

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.

FILED

SID J. WHITE

OCT 25 1995

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

KNECHT & KNECHT, P.A.
Attorneys for Petitioner
Suite 411, Douglas Centre
2600 Douglas Road
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(305) 445-0531

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INTRODUCTION

The Petitioner, GULLIVER ACADEMY, INC., was the Defendant in the trial court and Appellee below. 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, were the Plaintiffs in the trial court and Appellants below.

This Court has discretionary jurisdiction to review the decision of the Third District Court of Appeal (App. 1-3) which reversed an order granting attorney's fees and costs, pursuant to \$768.79, Florida Statutes (App. 4), to the Petitioner, GULLIVER ACADEMY, INC., on the basis of direct conflict with decisions of this Court and other District Courts of Appeal. Art. V, §3(b)(3), Fla. Const. and Fla.R.App.P. 9.120.

Reference to the attached Appendix will be designated by the letters "App".

JURISDICTIONAL ISSUE

WHETHER THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL BY STRICTLY APPLYING THE 30-DAY PROCEDURAL RULE OF \$768.79 REQUIRING FILING OF A MOTION FOR ATTORNEY'S FEES AND COSTS WITHIN 30 DAYS AFTER ENTRY OF JUDGMENT DESPITE THERE BEING NO FINALITY TO THE JUDGMENT BECAUSE OF A MOTION FOR NEW TRIAL PREVIOUSLY FILED AND A RESERVATION OF JURISDICTION IN THE JUDGMENT TO SUBSEQUENTLY TAX ATTORNEY'S FEES AND COSTS.

STATEMENT OF THE FACTS AND CASE

This was a personal injury action brought by the minor Respondent and his parents against the Petitioner, GULLIVER ACADEMY, where the minor sustained an injury while attending school.

GULLIVER filed an Offer of Judgment (App. 5-6) which was not responded to and thereafter a jury found in its favor (App. 2). An Order granting GULLIVER's Motion for Attorney's Fees and Costs, pursuant to the Offer of Judgment Statute was reversed as being untimely. A motion for rehearing was denied by order entered September 13, 1995 (App. 7). Notice to Invoke Discretionary Jurisdiction (App. 8) was filed on October 12, 1995.

Operative time factors are as follows:

April 13, 1994 - Motion for new trial filed.

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 found in App. 2).

JURISDICTIONAL ARGUMENT

THE THIRD DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL BY STRICTLY APPLYING THE 30-DAY PROCEDURAL RULE OF §768.79 REQUIRING FILING OF A MOTION FOR ATTORNEY'S FEES AND COSTS WITHIN 30 DAYS AFTER ENTRY OF JUDGMENT DESPITE THERE BEING NO FINALITY TO THE JUDGMENT BECAUSE OF A MOTION FOR NEW TRIAL PREVIOUSLY FILED AND A RESERVATION OF JURISDICTION IN THE JUDGMENT TO SUBSEQUENTLY 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 lower 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.

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 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.

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 approximately 6½ months later or more that 4½ months after the attorney's fee motion was filed. See also Davis v. Evans, 132 So.2d 476, 482 (Fla.App. 1Dist. 1961).

Not only did the trial court reserve jurisdiction to award attorney's fees and costs in the judgment entered after a

motion for new trial was filed, but the order awarding fees pursuant to the Offer of Judgment Statute was entered two days after the order denying Respondents' motion for a new trial. There was no time delay, no thwarting of justice and the finality of the judgment, to which the motion for attorney's fees and costs was directed, was not determined until many months after the Motion to Tax Attorney's Fees and Costs was served.

CONCLUSION

The lower court opinion conflicts with prior opinions of this Court because:

1. there was no finality to the judgment until long after the Motion to Tax Attorney's Fees and Costs was filed;
2. there was no undue delay;
3. it does not allow the trial judge to exercise sound discretion; and
4. it takes away substantive rights through application of a procedural rule that does not apply because of the reservation of jurisdiction.

Respectfully submitted,

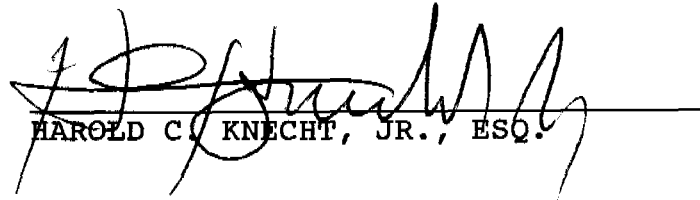
KNECHT & KNECHT, P.A.
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Suite 411, Douglas Centre
2600 Douglas Road
Coral Gables, Florida 33134
PHONE: (305) 445-0531

By


HAROLD C. KNECHT, JR., ESQ.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioner's Brief on Jurisdiction with Appendix was mailed this 20 day of October, 1995 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.

IN THE SUPREME COURT OF FLORIDA

CASE NO:

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 BRIEF ON JURISDICTION**

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Order granting Gulliver's Motion for Attorney's Fees and Costs Pursuant to FSA §768.79 (dated December 9, 1994).	4
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Decision of Third District Court of Appeal denying motion for rehearing and/or motion for Supreme Court certification and motion for rehearing en banc (dated September 13, 1995).	7
Notice to Invoke Discretionary Jurisdiction (dated October 11, 1995	8

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,

**

**

**

**

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.

RALPH 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

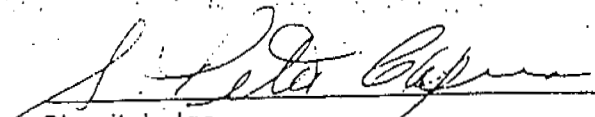
FOR ATTORNEY'S FEES + COSTS PURSUANT TO
FSA SEC. 768.79

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:

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.
Attorneys for Defendant, GULLIVER
Suite 411, Douglas Centre
2600 Douglas Road
Coral Gables, Florida 33134
PHONE: (305) 445-0531 (Dade)
~~(305) 525-7776 (Broward)~~

BY


HAROLD C. KNECHT, JR.

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

**

**

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

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

DCA CASE NO: 95-00038
L.T. CASE NO: 91-56048

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of their minor son, ROBERT BODEK,
on behalf of their minor son,
Robert Bodek and themselves,
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Appellants,

vs.

GULLIVER ACADEMY, INC.,

Appellee.

**NOTICE TO INVOKE DISCRETIONARY
JURISDICTION OF SUPREME COURT**

Notice is given that GULLIVER ACADEMY, INC., Appellee/
Petitioner, invokes the discretionary jurisdiction of the supreme
court to review the decision of this court rendered on September
13, 1995, which decision denied petitioner's motion for rehearing
and/or motion for Supreme Court certification and motion for
rehearing en banc, which was directed to this court's June 14, 1995
opinion of reversal of the trial court's order granting
petitioner's motion for attorney's fees and costs pursuant to FSA
§768.79.

The decision of the Third District Court of Appeal sought
to be reviewed expressly and directly conflicts with decisions of
other District Courts of Appeal and of the Supreme Court on the
same question of law.

WE HEREBY CERTIFY that a true and correct copy of the

foregoing was mailed this 11th day of October, 1995 to JAMES C. BLECKE, ESQ., Attorney for Appellants/Respondents, 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.

KNECHT & KNECHT, P.A.
Attorneys for GULLIVER
Suite 411, Douglas Centre
2600 Douglas Road
Coral Gables, Florida 33134
(305) 445-0531

BY 
HAROLD C. KNECHT, JR., ESQ.

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
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Appellants,

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vs.

** CASE NO. 95-38

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**

Appellee.

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A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal Third District

By

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

James C. Blecke

/NB

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

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	**	
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	**	
GULLIVER ACADEMY, INC.,	**	
	**	
Appellee.	**	

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Reversed.