IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 86,652

GULLIVER ACADEMY, INC.,	:
Petitioner,	:
vs.	:
RALPH BODEK and LORRAINE BODEK, as Parents and Natural Guardians of their minor son, ROBERT BODEK, on behalf of their minor son, Robert Bodek and themselves, individually,	:
Respondents.	:

DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENTS RALPH BODEK, LORRAINE BODEK AND ROBERT BODEK

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INTRODUCTION

This brief is filed on behalf of the plaintiff respondents, Ralph Bodek and Lorraine Bodek, as parents and natural guardians of their minor son, Robert Bodek.

STATEMENT OF THE CASE AND FACTS

Gulliver's statement of the case and facts is not objectionable, but is incomplete. Bodek restates the case and facts necessary to resolution of all issues presented. Robert Bodek was a student at Gulliver Academy and sustained serious injury when he fell from the edge of a second floor stairwell balcony (A. 1-3). Bodek brought a multicount complaint against Gulliver and another student, Jarrod Fox, alleging their combined negligence as the cause of his injuries (A. 1-18).

During the litigation, the claim against Jarrod Fox was settled with court approval, after the guardian ad litem recommended the settlement as in the best interest of the minor (A. 20-2). The gross settlement was for two hundred thousand dollars. The court order approving settlement details disposition of the funds (A. 20-2).

Thereafter, Gulliver served an "Offer of Judgment for $125,000.00 pursuant to the terms and conditions of 768.79 F.S.A." (A. 23). The offer was later amended to recite, "The offer is being made by the Defendant, Gulliver Academy, Inc. to the Plaintiffs." (A. 24). Bodek served an objection to the offer of judgment and the amended offer of judgment, contending that the claim of a minor can only be settled based upon a court order approving the settlement and, therefore, the plaintiffs were powerless to accept or reject an offer of judgment under Section 768.79, Florida Statutes (A. 26). Nancy Copperthwaite, the court appointed guardian ad litem, recommended against the proposed settlement because she felt it was too low (A. 85-90).

The case proceeded to jury trial and a defense verdict. The final judgment in this case was signed and filed April 19, 1994 and was "entered" April 21, 1994 when recorded (S.A. 1). On June 8, 1994, Gulliver moved to tax attorney's fees and costs pursuant to Section 768.79, Florida Statutes (A. 30-1).

The trial court conducted a hearing on entitlement, where both parents and the court appointed guardian ad litem, Ms. Copperthwaite, testified about their reasons for rejecting the offer of judgment (A. 34-90). The court also heard independent expert witness testimony on why the offer was inadequate and contrary to the minor's best interests (A. 90-104).

ISSUES ON APPEAL

I.

WHETHER THE MOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO SECTION 768.79 WAS UNTIMELY.

II.

WHETHER THE TRIAL COURT ERRED IN GRANTING ATTORNEY'S FEES AND COSTS PURSUANT TO SECTION 768.79, WHEN THE OFFER OF JUDGMENT IS NOT IN PROPER FORM AND IS INCAPABLE OF ACCEPTANCE OR REJECTION WITHOUT COURT INTERVENTION.

SUMMARY OF ARGUMENT

The motion for sanctions under Section 768.79 was served more than thirty days after entry of judgment and, as such, was untimely. The untimely motion should have been denied by the trial court and the district court reversed accordingly. Bosch v. Hajjar, 639 So.2d 1096, 1097 (Fla. 4th DCA 1994).

The offer of judgment purportedly filed under Section 768.79 was extended to "the Plaintiffs" generically, without identifying the party or parties to whom the offer was being made or the amount(s) of the offer(s) extended to each plaintiff. The offer was contingent upon review by the court appointed guardian ad litem, and contingent upon review and approval by the trial court. As such, the offer failed to meet the strict criteria imposed by Section 768.79 and was therefore an invalid predicate for imposition of sanctions. Cf. Bush Leasing, Inc. v. Gallo, 634 So.2d 737 (Fla. 1st DCA), rev. den., 645 So.2d 450 (Fla. 1994); Martin v. Brusseau, 564 So.2d 240 (Fla. 4th DCA 1990).

ARGUMENT

I.

THE MOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO SECTION 768.79 WAS UNTIMELY.

The motion was not made within thirty days after entry of judgment. The "reservation" of jurisdiction in the judgment was surplusage, Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986), as the motion was untimely under the statute.

It is fundamental Florida law that awards of attorney's fees are in derogation of the common law and will be granted only pursuant to contract or statute. It is equally well-settled that any statute allowing an award of attorney's fees will be strictly construed. Roberts v. Carter, 350 So.2d 78 (Fla. 1977); Sunbeam Enterprises, Inc. v. Upthegrove, 316 So.2d 34 (Fla. 1975); Steinhardt v. Eastern Shores White House Association, Inc., 413 So.2d 785 (Fla. 3d DCA 1982); Sheridan v. Greenberg, 391 So.2d 234 (Fla. 3d DCA 1981).

Section 768.79, Florida Statutes (1993) permits recovery of attorney's fees and additional costs as a sanction for refusing an offer of settlement. This statutory authority is expressly limited and provides:

> Upon motion made by the offeror *within 30 days after the entry of judgment* . . . the court shall . . . .

In Bosch v. Hajjar, 639 So.2d 1096, 1097 (Fla. 4th DCA 1994), the court confronted this very language and squarely held that the motion for sanctions under Section 768.79 filed more than thirty days after the entry of judgment was untimely and should have been denied.

> As for the attorney's fee, when the applicable rule and statute governing offers of judgment are involved, the motion for an attorney's fee must be made within a thirty day period. . . . [The motion] was untimely, and therefore should have been denied. [639 So.2d at 1097].

The trial court erred in failing to follow Bosch v. Hajjar, the controlling precedent. Cf. Pardo v. State, 596 So.2d 665 (Fla. 1992) (in the absence of interdistrict conflict, district court decisions bind all Florida trial courts). The Third District reversed.

Bosch v. Hajjar was directly on point and governed this appeal. There was no reason for the Third District to part company with the Fourth District on this issue, as Bosch v. Hajjar is consistent with case law generally disallowing recovery of attorney's fees and costs on untimely motions. See, Lobel v. Southgate Condominium Association, Inc., 436 So.2d 170, 171 (Fla. 4th DCA 1983) (motion for appellate attorney's fees denied as tardy when untimely filed under Florida Rule of Appellate Procedure 9.400(b)); Joseph Land & Co. v. Green, 486 So.2d 87 (Fla. 1st DCA 1986) (same); Spivey v. Battaglia Fruit Company, Inc., 142 So.2d 3, 4 (Fla. 1962) (untimely motion for attorney's fees under old Rule 3.16(3) denied); Rutkin v. State Farm Mutual Automobile Insurance Company, 214 So.2d 99, 100 (Fla. 3d DCA 1968) (same); Travelers Insurance Company v. Tallahassee and Trust Company, 133 So.2d 463, 467 (Fla. 1st DCA 1961), cert. den., 138 So.2d 463 (Fla. 1962) (same); Frisard v. Frisard, 495 So.2d 766, 767-8 (Fla. 4th DCA 1986) (motion for appellate costs filed in trial court more than thirty days after issuance of mandate untimely under Rule 9.400(a)); Thornburg v. Pursell, 476 So.2d 323, 324 (Fla. 2d DCA 1985) (same); Abraham v. S.N.W. Corp., 549 So.2d 776, 777 (Fla. 4th DCA 1989) (same).

It is well settled that "entry of judgment" means the recording of the judgment. Casto v. Casto, 404 So.2d 1046, 1048 (Fla. 1981); Bannister v. Allen, 127 So.2d 907 (Fla. 3d DCA 1961). The motion for attorney's fees was not made "within 30 days after the entry of judgment" and was thus untimely. The fact that the judgment was "rendered" October 31, 1994 with the denial of post trial motions is irrelevant. The statute clearly and unequivocally required a motion filed within thirty days after the "entry" of judgment. Cf. Casto v. Casto, 404 So.2d at 1048.

On these fundamental issues, the First District decision in Gilbert v. K-Mart Corporation, 664 So.2d 335 (Fla. 1st DCA 1995), is in complete agreement.

> The language of the statute is unambiguous. By its express terms, the motion is to be filed within 30 days from the entry of judgment. We agree with the trial court, 'entry of judgment' means the recording of the judgment in the court's official record. *See Casto v. Casto*. [664 So.2d at 338].

The secondary issue in Gilbert v. K-Mart was whether the trial court had "jurisdiction" to allow a late filing of the motion for attorney's fees upon a showing of excusable neglect. There is no conflict between Gilbert v. K-Mart and the Third District decision in this case. Here, neither the trial court nor the district court of appeal was presented with the question of whether Gulliver's untimely filing of its motion for attorney's fees was the result of excusable neglect. Likewise, the Fourth District decision in Bosch v. Hajjar never addressed trial court enlargement of time beyond the statutory thirty days.

Neither the Third District nor the Fourth District reversed the attorneys' fee awards for want of trial court jurisdiction over the untimely motions. Since there is no conflict

between or among the district court decisions interpreting the thirty day from entry of judgment statutory limitation on filing motions requesting attorney's fees, this Court should reconsider its acceptance of conflict jurisdiction and decline review.

This Court need not reach the issue of excusable neglect in this case because it is not an issue that was raised or decided below. It is not the function of an appellate court to entertain for the first time on appeal defenses that could have but were not interposed or presented below. E.g. Wilkerson v. Alachua County, 21 FLW D682 (Fla. 1st DCA 1996).

Here from day one, Gulliver has singularly and incorrectly contended that its motion was timely filed. A mistaken view of the law, however, does not constitute "excusable neglect." Cf. Kuykendall v. Kuykendall, 301 So.2d 466, 467 (Fla. 1st DCA 1974). Excusable neglect is not present in this case. Regardless of whether the thirty days statutory limitation is considered procedural, substantive, or jurisdictional — unexcused noncompliance with the statute warrants denial of the statutory relief requested. The district court decision was correct and should be approved.

II.

THE TRIAL COURT ERRED IN GRANTING ATTORNEY'S FEES AND COSTS PURSUANT TO SECTION 768.79, BECAUSE THE OFFER OF JUDGMENT IS NOT IN PROPER FORM AND IS INCAPABLE OF ACCEPTANCE OR REJECTION WITHOUT COURT INTERVENTION.

Statutes authorizing the recovery of attorney's fees are in derogation of the common law and are strictly construed. Roberts v. Carter; Sunbeam Enterprises v. Upthegrove; Steinhardt v. Eastern Shores White House; Sheridan v. Greenberg.

Section 768.79(2) is quite specific and should be strictly construed. An offer must "name the party making it and the party to whom it is being made." In this case, the first offer of judgment failed entirely to meet this statutory requirement. The amended offer of judgment named the party making the offer, but failed to specify to which plaintiff or plaintiffs the offer was being made, whether the offer was being made to the plaintiffs in their individual or representative capacities, or the amounts being offered each plaintiff. Furthermore, the offer was necessarily conditioned upon review by a third party, the court appointed guardian ad litem, and contingent upon further review and approval by the trial court.

Under Section 768.79, strict compliance is a prerequisite to imposition of sanctions. Any condition either specifically contained in the offer or implied in the offer invalidates the offer and disqualifies the offering party from recovering attorney's fees and costs under the statute. Bush Leasing, Inc. v. Gallo, 634 So.2d 737 (Fla. 1st DCA), rev. den., 645 So.2d 450 (Fla. 1994) (offer contingent upon third party uninsured motorist carrier authorization was invalid under Section 768.79, precluding recovery of attorney's fees); Martin v. Brusseau, 564 So.2d 240 (Fla. 4th DCA 1990) (offer contingent upon execution of a release, satisfaction, hold harmless affidavit, and stipulation for dismissal rendered offer invalid under Section 768.79).

This case is distinguishable from Tucker v. Shelby Mutual Insurance Co. of Shelby, Ohio, 343 So.2d 1357 (Fla. 1st DCA 1977) in two important respects. First, Section 768.79 is far more specific than the old Rule 1.442 under consideration in Tucker v. Shelby Mutual. While both require service of the offer on the adverse party, only Section 768.79 separately requires a specific identification of the party making the offer and the party to whom

the offer is being made. Second, the old Rule 1.442 simply shifted the prevailing party trigger point for recovery of taxable costs, a far less onerous sanction than the imposition of attorney's fees in addition to costs. While the old Rule 1.442 had the salutary purpose of encouraging settlement with a shift in costs, the severity of the sanctions imposed by Section 768.79 weigh heavily against a liberal application. This is especially true when the party to be sanctioned is a severely injured minor, protected by the court with the assistance of a court appointed guardian ad litem.

Independent of statute or rule, the court has the inherent jurisdiction and right to control and protect minor children and their property. Cone v. Cone, 62 So.2d 907, 908 (Fla. 1953); State, Department of Health and Rehabilitative Services v. Hollis, 439 So.2d 947, 949 (Fla. 1st DCA 1983). This inherent power stems from the duty of courts to protect the interests of minors. The court "is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom." Cooper v. Cooper, 194 So.2d 278, 281 (Fla. 2d DCA 1967).

The rights of children cannot be waived by their parents or their counsel, absent order and approval of court. Romish v. Albo, 291 So.2d 24 (Fla. 3d DCA 1974). A guardian ad litem cannot bind a minor by admission or waiver. Cornelius v. Sunset Golf Course, 423 So.2d 567, 569 (Fla. 1st DCA 1982).

Both law and equity compel strict construction of Section 768.79. Sanctions should not be imposed against the minor child in this case, where the court appointed guardian ad litem opposed the settlement.

CONCLUSION

This Court should reconsider its acceptance of jurisdiction and decline review. The three district courts' uniform interpretation of "30 days after the entry of judgment" should be approved. Excusable neglect was not present factually, raised below, or an issue to be decided in this case.

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon: CHARLES B. PATRICK, ESQUIRE, Counsel for Bodek, 1648 South Bayshore Drive, Miami, FL 33133; and to HAROLD C. KNECHT, JR., ESQUIRE, Knecht & Knecht, P.A., Counsel for Gulliver Academy, Inc., Douglas Centre, Suite 411, 2600 Douglas Road, Coral Gables, FL 33134, this 26th day of April, 1996.

By 
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