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 JENNIE POORE, CRNA,

Respondents.

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

PETITIONERS' REPLY BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE AND FACTS

The defendants have accused us of attempting to "mislead" the Court by "misinterpreting" §768.56 as a statute requiring "that the fees be determined and awarded by the trial court after the main claims were tried to the jury and resolved". We plead not guilty. The statute requires the trial court to award attorney's fees to the "prevailing party" in a medical malpractice action--and the prevailing party simply cannot be determined until the main claims have been tried and resolved. Our paraphrase of the statute is therefore perfectly correct--and the defendants are therefore simply wrong in their uncomplimentary insistence to the contrary.

II.
ISSUES PRESENTED

Our initial brief raises a single issue, which we stated as follows:

> A. 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".

The defendants have raised a second issue in their answer brief, which they have stated as follows:

> B. 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.

III.
ARGUMENT

> A. 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 PLAINTIFFS' MOTION FOR ATTORNEY'S FEES WAS FILED THREE DAYS AFTER THE "FINAL JUDGMENT" ON THE MAIN CLAIMS BECAME "FINAL".

Because our initial brief contains an adequate response to the defendants' argument, our reply will be brief. First, we take issue with the defendants' reading of *Roberts v. Askew*, 260 So.2d 492 (Fla. 1972). According to the defendants, the expansive language of this Court's decision in *Roberts*--which grants trial courts continuing jurisdiction to enter a prevailing party cost judgment within a reasonable time after entry of a final judgment on the main claims--applies only where a trial court has specifically recited the magic words necessary to reserve jurisdiction to tax costs. *Roberts*, however, says no such thing--nor has it ever been construed to say such a thing. In fact, when the defendants' reading of *Roberts* has been urged upon the District Courts of this state, it has been consistently rejected. *See, e. g., 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).

The Court is capable of reading *Roberts*, of course, and we leave that task to the Court--confident that it will conclude that we have read *Roberts* correctly. Fairly read, *Roberts* is simply Florida's logical counterpart to Rules 54(d) and 58 of the Federal Rules of Civil Procedure--which create post-judgment jurisdiction to entertain a "collateral and independent claim" for prevailing-party costs.[1/] The defendants are therefore

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[1/] It is simply inconsequential to the issue presented here that Rule 54(d) initially provides that costs "may be taxed by the Clerk", because the Clerk's action is subject to review under Rule 54(d) by a federal trial court--and federal trial courts therefore clearly have continuing jurisdiction to entertain claims for prevailing-party costs after entry of final judgment on the main claims.

simply wrong that Florida law is out of step with federal law, and that this Court may not harmonize the two further by following *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed.2d 325 (1982), in the circumstances presented here.[2/] Once again, we respectfully submit that the federal approach to the procedural problem presented here has much to commend it in terms of simplification of judicial administration and preservation of substantive rights, and we urge this Court to follow the United States Supreme Court's lead.

We find the remainder of the defendants' argument to be somewhat superficial and relatively unresponsive to our position. Although the defendants insist that the decisional law in this area is harmonious, it clearly is not--as even a cursory reading of the decisions cited in our initial brief will reveal. In addition, of course, the face of the decision sought to be reviewed here itself recognizes conflict in the law with its "*but see*" citation to *Young v. Altenhaus*, 448 So.2d 1039 (Fla. 3rd DCA 1983), *quashed on other grounds*, 10 FLW 252 (Fla. May 2, 1985). Neither can this Court's decision in *Wiggins v. Wiggins*, 446 So.2d 1078 (Fla. 1984), be finessed as an aberration designed to create jurisdiction only where a voluntary dismissal has been taken. Jurisdiction is jurisdiction. If a trial court has continuing jurisdiction to award attorney's fees after a voluntary dismissal has divested it of jurisdiction over the main claims, then it should have the same jurisdiction where it has been divested of jurisdiction over the main claims for other reasons. Neither, as we thought we made clear in our initial brief, is the notion of "finality of judgments" implicated in any way by our proposal here. In fact, what we have proposed is already routinely done in the trial courts of this state, as the defendants

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[2/] The defendants are also wrong that *White* turns upon the fact that the statute in issue there provided that fees shall be awarded as part of the costs. The Supreme Court expressly rejected a line of authority which had relied upon that language to create post-judgment jurisdiction to award attorney's fees, and adopted instead another line of authority holding that a motion for prevailing party attorney's fees raises a "collateral and independent claim" which a trial court has continuing jurisdiction to entertain.

have themselves recognized. A "final judgment" disposing of the main claims is entered, and then separate judgments are entered on the collateral and independent claims for prevailing-party costs and fees--and no one has ever suggested that this two-step procedure destroys the "finality" of the judgment on the main claims.

In the final analysis, there is only one difference between the two procedures proposed here for effectuating these successive judgments. The defendants insist that each circuit judge must establish jurisdiction to award prevailing-party cost and attorney's fee judgments on a case-by-case basis, by the mechanical insertion of the magic words "jurisdiction is reserved" in the judgment on the main claims. In contrast, we propose the same process, with only a minor modification--that the magic words "jurisdiction is reserved" be inserted in every judgment entered by the trial courts of this state by a general rule applicable to all cases--like the general rule which exists in the federal system. Reduced to its essentials, the question really before the Court is which of the two procedures makes more sense from the standpoint of judicial administration. We think our proposed procedure wins hands down.

Consider the defendants' procedure. According to the defendants, if the trial court fails to recite the magic words preserving the prevailing party's substantive right to recover attorney's fees, the prevailing party must attack the defect in the form of the final judgment (represented by its failure to reserve jurisdiction to afford relief granted by substantive law) by a Rule 1.530 motion, a Rule 1.540 motion, or an appeal. That extended procedural tap dance is necessary, according to the defendants, simply to obtain the benefit of three words which should have been in the final judgment in the first place. If there were any good reason for ever refusing a prevailing party those three magic words, then the defendants' procedure might make some sense. But the defendants do not suggest any good reason for ever refusing a prevailing party continuing

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jurisdiction to enforce his substantive rights, and there is no good reason for ever refusing to extend that jurisdiction to a prevailing party.

As the defendants themselves recognize, the failure to include the magic words is merely a mistake, automatically rectifiable upon request. According to the defendants, however, if the trial court makes the mistake and the prevailing party does not seek its rectification with a barrage of procedural maneuvers, then the loss of the prevailing party's substantive rights should be considered the fault of the prevailing party, and the law should hold that the prevailing party has "waived" the substantive rights to which he is entitled by law because he did not seek correction of the trial court's undeniable mistake. If that makes sense to the Court, then it may simply approve the District Court's decision (and continue to entertain numerous appeals addressing the unfairness of this procedural minefield). If, as we suspect, however, requiring all that procedural busywork to rectify an obvious oversight in order to preserve substantive rights granted by law seems as silly to the Court as it seems to us, then something should be done about it.

What can be done about it is simple. If it is already proper (indeed, we think, required) for each individual trial judge to make a rule in each individual case creating continuing jurisdiction to enforce substantive rights given to a prevailing party, merely by inserting three magic words in the final judgment on the main claims, then it would certainly be proper for this Court simply to announce the same rule for all cases. Nothing changes. The law remains the same. It is now simply uniform, governing all cases--rather than dependent upon the astuteness of the trial judge and the attorneys involved in each individual case. The possibility of making the "mistake" upon which the defendants rely here to avoid their substantive obligations is simply removed, and the "waiver" of the mistake which the defendants assert here to avoid their substantive obligations can never occur. With such a rule, substantive rights granted by law to

prevailing parties will be uniformly protected in every case, without any change to already existing notions of jurisdiction--and substantive rights will no longer be sacrificed as a result of defects in form, mistakes, oversights, waivers, or the like.

The purpose of procedural rules is, of course, to ensure implementation of substantive rights. The general procedural rule which we propose here serves that purpose admirably--and it is perfectly consistent with "this Court's philosophy that procedural practices should not be permitted to frustrate substantive rights". *Williams v. State*, 324 So.2d 74, 80 (Fla. 1975). The rule we propose has a solid foundation in *Roberts v. Askew*, *supra*, and it will create consistency in the law by ensuring that a trial court's jurisdiction to awarding prevailing-party attorney's fees is the same as its jurisdiction to award prevailing-party costs. The rule we propose will also conform to the federal rule, which one must assume was well thought out before it was adopted. The rule we propose will also eliminate a great deal of unnecessary, perfunctory motion practice directed solely to the language of final judgments, and will eliminate the unnecessary mechanical appeals which the District Court has invited by its decision below. The rule we propose will also do no harm whatsoever, since it will simply ensure that every judgment on the main claims in every suit will contain by rule what even the defendants admit should always be there in the first place.

Finally, we ask the Court to search the defendants' brief for an explanation of *why* the case-by-case approach they suggest makes any sense. It will find no such explanation--and no such explanation can be advanced, because the procedure they propose is simply a Rube Goldberg device which has been invented by some courts (and, as we explained in our initial brief, avoided by many others) to fill an obvious void in the rules of civil procedure. That device has proven to be a trap for the unwary, however, and it has frequently resulted in the loss of substantive rights for no good reason. The problem presented here--which is clearly caused by an elevation of form over substance, and the

lack of a general provision in the rules governing the filing of motions for prevailing-party attorney's fees--is not an isolated one, as the defendants appear to suggest. If the numerous decisions discussed in both briefs here have not convinced this Court of that, the Court will certainly be convinced by the subsequent history of the decision sought to be reviewed here, as it has been played out in the Fourth District. In the few short months since this case was decided there, the Fourth District has reversed no less than four awards of attorney's fees because of a trial court's failure to recite the three magic words which would have protected the litigants' substantive rights to attorney's fees.[3/] And there will undoubtedly be dozens and dozens more if this Court does not accept the unique opportunity given it here (which is not likely to come along often) to chisel those three magic words in stone by adopting a general rule applicable to all cases, as the federal courts have done.

In conclusion, we remind the Court of its eminently quotable observation in *Cabot v. Clearwater Construction Co.*, 89 So.2d 662, 664 (Fla. 1956):

> . . . No longer are we concerned with the "tricks and technicalities of the trade". The trial of a lawsuit should be a sincere effort to arrive at the truth. It is no longer a game of chess in which the technique of the maneuver captures the prize.

If that sentiment still prevails here--and if our rules are to be designed to ensure implementation of substantive rights, rather than provide procedural pitfalls and hazards upon which substantive rights are sacrificed at the slightest misstep in form--we respectfully urge the Court to follow its own lead in *Roberts*, and follow the United States Supreme Court's lead in *White*, and hold that a trial court has continuing jurisdiction to resolve "collateral and independent claims" for prevailing-party costs and attorney's fees, not-

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[3/] *See Miraglia v. Geiger*, 463 So.2d 448 (Fla. 4th DCA 1985); *Frisard v. Frisard*, 468 So.2d 399 (Fla. 4th DCA 1985); *Compton v. Gator Office Supply & Furniture, Inc.*, 10 FLW 1579 (Fla. 4th DCA June 26, 1985); *Keister v. Polen*, 10 FLW 1599 (Fla. 4th DCA June 26, 1985).

withstanding that the ligitation of the main claims has been concluded with a final judgment, and notwithstanding that the trial court may have forgotten to utter the three magic words which most assuredly belonged in that final judgment.

B. THE TRIAL COURT DID NOT ERR IN AWARDING ATTORNEY'S FEES AGAINST THE DEFENDANT, JENNIE POORE, A REGISTERED NURSE ANESTHETIST AND EMPLOYEE OF THE DEFENDANT-HOSPITAL, PURSUANT TO §768.56.

The defendants have raised a second issue here, contending that the trial court erred in assessing attorney's fees against the defendant, Jennie Poore, a registered nurse anesthetist and employee of the defendant-hospital. We do not believe this issue is properly before the Court, because it was not reached by the District Court below. If this Court should quash the District Court's decision, as we have requested, we think the proper course to follow would be to remand the case to the District Court--at which point the issue can be decided by the District Court, in due course. On the off-chance that the Court might choose to reach the issue, we will set out the brief argument which we made on this point in the District Court below.

The defendants contend that §768.56 plainly and unambiguously authorizes attorney's fees awards only against medical and osteopathic physicians, podiatrists, hospitals, and health maintenance organizations; that the statute is in derogation of the common law, and must therefore be strictly construed; and that the statute therefore does not authorize the award of attorney's fees against the hospital's nurse-anesthetist. We disagree with all three steps of the syllogism.

First, the statute does not plainly and unambiguously state that attorney's fees can be awarded only against medical and osteopathic physicians, podiatrists, hospitals, and health maintenance orgainizations. It states in pertinent part as follows:

> 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 by reason of injury, death, or monetary loss on account of alleged malpractice by

> any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization; . . .

The statute goes on to state that such fees will be taxed "against non-prevailing parties". In other words, the statute requires an award of attorney's fees to be assessed against a non-prevailing party in a medical malpractice action which involves a claim for damages on account of the alleged malpractice of a hospital (among others).

Ms. Poore was a non-prevailing party in a medical malpractice action involving a claim for damages on account of the negligence of her employer, the defendant-hospital. The statute does not foreclose an award of attorney's fees against Ms. Poore; it fully supports such an award. Surely the legislature must have been aware that a claim for damages on account of the alleged malpractice of a hospital is necessarily a claim for damages on account of the alleged malpractice of a hospital employee, since a hospital cannot itself be negligent, and can only be vicariously liable for the negligence of an employee. If the legislature had meant to allow an award of attorney's fees against only some defendants in an action for damages on account of the alleged malpractice of a hospital, and prohibit an award of attorney's fees against other medical malpractice defendants in the same action, for the same alleged malpractice, it could have said so. It did not, and we therefore believe that the award of attorney's fees against Ms. Poore was properly entered.

Second, although it is true as a general proposition that attorney's fee statutes are in derogation of the common law and must be strictly construed, it is not true that §768.56 must be strictly construed. Courts have held to the contrary: ". . . it cannot be doubted that the purpose of the statute [§768.56] was remedial and that it should be construed liberally to effectuate the legislative purpose". *Theodorou v. Burling*, 438 So.2d 400, 402 (Fla. 4th DCA 1983). *Accord*, *Young v. Altenhaus*, 448 So.2d 1039 (Fla. 3rd DCA 1983), *quashed on other grounds*, 10 FLW 252 (Fla. May 2, 1985). The second step of the defendants' syllogism is therefore also in error. Because both the first and

second steps of the defendants' syllogism are in error, it follows that the third step is likewise in error. The order awarding attorney's fees against Ms. Poore was therefore proper.

IV.
CONCLUSION

With respect to the first issue presented, we respectfully urge the Court once again to extend the principle of *Roberts v. Askew* to the problem presented by the instant case; harmonize Florida law with federal law; quash the decision of the District Court below; and remand the case with directions to affirm the plaintiffs' judgment for attorney's fees against the hospital--and consider the question of the applicability of §768.56 to Nurse Poore. If the second issue presented here is reached on the merits, we respectfully submit that the trial court did not err in assessing attorney's fees against Nurse Poore, and that the District Court should be directed on remand to affirm that judgment as well.

V.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 2nd day of August, 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.

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