

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2443

DCA NOS. 3D03-2140
3D03-2713

SAIA MOTOR FREIGHT LINE, INC.,
etc., et al.,

Petitioners,

vs.

LESLIE REID and KEICHAN LEWIS, as
Co-Personal Representatives of the Estate
and Survivors of JOAN PAULINE BRYAN,
deceased,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

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INTRODUCTION

Respondents Leslie Reid and Keichan Lewis, Co-Personal Representatives of the Estate and Survivors of Joan Pauline Bryan, deceased, will be referred to as they stand before this Court, as they stood in the trial court and by name. Petitioners Saia Motor Freight Line, Inc. and Ray Charles Sellars will be referred to as they stand before this Court, as they stood in the trial court and collectively as Saia.

“R” refers to the record on appeal. “A” refers to the appendix filed with Saia’s brief in the Third District, containing the two trial court hearing transcripts dated March 28, 2003 (A1) and June 24, 2003 (A2), which were supplemented to the record on appeal.

Emphasis is supplied by counsel unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

On May 12, 2001, Joan Pauline Bryan was involved in an automobile collision that caused her death. Ms. Bryan left two survivors: her husband, Leslie Reid, and her daughter, Keichan Lewis. Mr. Reid and Ms. Lewis were appointed co-personal representatives of Ms. Bryan's estate. On November 26, 2001, Mr. Reid and Ms. Lewis, as co-personal representatives and co-plaintiffs, filed a complaint against Saia Motor Freight Line and Ray Charles Sellars for the wrongful death of Ms. Bryan. (R. 1-10).

A jury trial was held resulting in a verdict in favor of plaintiffs Keichan Lewis and Leslie Reid. On January 2, 2003, the trial court entered its First Amended Final Judgment in the amount of \$1,805,600, of which \$1,000,000 was for the benefit of Leslie Reid and \$805,600 was for the benefit of Keichan Lewis. The trial court reserved jurisdiction to award the plaintiffs costs and to consider plaintiff Leslie Reid's claim for attorney's fees. (R. 283-284).^{1/}

On March 17, 2003, Plaintiffs, as the prevailing parties in this action, filed their verified motion to tax costs. (R. 330). A hearing on the motion for costs was held

¹ The trial court had previously entered a final judgment dated November 21, 2002, and an amended final judgment dated November 26, 2002. The trial court reserved jurisdiction to award attorney's fees and costs in each of these judgments. (R. 256-258, 268-270).

on June 24, 2003. (A2). Defendant objected that the motion for costs was untimely. (A2 at 3-21). The trial court overruled that objection, (A2 at 19-21), and awarded Plaintiffs costs in the amount of \$66,429.79. (R. 390-393). Defendant appealed. (R. 387-389).^{2/}

On appeal the Third District affirmed the award of costs. *Saia Motor Freight Line, Inc. v. Reid*, 888 So.2d 102 (Fla. 3d DCA 2004). In its opinion filed November 24, 2004, it held:

Finding that the motion for prevailing party costs was timely, we affirm the trial court's proper award of costs. We agree with the Fourth District's decision in *Fisher v. John Carter & Assocs., Inc.*, 864 So.2d 493 (Fla. 4th DCA 2004), and hold that the trial court may award costs pursuant to a final judgment's reservation of jurisdiction despite a party's failure to comply with the 30-day time period set forth in Florida Rule of Civil Procedure 1.525. See *Gulliver Acad., Inc. v. Bodek*, 694 So.2d 675 (Fla. 1997). Therefore, the trial court properly awarded costs to the co-personal representatives. We also certify conflict with *Gulf Landings Ass'n. Inc. v. Hershberger*, 845 So.2d 344 (Fla. 2d DCA 2003), and *Wentworth v. Johnson*, 845 So.2d 296 (Fla. 5th DCA 2003).

^{2/} In a separate order, the trial court also awarded Mr. Reid \$68,567.14 in attorney's fees, pursuant to Fla. Stat. § 768.79 and Fla. R.Civ.P. 1.442, based upon a proposal for settlement. (R. 394). Saia also appealed that order. (R. 358-363). The appeals were consolidated and in its opinion below the Third District reversed the fee award. 888 So.2d at 102, 104. The fee award is not at issue in the present appeal.

888 So.2d at 104 (footnote omitted).

On December 28, 2004, Saia filed its Notice to Invoke seeking to invoke the discretionary jurisdiction of this Court based upon the certified conflict. This Court postponed its decision on jurisdiction and ordered the parties to proceed with briefs on the merits.

JURISDICTION AND STANDARD OF REVIEW

Respondents agree that conflict exists between the various decisions of the District Courts of Appeal which have considered the issue of whether a reservation of jurisdiction in a final judgment is procedurally an enlargement of time which permits the trial court to award costs based on a motion filed beyond the thirty-day period provided in Florida Rule of Civil Procedure 1.525. In its opinion below the Third District certified conflict with *Gulf Landings Ass'n. Inc. v. Hershberger*, 845 So.2d 344 (Fla. 2d DCA 2003), and *Wentworth v. Johnson*, 845 So.2d 296 (Fla. 5th DCA 2003), on this issue. In its recent decision in *Nicoletti v. Nicoletti*, 2005 WL 496826 (Fla. 2d DCA March 4, 2005), the Second District certified conflict with this case as well as the Fourth District's decision in *Fisher v. John Carter & Associates, Inc.*, 864 So.2d 493 (Fla. 4th DCA 2004). *See also Molloy v. Flood*, 884 So.2d 256 (Fla. 2d DCA 2004), and *Lyn v. Lyn*, 884 So.2d 181 (Fla. 2d DCA 2004)(both certifying conflict with *Fisher*). In *Smith v. Smith*, 2005 WL 284859 (Fla. 1st DCA Feb. 8, 2005), the First District also recognized the split, although it did not certify conflict. Therefore, this case lies within the discretionary jurisdiction of this Court, if the Court chooses to exercise it. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv) & (vi).

The standard of review with respect to this legal determination regarding the

construction of the rules of procedure is *de novo*. See *Smith v. Smith*, 2005 WL 284859 at *2; *State Dep't of Transp. v. Southtrust Bank*, 886 So.2d 393, 396 (Fla. 1st DCA 2004); *Gosselin v. Gosselin*, 869 So.2d 667, 668 (Fla. 4th DCA 2004).

SUMMARY OF ARGUMENT

The Third District properly affirmed the trial court's award of costs to Plaintiffs. In *Gulliver Academy, Inc. v. Bodek*, 694 So.2d 675 (Fla. 1997), this Court held that a trial court's timely reservation of jurisdiction in a final judgment was procedurally an enlargement of time under Rule 1.090(b) which permitted the trial court to consider a motion for attorney's fees and costs which was filed beyond the thirty day time period specified by the offer of judgment statutes and Rule 1.442(g). Contrary to Saia's argument, there is nothing in Rule 1.525 which precludes an enlargement of time or overrules this Court's decision in *Gulliver Academy*.

Here, within thirty days of the judgment the trial court reserved jurisdiction to award costs and fees. Under *Gulliver Academy*, that timely reservation of judgment operated as an extension of time under Rule 1.090(b). Therefore, under the procedure approved by this Court in *Gulliver Academy*, the subsequently filed motion to tax costs, although filed more than thirty days after entry of the first amended judgment, was not untimely. This Court should reject Petitioner's argument that in adopting Rule 1.525 the Court *sub silentio* overruled its decision in *Gulliver Academy* and hold that the trial court's award of costs was properly affirmed.

ARGUMENT

THE TRIAL COURT'S AWARD OF PREVAILING PARTY COSTS WAS PROPER BASED UPON THE TRIAL COURT'S TIMELY RESERVATION OF JURISDICTION IN THE FINAL JUDGMENT WHICH SERVED PROCEDURALLY AS AN ENLARGEMENT OF TIME ALLOWING THE FILING OF A MOTION FOR COSTS BEYOND THE THIRTY-DAY PERIOD PROVIDED IN RULE 1.525.

In *Gulliver Academy, Inc. v. Bodek*, 694 So.2d 675 (Fla. 1997), this Court held that a trial court's reservation of jurisdiction in a final judgment was an enlargement of time which permitted the trial court to consider the defendant's motion for attorney's fees and costs which was filed beyond the thirty day period provided in the offer of judgment statutes, stating:

[W]hen [the] trial court entered final judgment, the court reserved jurisdiction to entertain a motion for attorney fees and costs. This reservation of jurisdiction allowed the trial court to consider further proceedings on the issue of attorney fees even though the motion for fees was filed more than thirty days after the entry of judgment. ***We find that a reservation of jurisdiction in a final judgment is procedurally an enlargement of time under rule 1.090(b), which may allow a party to file a late motion for attorney fees.*** Any other interpretation would make the trial court's reservation in the final judgment not only a nullity but a procedural trap.

Id. at 677.

Despite that clear and unequivocal holding of this Court, Saia argued below that the trial court, which reserved jurisdiction in the final judgment to tax costs and fees, lacked the power to grant Plaintiff Lewis' motion for costs filed more than thirty days after the judgment, arguing that Rule 1.525, enacted after *Gulliver*, "does not permit an enlargement of time." (Appellant's Brief in the Third District at 12). This argument was properly rejected by both the trial court and the Third District. There is nothing in Rule 1.525 to suggest that the time period specified in that rule is not subject to an enlargement of time under Rule 1.090(b). Indeed, even those district courts which have rejected the argument that a reservation of jurisdiction in a final judgment operates procedurally to enlarge the thirty day period provided in Rule 1.525 have recognized that the trial court has the power to extend that time period under Rule 1.090(b). See *Smith v. Smith* 2005 WL 284859 (Fla. 1st DCA Feb. 8, 2005); *State, Dep't of Transp. v. Southtrust Bank*, 886 So.2d 393 (Fla. 1st DCA 2004); *Lyn v. Lyn*, 884 So.2d 181 (Fla. 2d DCA 2004); *Wentworth v. Johnson*, 845 So.2d 296 (Fla. 5th DCA 2003); *Carter v. Lake County*, 840 So.2d 1153 (Fla. 5th DCA 2003).

In its brief here, Saia has abandoned that argument and now acknowledges that the thirty-day period provided in Rule 1.525 is subject to an enlargement of time under Rule 1.090(b). However, Saia continues to contend that this Court's holding

in *Gulliver Academy*, that a reservation of jurisdiction in a final judgment operates procedurally as an enlargement of time under Rule 1.090(b) which may allow a party to file a late motion for attorney's fees and costs, is no longer good law due to the subsequent adoption of Rule 1.525. That argument should be rejected by this Court, as it was by the Third District below and by the Fourth District's decision in *Fisher v. John Carter and Assoc., Inc.*, 864 So.2d 493 (Fla. 4th DCA 2004).

Prior to the adoption of Rule 1.525 there was no generally applicable time period specified by the rules for filing a motion for costs and attorney's fees; rather, the general rule as established by Florida case law was that such motions need only be filed within a "reasonable" time. *See Stockman v. Downs*, 573 So.2d 835 (Fla. 1991); *E & A Produce Corp. v. Superior Garlic Int'l, Inc.*, 864 So.2d 449, 451 (Fla. 3d DCA 2003). The uncertainty created by conflicting case law determining what was "reasonable" engendered suggestions that a rule of procedure concerning such motions might be appropriate. *See Shipley v. Belleair Group, Inc.*, 759 So.2d 28, 30 (Fla. 2d DCA 2000). However, in suggesting such a rule, the court in *Shipley* noted the need for flexibility to allow the courts to accommodate post-trial motions and the differing needs of lawyers and parties in various types of cases. *Id.*

This Court similarly recognized the need for such flexibility in *Gulliver*:

By approving this procedure, we allow decisions on

attorney fees to proceed in a manner consistent with judicial efficiency and economy. . . . [T]he trial court should have the discretion to extend the time for filing the motions by reserving jurisdiction in the final judgment.

694 So.2d at 677-78.

In enacting the new rule, this Court stated that it was only intended to establish a time requirement; there is nothing to indicate that the Court intended to deprive trial courts of their discretion to enlarge that time requirement by a reservation of jurisdiction as recognized in *Gulliver Academy*. See Fla.R.Civ.P. 1.525 Court Commentary. As Saia notes, this Court was undoubtedly aware of its decision in *Gulliver* when it adopted Rule 1.525. If by adopting that rule this Court intended to recede from the procedure it approved in *Gulliver Academy* it could have made that clear by the simple expedient of so stating in Rule 1.525 or its Commentary but it did not. As the Court has expressly stated, “this Court does not intentionally overrule itself sub silentio.” *F.B. v. State*, 852 So.2d 226, 228 (Fla. 2003); *Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002).

As Saia acknowledges at 10, “the rules of construction applicable to statutes also apply to the construction of rules.” *Brown v. State*, 715 So.2d 241, 243 (Fla. 1998); *Southtrust Bank*, 886 So.2d at 395. There is a general presumption that no change in the common law is intended unless a statute is unequivocal and clear in that

regard, or is so repugnant to the common law that the two cannot coexist. *Time Ins. Co. v. Burger*, 712 So.2d 389, 393 (Fla. 1998); *State v. Ashley*, 701 So.2d 338, 341 (Fla. 1997); *Thornber v. City of Ft. Walton Beach*, 568 So.2d 914, 918 (Fla. 1990). See also *Hollar v. Int'l Bankers Ins. Co.*, 572 So.2d 937, 939 (Fla. 3d DCA 1990)(“Statutes should be construed to harmonize with existing law.”)

Saia’s contention that by simply establishing a thirty day time period for filing motions for costs and attorney’s fees, in place of the vague “reasonable time” standard applied under the prior existing caselaw, this Court necessarily receded from its holding in *Gulliver Academy* is also contradicted by an examination of the facts in that case. Exactly like the time period now provided in Rule 1.525, the time period mandated by the offer of judgment statutes at issue in *Gulliver*, which this Court determined to be procedural, required the motion for attorney’s fees to be filed within thirty days of the entry of judgment, as did Rule 1.442(g)(1996 revision) which this Court had recently adopted to govern such motions. Importantly, this Court clearly expressed its intention that the procedure it approved in granting trial courts the discretion to extend the time for filing such motions by reserving jurisdiction in the final judgment *would be equally applicable to the thirty day time period established by the new rule:*

[W]e note that under the new rule, there could be a

reservation of jurisdiction in a final judgment entered on a jury verdict which would not be timely if the final judgment was not entered within thirty days of the jury verdict. In that situation, the party would have to show excusable neglect under Rule 1.090(b)(2).

By approving this procedure, we allow decisions on attorney fees to proceed in a manner consistent with judicial efficiency and economy. . . . [T]he trial court should have discretion to extend the time for filing the motions by reserving jurisdiction in the final judgment. . . . Of course, *absent a reservation of jurisdiction*, a motion for attorney fees based upon the statutes must be filed within thirty days *as provided in the rule*.

Gulliver Academy, 694 So.2d at 677-78. See also *Kendall Country Estate, Inc. v. Pierson*, 826 So.2d 1002 (Fla. 3d DCA 2001)(recognizing that under *Gulliver Academy* and Rule 1.442(g) the court has the right to reserve jurisdiction to award fees if it acts within 30 days of the verdict).

With the subsequent adoption of Rule 1.525, Rule 1.442(g) was amended to incorporate that rule, shifting the thirty day period for filing a motion for fees and costs based on a proposal for settlement to the new, more general rule. See Fla.R.Civ.P. 1.442 Committee Notes, 2000 Amendment. There is no principled reason to treat the effect of a reservation of jurisdiction any differently under the thirty day time period provided in Rule 1.525 than this Court treated it under the offer of judgment statute and prior Rule 1.442(g). See *Southtrust*, 886 So.2d at 395

(“rules promulgated by the supreme court which deal with the same subject matter should be construed together and in the light of each other”)(quoting *Dibble v. Dibble*, 377 So.2d 1001,1003 (Fla. 3d DCA 1979)).

The significance Saia seeks to place on the use of the word “shall” in Rule 1.525 is unwarranted. Prior Rule 1.442(g), in very similar language, also provided that a party seeking to recover sanctions (i.e. costs and attorney’s fees) based on the statute “**shall** do so by service of an appropriate motion within 30 days after the entry of judgment” *Gulliver Academy*, 694 So.2d at 677. Nevertheless, this Court held that a reservation of jurisdiction served to enlarge that time period. *Id.* Where the same language appears in two rules, it should be interpreted consistently. *HIP Health Plan of Fla., Inc. v. Griffin*, 757 So.2d 1272, 1273 (Fla. 4th DCA 2000). *See also Dade County v. Moreno*, 227 So.2d 548 (Fla. 3d DCA 1969)(while rule superseded statute and provided for slightly different practice, prior opinions were persuasive as to meaning of terms employed). Nor is Saia’s argument that the holding in *Gulliver Academy* is no longer valid because Rule 1.525 was intended to provide a “bright-line” persuasive—the same thirty-day “bright-line” existed in the statute and rule addressed in *Gulliver Academy*.

In *Fisher v. John Carter and Assoc., Inc.*, 864 So.2d 493 (Fla. 4th DCA 2004), the Fourth District rejected the plaintiff’s argument that the trial court’s award

of attorney's fees was improper, despite a reservation of jurisdiction in the judgment, because the defendant's motion for fees was filed more than three months after entry of the judgment and Rule 1.525 absolutely barred any application for fees not filed within thirty days of final judgment. In affirming the award of attorney's fees, the Fourth District relied on this Court's decision in *Gulliver Academy* and held that the reservation of jurisdiction in the final judgment extended the time for filing a motion for attorney's fees, explaining:

Though *Gulliver* was decided before Florida Rule of Civil Procedure 1.525 was adopted, the pertinent time provisions of the two statutes are so closely analogous to the rule that we can find no reason not to extend its holding.

Fisher, 864 So.2d at 496. In its decision below the Third District agreed with the Fourth District's decision in *Fisher*, citing *Gulliver*. *Saia*, 888 So.2d at 104.

Contrary to Saia's assertions, the view taken by the Third and Fourth Districts does not make the rule "permissive" or render it a "virtual nullity." Like the statutes and rule addressed in *Gulliver Academy*, Rule 1.525 establishes a time requirement generally applicable to motions for costs and attorney's fees. As in *Gulliver*, the thirty-day time period set by Rule 1.525 will apply in the absence of an enlargement of time either through: (1) a timely reservation of jurisdiction in the final judgment which operates procedurally as an enlargement of time under Rule 1.090(b); (2) a

motion for extension of time under Rule 1.090(b)(1) filed within thirty days; or (3) if the reservation of jurisdiction occurs or the motion for extension is made after the thirty day period, upon a showing of excusable neglect as provided in Rule 1.090(b)(2). In the present case, no showing of excusable neglect was necessary because the trial court reserved jurisdiction within thirty days of the judgment. As this Court held in *Gulliver*, “[e]xcusable neglect is only a necessary finding if the reservation of jurisdiction occurs after the thirty-day time period.” 694 So.2d at 677.

In filing their motion for costs in this case, Plaintiffs relied on the procedure approved by this Court in *Gulliver Academy*. (See A2 at 13). In reaching its decision in that case, this Court stated:

We find that a reservation of jurisdiction in a final judgment is procedurally an enlargement of time under rule 1.090(b), which may allow a party to file a late motion for attorney fees. ***Any other interpretation would make the trial court’s reservation in the final judgment not only a nullity but a procedural trap.***

694 So.2d at 677. If that was true before the decision in *Gulliver Academy*, it is all the more true after that decision clearly established that such a procedure was proper and operated as an enlargement of time. Indeed, that procedural trap is amply demonstrated by the cases decided in those districts which have taken the view that

Gulliver Academy has been abrogated by the adoption of Rule 1.525.^{3/}

As noted above, this Court does not intentionally overrule itself *sub silentio*. Thus, this Court should hold that it did not *sub silentio* overrule *Gulliver Academy* simply by adopting Rule 1.525 establishing a thirty day period applicable to all motions for costs and attorney's fees, rather than the thirty day period previously contained in Rule 1.442(g). The trial court properly found that this Court's decision in *Gulliver Academy* and Rule 1.525 should be read together and reconciled if possible, and that is what it did. (A2 at 19-21).

Respondents respectfully submit that the Third District's decision that the Plaintiffs' motion for prevailing party costs in this case was timely and the trial court's award of prevailing party costs to Plaintiffs was proper, based upon the trial court's timely reservation of jurisdiction in the final judgment, is entirely correct and that the trial court's award of costs was properly affirmed.

^{3/} For example, in *Swann v. Dinan*, 884 So.2d 398 (Fla. 2d DCA 2004), on December 20, 2001, six days after a jury verdict in its favor, the defendant filed a motion to tax attorney's fees and costs pursuant to a proposal for settlement. A notice of appeal was filed after denial of posttrial motions but prior to entry of a final judgment. The district court relinquished jurisdiction to allow entry of a final judgment and on November 25, 2002, the trial court entered a final judgment and reserved jurisdiction to consider the award of attorney's fees and costs. Following an affirmance by the district court, the trial court conducted a hearing and awarded fees based on the motion which had been filed on December 20, 2001. The district court reversed because the motion for fees was not filed within thirty days after entry of the November 25, 2002 judgment.

CONCLUSION

For the foregoing reasons, Respondents Leslie Reid and Keichan Lewis, Co-Personal Representatives of the Estate and Survivors of Joan Pauline Bryan, deceased, respectfully request this Court to affirm the decision of the Third District Court of Appeal and the final judgment on costs entered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this ___ day of March, 2005 to: Hinda Klein, Esquire, Counsel for Petitioner, CONROY, SIMBERG, GANON, KREVANS, & ABEL, P.A., 3440 Hollywood Boulevard, Second Floor, Hollywood, FL 33021; Benjamin Salzillo, Esquire, RICCI ~ LEOPOLD, P.A., 2925 PGA Blvd., Suite 200, Palm Beach Gardens, FL 33410, Counsel for Leslie Reid and Patrick S. Cousins, Esquire, Co-Counsel for Leslie Reid, COUSINS & ASSOCIATES, P.A., 330 Clematis Street, Suite 218, West Palm Beach, FL 33401.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations and the font is in Times New Roman 14-point typeface, in compliance with Rule 9.210(a)(2).

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