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IN THE SUPREME COURT OF FLORIDA

CASE NO: 86,652

District Court of Appeal
3rd District - No. 95-38
L.T. Case No: 91-56048 CA 27

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.

FILED
SID J. WHITE
APR 1 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S AMENDED BRIEF ON THE MERITS

KNECHT & KNECHT
Attorneys for Petitioner
Suite 411, Douglas Centre
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(305) 445-0531

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INTRODUCTION

The Petitioner, GULLIVER ACADEMY, INC., was the Appellee in the District Court and Defendant in the trial court. The Petitioner shall be referred to as GULLIVER and the Respondent as BODEK. References to the Petitioner's Appendix shall be followed by "App." and the page number.

STATEMENT OF THE CASE AND FACTS

This was a personal injury action by the Respondents, 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 against the Petitioner, GULLIVER ACADEMY, INC.

GULLIVER filed an Amended Offer of Judgment (App. 4) which was not responded to and thereafter a jury found in its favor (App. 6). An Order granting GULLIVER's Motion for Attorney's Fees and Costs (App. 7), pursuant to the Offer of Judgment Statute, was reversed by the District Court as being untimely (App. 1). A Motion for Rehearing was denied by Order entered September 13, 1995 (App. 8). Following a Notice to Invoke Discretionary Jurisdiction, this Court entered its Order accepting jurisdiction and dispensing with oral argument on February 13, 1996 (App. 9).

There were two issues raised before the District Court. The first involved interpretation of the thirty day rule concerning the filing of a Motion for Attorney's Fees under §768.79, Fla.Stat. (Supp. 1990) because the motion was filed 50 days after entry of Final Judgment instead of 30. The Judgment contained a reservation

of jurisdiction to consider a Motion for Attorney's Fees and Costs.

The second point raised was whether the Offer of Judgment was in proper form because the offer was directed to the plaintiffs in their individual and representative capacity for their minor son, rather than being broken down between them. This second point was not reached by the District Court because their resolution of the thirty-day time period issue was dispositive of the case.

Operative time factors for consideration are as follows:

April 13, 1994 - Motion for new trial filed from adverse jury verdict.

April 19, 1994 - Final judgment entered in favor of GULLIVER reserving jurisdiction to consider a motion on attorney's fees and costs.

June 8, 1994 - GULLIVER filed its motion for attorney's fees and costs pursuant to \$768.79.

October 31, 1994 - Trial court denied plaintiff's motion for new trial.

November 2, 1994 - Trial court granted GULLIVER's motion for attorney's fees and costs.

(All foregoing dates are found at App. 2.)

POINTS ON APPEAL

I

WHETHER THE 30-DAY PROCEDURAL RULE OF §768.79, FLORIDA STATUTES, REQUIRING FILING OF A MOTION FOR ATTORNEY'S FEES AND COSTS WITHIN 30 DAYS AFTER ENTRY OF JUDGMENT CAN BE EXTENDED BY A RESERVATION OF JURISDICTION IN THE JUDGMENT TO TAX ATTORNEY'S FEES AND COSTS.

II

WHETHER THE 30-DAY PERIOD BEGINS TO RUN WHEN THE JUDGMENT BECOMES FINAL AFTER DENIAL OF A MOTION FOR NEW TRIAL.

SUMMARY OF THE ARGUMENT

I.

Under the Rules of Civil Procedure, Rule 1.090(b), the trial court has power to control and enlarge the time procedures called for in the Rules. Here the court retained jurisdiction in its Final Judgment to tax attorney's fees and costs in keeping with its inherent power. The Petitioner's motion was filed within this period of retention.

II.

There was no finality to the Judgment until Respondent's motion for a new trial was ruled upon almost six months after Petitioner filed its motion to tax attorney's fees and costs. The statutory language of §768.79(6) supports the conclusion that there be finality before the 30-day period begins to run for filing of the motion to tax fees and costs.

ARGUMENT

I.

WHETHER THE 30-DAY PROCEDURAL RULE OF §768.79, FLORIDA STATUTES, REQUIRING FILING OF A MOTION FOR ATTORNEY'S FEES AND COSTS WITHIN 30 DAYS AFTER ENTRY OF JUDGMENT CAN BE EXTENDED BY A RESERVATION OF JURISDICTION IN THE JUDGMENT TO TAX ATTORNEY'S FEES AND COSTS.

The procedural aspects of the Offer of Judgment Statute 768.79(6) was adopted as a rule of the court in Timmons v. Combs, 608 So.2d 1 (Fla. 1992). This procedure calls for the motion to be made within 30 days after entry of judgment or after voluntary or involuntary dismissal. The District Court considered this 30-day period to be up prior to filing of the motion on June 8, 1994, which was 50 days after the final judgment, subject to rehearing, was entered.

In the case sub judice, the trial court retained jurisdiction for an award of attorney's fees and costs and the judgment itself was not rendered with finality until October 31, 1994 when plaintiffs' motion for a new trial was denied. This was almost five months after the motion to tax attorney's fees was filed.

As noted by this Court in Shore v. Murphy, 88 So.2d 294 (Fla. 1956), the

purpose to be accomplished by the rules is to expedite disposition of cases [O]ne of the basic objectives of the New Rules of Civil Procedure was to expand the judicial discretion of the trial courts in procedural matters wherever full and complete justice required that such discretion be exercised.

Instead of limiting and restricting the sound discretion of the trial judge, the purpose of the New Rules was to liberate the trial courts from many of the hard and fast technical procedural restrictions of the common law.

The case of Gilbert v. K-Mart Corp., 664 So.2d 335 (Fla.App. 1Dist. 1995) is very analogous. One difference in Gilbert is that defendant's motion for attorney's fees was not filed until seventeen days after the trial court denied plaintiff's motion for a new trial whereas in Gulliver the motion for attorney's fees and costs was filed almost five months before there was a denial of plaintiff's motion for a new trial. In Gilbert, the District Court held that the 30-day requirement was not jurisdictional and that there was an express reservation of jurisdiction as was done in the case sub judice; furthermore, that Rule 1.090(b) superseded the procedural time period called for by the Offer of Judgment Statute. Certainly, there could be no prejudice to the Plaintiff since the Motion for New Trial was not ruled on and denied until approximately five months after the Motion for Attorney's Fees and Costs.

II.

WHETHER THE 30-DAY PERIOD BEGINS TO RUN WHEN THE JUDGMENT BECOMES FINAL AFTER DENIAL OF A MOTION FOR NEW TRIAL.

The trial court determines whether attorney's fees and costs are to be awarded by comparing the Offer of Judgment with the "judgment obtained", §768.79(6)(a), which is similar to the "judgment finally obtained" in former Fla.R.Civ.P. 1.442. This has been construed to mean "a judgment which has finally disposed of the case and becomes final after all rights to appellate review have been exhausted", Cheek v. McGowan Elec. Supply Co., 483 So.2d 1373 (Fla.App. 1Dist. 1985). A trial court does not dispose of a case until a pending motion for a new trial has been denied, Winn v. Lovett Grocery Co. v. Luke, 24 So.2d 310, 313 (Fla. 1945).

In Holland v. Miami Springs Bank, 53 So.2d 646 (Fla. 1951), failure of an appellant to file assignments of error in the trial court, until long after the time for such filing had expired, was not sufficient basis for dismissal of the appeal. The Court further noted that failure to comply with the Rules of Court would not have resulted in any undue delay. In the case sub judice, the final judgment reserving jurisdiction was entered after the motion for new trial. The motion was not ruled on and denied until more than six months later or almost five months after the attorney's fee motion was filed. See also Davis v. Evans, 132 So.2d 476, 482 (Fla.App. 1Dist. 1961).

That this Court intended by adoption of the statutory procedure as a rule of its own that there be finality in a judgment

is supported by the following statutory language:

Upon motion made by the offeror within 30 days
after the entry of judgment or after voluntary
or involuntary dismissal. . . .

Florida Statute, §768.79(6).

Thus, the statute which has been adopted by this Court as one of the rules of procedure governing practice before the courts has language confirming there should be finality before the 30-day period commences to run. In any event, this time period is clearly subject to the continuing power and jurisdiction of the trial court, supra, (Point I).

CONCLUSION

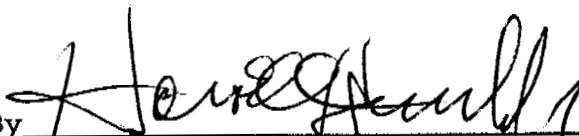
The District Court opinion should be reversed and the lower court order granting petitioner's motion to tax attorney's fees and costs should be reinstated because:

1. There was a reservation in the final judgment to do so.
2. Rule 1.090(b) permits the trial court discretion to enlarge time periods called for by the Rules, which was done in this case by the reservation of jurisdiction and the granting of petitioner's motion to tax fees and costs.
3. The substantive rights afforded by the Offer of Judgment Statute should not be taken away by applying the 30-day procedural rule when a motion to tax attorney's fees and costs is filed prior to the judgment becoming final.
4. There was no undue delay.

Respectfully submitted,

KNECHT & KNECHT
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PHONE: (305) 445-0531

By



HAROLD C. KNECHT, JR., ESQ.)

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioner's Brief on the Merits and attached Appendix was mailed this 29 day of March, 1996 to JAMES C. BLECKE, ESQ., Attorney for Appellants, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130 and CHARLES B. PATRICK, ESQ., Charles B. Patrick, P.A., Attorney for Plaintiffs, 1648 S. Bayshore Drive, Miami, Florida 33133.


HAROLD C. KNECHT, JR., ESQ.

Appendix

IN THE SUPREME COURT OF FLORIDA

CASE NO: 86,652

Third District Court
Case No: 95-38
L.T. Case No: 91-56048 CA 27

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.

**APPENDIX TO
PETITIONER'S AMENDED BRIEF ON THE MERITS**

KNECHT & KNECHT
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(305) 445-0531

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1995

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,

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**

Appellants,

vs.

**

CASE NO. 95-38

GULLIVER ACADEMY, INC.,

**

Appellee.

**

. Opinion filed June 14, 1995.

An Appeal from the Circuit Court for Dade County, S. Peter
Capua, Judge.

Charles B. Patrick and James C. Blecke, for appellants.

Knecht & Knecht and Harold C. Knecht, Jr., for appellee.

Before NESBITT, GERSTEN and GODERICH, JJ.

PER CURIAM.

The plaintiffs below appeal from an order granting

attorney's fees and costs, pursuant to Section 768.79, Florida Statutes, to the defendant, Gulliver Academy, Inc. [Gulliver]. We reverse.

Gulliver served an offer of judgment, pursuant to Section 768.79, Florida Statutes, on the plaintiffs. The plaintiffs rejected the offer. The case proceeded to trial, and the jury found in favor of Gulliver. On April 13, 1994, the plaintiffs filed a motion for new trial and/or for judgment notwithstanding the verdict. On April 19, 1994, the trial court entered final judgment in favor of Gulliver reserving jurisdiction to consider a motion on attorney's fees and costs. On June 8, 1994, Gulliver filed its motion for attorney's fees and costs, pursuant to Section 768.79. On October 31, 1994, the trial court denied the plaintiffs' motion for new trial and/or judgment notwithstanding the verdict. On November 2, 1994, the trial court granted Gulliver's motion for attorney's fees and costs. This appeal follows.

The plaintiffs contend that the trial court erred in granting Gulliver's motion for attorney's fees and costs pursuant to Section 768.79. We agree.

Section 768.79 requires that the motion for attorney's fees and costs be filed "within 30 days after the entry of judgment. . . ." § 768.79(6), Fla. Stat. (Supp. 1990). In the instant case, the motion for attorney's fees and costs was filed on June 8, 1994, more than 30 days after judgment was entered on April 19, 1994.

Because the motion below was untimely, we reverse the trial court's order granting Gulliver's motion for attorney's fees and costs. See Bosch v. Hajjar, 639 So. 2d 1096 (Fla. 4th DCA 1994).

Since the above issue is dispositive, we do not address the remaining point raised by the plaintiffs.

Reversed.

HCKjr:rmn
4136

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 91-56048 CA 27

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,

Plaintiffs,

vs.

GULLIVER ACADEMY, INC. and
JARROD FOX, a minor,

Defendants.

AMENDED OFFER OF JUDGMENT
Florida Bar No: 043582

The Defendant, GULLIVER ACADEMY, INC., serves this Amended Offer of Judgment and says:

1. This Offer of Judgment is being made pursuant to the terms and conditions of 768.79 F.S.A.
2. The offer is being made by the Defendant, Gulliver Academy, Inc. to the Plaintiffs.
3. The total amount of the offer from the Defendant, Gulliver Academy, Inc. is \$125,000.00 which sum is in addition to that already received by the Plaintiffs from the Defendant, Jarrod Fox which the Defendant Gulliver understands to have been \$200,000.00. This offer for judgment of \$125,000.00 contemplates there will be no set off or reduction because of funds received by settlement with Fox. Thus, if in fact, the Plaintiffs have received \$200,000.00 from the Defendant Fox the effect of this offer of judgment is to give to the Plaintiffs an additional sum of \$125,000.00.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and sent via fax this 13 day of April, 1993 to CHARLES B. PATRICK, ESQ., Charles B. Patrick, P.A., Attorney for Plaintiffs, 1648 S. Bayshore Drive, Miami, Florida 33133 and to DALE L. FRIEDMAN, ESQ., Conroy, Simberg and Lewis, P.A., Attorneys for Jarrod Fox, Venture Corporate Center I, Second Floor, 3440 Hollywood Boulevard, Hollywood, Florida 33021.

Knecht & Knecht, P.A.
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PHONE: (305) 445-0531 (Dade)
(305) 525-7776 (Broward)

By


HAROLD C. KNECHT, JR.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 91-56048 CA 27

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,

Plaintiffs,

vs.

GULLIVER ACADEMY, INC.,

Defendant.

FINAL JUDGMENT

Pursuant to the verdict rendered in this cause, it is adjudged that the plaintiffs, 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, take nothing by this action and that defendant, GULLIVER ACADEMY, INC., go hence without day. Jurisdiction is reserved to consider motion to tax costs and attorney's fees hereafter.

ORDERED at Miami, Dade County, Florida, this APR 19 1994 day
of April, 1994.

S. PETER CAPUA

CIRCUIT JUDGE

Copies furnished to:

Charles B. Patrick, Esq.
Harold C. Knecht, Jr., Esq.

KALPH BODEK + LORRAINE
BODEK, AS PARENTS + NATURAL
GUARDIANS OF THEIR MINOR SON,
ROBERT BODEK, ON BEHALF OF
THEIR MINOR SON, ROBERT BODEK
+ THEMSELVES, INDIVIDUALLY,

Plaintiff(s)

vs.

GULLIVER ACADEMY, INC.
Defendant(s)

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

DIVISION: CA 27

CASE NO.: 91-56045

ORDER DENYING/GRANTING
PLAINTIFF'S/DEFENDANT'S
MOTION FOR ATTORNEY'S
FEES + COSTS PURSUANT
TO FSA SEC. 768.79

THIS CAUSE having come on to be heard on NOVEMBER 2, 1994

on Plaintiff's/Defendant's Motion

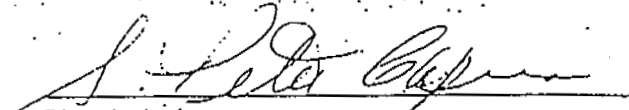
FOR ATTORNEY'S FEES + COSTS PURSUANT TO
FSA SEC. 768.79

and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is
hereupon,

ORDERED AND ADJUDGED that said Motion be, and the same is hereby

GRANTED AS TO ALL ISSUES RELATED TO
FSA SEC. 768.79

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 9
day of December, 1994


Circuit Judge

PETER CAPUA

Copies furnished to:

RECEIVED

SEP 14 1995

KNECHT & KNECHT P.A.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1995
WEDNESDAY, SEPTEMBER 13, 1995

RALPH BODEK and LORRAINE
BODECK, etc., et al.,

Appellants,

vs.

GULLIVER ACADEMY, INC.,

Appellee.

**

**

** CASE NO. 95-38

**

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Upon consideration, appellee's motion for rehearing and/or
motion for Supreme Court certification is hereby denied. NESBITT,
GERSTEN and GODERICH, JJ., concur. Appellee's motion for
rehearing en banc is denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeals Third District

By

cc: Harold E. Knecht Jr.
Charles B. Patrick

James C. Blecke

/NB

RECEIVED

FEB 15 1996

Supreme Court of Florida

KNECHT & KNECHT, P.A.

TUESDAY, FEBRUARY 13, 1996

GULLIVER ACADEMY, INC.,

Petitioner,

v.

RALPH BODEK, ET AL.,

Respondents.

* * * * *

ORDER ACCEPTING JURISDICTION & DISPENSING WITH ORAL ARGUMENT

CASE NO. 86,652

District Court of Appeal, 3rd District - No. 95-38

* * * * *

The Court has accepted jurisdiction and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Petitioner's brief on the merits shall be served on or before March 11, 1996; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs.

Please send to the Court, either in Word Perfect format or ASCII text format, a 3-1/2" diskette of the briefs filed in this case. This procedure is voluntary. PLEASE LABEL ENVELOPE TO AVOID ERASURE.

The Clerk of the District Court of Appeal, Third District, shall file the original record on or before April 15, 1996.

GRIMES, C.J., KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur OVERTON and SHAW, JJ., dissent

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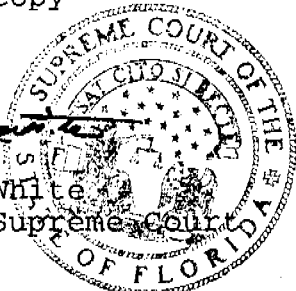
BH

cc: Hon. Louis J. Spallone, Clerk

TEST:

Sid J. White

Sid J. White, Clerk, Supreme Court



Mr. Harold C. Knecht
Mr. Charles B. Patarick
Mr. James C. Blecke