simply--as the United States Supreme Court did in *White v. New Hampshire Department of Employment Security*, and as this Court itself may already have announced in *Wiggins*--that a trial court which has continuing jurisdiction to award prevailing-party "costs" has the same continuing jurisdiction to award prevailing-party attorney's fees, with or without a reservation of jurisdiction in the "final judgment" on the main claims which determines which litigant is the "prevailing party". The announcement of such a rule will do no violence to the concept of "finality" with respect to the judgment entered on the main claims, because prevailing-party

attorney's fees can easily be considered a "collateral and independent claim", just as "costs" are presently considered after *Roberts v. Askew*. The announcement of such a rule will also effect no substantial change in the law, since individual trial courts are now at liberty to announce such a rule in every case on a case-by-case basis simply by reserving jurisdiction to award attorney's fees, and all that we are asking is for this Court to create a general rule which does exactly the same thing, but which covers *all* cases--including those cases in which a trial court forgets to include the magic words in the final judgment disposing of the main claims. If this Court is persuaded to make such an announcement, the District Court's decision should be quashed. If it is not persuaded to make such an announcement, however, we respectfully request in the alternative that, at the very least, it resort to one of the artificial devices or legal "fictions" to which the courts have resorted in the past, or follow *Young v. Altenhaus, supra*, and quash the decision for that alternative reason.

V.
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* does 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. We respectfully urge the Court to extend the principle of *Roberts v. Askew* to the problem presented by the instant case; quash the decision of the District Court below; and remand the case with directions to affirm the plaintiffs' judgment for attorney's fees.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 18th day of June, 1985, to: William D. Ricker, Jr., Esq., FLEMING, O'BRYAN & FLEMING, P.O. Drawer 7028, Ft. Lauderdale, Fla. 33338; George E. Bunnell, Esq., BUNNELL, DENMAN & WOULFE, P.A., P.O. Drawer 22988, Ft. Lauderdale, Fla. 33335; Ellen Mills Gibbs, Esq., GIBBS & ZEI, P.A., 224 Southeast Ninth Street, Ft. Lauderdale, Fla. 33316; and to Leonard M. Bernard, Jr., Esq., BERNARD & O'BRIEN, P.O. Drawer 14126, Ft. Lauderdale, Fla. 33302.

Respectfully submitted,

SPENCE, PAYNE, MASINGTON, GROSSMAN
& NEEDLE, P.A.
Suite 300, Grove Professional Bldg.
2950 S.W. 27th Avenue
Miami, Fla. 33133
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

Attorneys for Petitioners

BY: Joel D. Eaton
JOEL D. EATON