031199

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC04-1929

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

Petitioners,

vs.

KEICHAN LEWIS and LESLIE REID,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ON REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL
CASE NO.: 3D03-2713

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PREFACE

Petitioners, SAIA MOTOR FREIGHT LINE, INC. and RAY CHARLES SELLARS will be collectively referred to as SAIA in this brief. Respondent KEICHAN LEWIS will be referred to as LEWIS in this brief and Respondent LESLIE REID will be referred to as REID..

References to the Record will appear as follows:

(R. ___)

STATEMENT OF THE CASE AND FACTS

This appeal arose from two separate final judgments, one for attorneys' fees and one for costs, rendered by the trial court after entry of a Final Judgment for $1,805,000.00 in favor of the Plaintiff, LESLIE REID and KEICHAN LEWIS as co-Personal Representatives of the Estate of JOAN PAULINE BRYAN, deceased . (R.283-284) The cost and fee judgments were entered after a final judgment, dated November 21, 2002, an amended final judgment, dated November 26, 2002, and a First Amended Final Judgment dated January 3, 2003 were rendered against SAIA on the Appellees' ESTATE'S wrongful death claim.[1] (R.256- 258, 268-270, 283-284) During the pendency of the litigation, the co-personal representatives, LESLIE REID and KEICHAN LEWIS were represented by different counsel and each individually served Proposals of Settlement on SAIA for their individual claims as beneficiaries. (R.275-282) KEICHAN LEWIS only filed a Motion to Tax Costs on the ground that he was a prevailing party. (R.330-

[1] Initially, the Plaintiff submitted Proposed Final Judgments to the trial court without providing a copy of those Judgments to the Defendant for its approval. (R.271-274) The Defendant objected to the first two final judgments on the grounds that they purported to enter a judgment in favor of the individual beneficiaries, and not the Estate, who was the sole party plaintiff. (R.271-274) Ultimately, the parties entered into an Agreed order vacating the incorrect Final Judgments. (R.285)

342)

The trial court considered REID and LEWIS' motion for costs. (R.330-342) The motion was filed on March 17, 2003, two and a half months after entry of the last final judgment. (R.293-284, 330-342) SAIA objected to the Motion on the grounds that it was untimely pursuant to Florida Rule of Civil Procedure 1.525, which requires that cost and fees motions be filed within thirty (30) days after entry of the Final Judgment. (A2.3) LEWIS argued that the Court could consider the Motion because it reserved jurisdiction to tax costs and fees in the body of the Final Judgment and because Florida Rule of Civil Procedure 1.090 permits the Court, within its discretion, to enlarge a time period if the request to do so is made before expiration of that time period. (A2.5) The trial court found that the Motion was timely and awarded LEWIS and REID costs of $66,429.79. (R.380-393)

SAIA timely appealed this order. (R2.387-389) On appeal, the Third District affirmed the judgment taxing costs, finding that the trial court's reservation of jurisdiction in the final judgment on damages effectively tolled the time for filing a motion to tax costs. (A.1-5) The Court 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).

(A.4-5) SAIA timely invoked this Court's jurisdiction to resolve the certified conflict. By order, this Court deferred its decision on jurisdiction and ordered the parties to brief the merits.

SUMMARY OF ARGUMENT

There is a clear and irreconcilable conflict between the District Courts of Appeal on the issue raised in this case, namely, whether Florida Rule of Civil Procedure 1.525 is mandatory and requires that a party moving for fees and/or costs file his/her motion within thirty (30) days of entry of the final judgment or whether the Rule permits the filing of any such motion at any time, as long as the trial court has reserved jurisdiction to consider such a motion. We submit that since every District Court in this state has weighed in on the issue and there is no way to reconcile the various holdings, this Court should accept jurisdiction to resolve the question once and for all.

In this case, the moving party filed its Motion to tax Costs two and a half months after the last amended Final Judgment was entered. That party did not move for an enlargement of time, nor did that party offer an excuse for its failure to comply with the plain language of the Rule. Instead, that party argued that pursuant to this Court's decision in Gulliver v. Bodek, 694 So. 2d 675 (Fla. 1997), which pre-dated the Rule, where the trial court reserves jurisdiction in its final judgment to award fees and/or costs, there is no deadline to file such a motion.

This argument is clearly contrary to the plain language of the Rule and

would undermine its express purpose which was to resolve uncertainty as to the timing of such motions and to timely conclude all proceedings in a case. While Florida Rule of Civil Procedure 1.090(b) may provide an enlargement of time in case where good cause has been shown, where, as here, there is no such showing and the moving party has not even attempted to obtain an enlargement of time under that Rule, the trial court should have denied the motion to tax costs. This Court should hold that Rule 1.525 is mandatory unless the moving party properly seeks an enlargment of time pursuant to Rule 1.090(b).

POINT ON APPEAL

THIS COURT SHOULD RESOLVE THE CERTIFIED CONFLICT BY DETERMINING THAT, PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.525, A MOTION TO TAX COSTS MUST BE FILED WITHIN 30 DAYS OF ENTRY OF THE FINAL JUDGMENT AND THAT A MOTION FILED THEREAFTER IS DEEMED UNTIMELY UNLESS THE MOVANT HAS COMPLIED WITH FLORIDA RULE OF CIVIL PROCEDURE 1.090 AND PROPERLY MOVED FOR AN ENLARGMENT OF TIME TO FILE THE MOTION.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CERTIFIED CONFLICT BY DETERMINING THAT, PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.525, A MOTION TO TAX COSTS MUST BE FILED WITHIN 30 DAYS OF ENTRY OF THE FINAL JUDGMENT AND THAT A MOTION FILED THEREAFTER IS DEEMED UNTIMELY UNLESS THE MOVANT HAS COMPLIED WITH FLORIDA RULE OF CIVIL PROCEDURE 1.090 AND PROPERLY MOVED FOR AN ENLARGMENT OF TIME TO FILE THE MOTION.

A. Jurisdiction

The Third District Court of Appeal has certified conflict between its decision in this case and 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), when it held that a motion to tax costs need not be served within the thirty (30) day time period set forth in Rule 1.525. The Second District has also issued two recent opinions certifying conflict between those decisions and the Fourth District's decision in Fisher v. John Carter & Assoc., Inc., 864 So. 2d 493 (Fla. 4th DCA 2004). See, Molloy v. Flood, 884 So. 2d 256 (Fla. 2d DCA 2004), Lyn v. Lyn, 884 So. 2d 181 (Fla. 2d DCA 2004), when **it** held that the time limitation set

forth in Rule 1.525 must be strictly and literally construed to preclude an award of costs based on an untimely motion.[2] The conflict between the Districts on the question of whether Rule 1.525 requires that a motion to tax costs must be served within 30 days after entry of the judgment is clear and irreconcilable and will continue to be certified to this Court until the Court resolves it. Therefore, this Court should exercise its conflict jurisdiction and resolve the conflict.

B. Standard of Review

In this case, the issue before the trial court was a pure question of law. As such, de novo review is the applicable standard. See, State Dept. of DOT v. Southtrust Bank, 886 So. 2d 393 (Fla. 1st DCA 2004).

C. The Merits

The final judgment for costs must be reversed. The Motion to Tax Costs was filed on March 17, 2003, two and a half months after the last Final Judgment was entered. (R.330-342) At the hearing on the Motion, no excusable neglect was proffered for the delay, but LEWIS' counsel argued that because the trial court reserved jurisdiction to tax costs in the body of the Final Judgment, the motion was timely because it could be filed at any time . (A2.5)

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[2] In those cases, it appears that none of the parties have pursued Supreme Court review of this issue.

SAIA argued that Rule 1.525, which provides that "[a]ny party seeking a judgment taxing costs, attorneys' fees or both shall serve a motion within 30 days after filing of the judgment . . . ", is clear and unambiguous and does not permit an automatic enlargement of time. SAIA argued that there was nothing in the Rule to indicate that if the Court reserved jurisdiction to award such costs, the moving party had no time limit within which to file its motion. (A2.17-18) The trial court found that Gulliver Academy, Inc. v. Bodek, 694 So. 2d 675 (Fla. 1997) permitted a trial court to consider a motion for costs filed more than thirty (30) days after the final judgment was rendered, if that judgment reserved jurisdiction to tax costs. (A2.20-21)

The trial court erred in relying on Bodek, in light of the fact that it pre-dated Florida Rule of Civil Procedure 1.525. The rule was enacted to establish a bright-line test of timeliness of Motions for Attorneys' Fees and costs and given that its clear and unambiguous language mandated the filing of such motions within thirty days, there is no occasion, and no good reason, to construe the rule otherwise. See, Rule 1.525 Committee Notes ("[t]his rule is intended to establish a time requirement to serve motions for costs and attorneys' fees");

Rules of Civil Procedure are construed in accordance with statutory

construction principles. See, Brown v. State, 715 So. 2d 241 (Fla. 1998); Syndicate Properties, Inc. v. Hotel Floridian Co., 114 So. 441 (Fla. 1927); Gervais v. City of Melbourne, 30 Fla. L. Weekly D70 (Fla. 5th DCA Dec. 23, 2004); Southtrust Bank, 886 So. 2d 393 (Fla. 1st DCA 2004). Unambiguous rules must be accorded their plain meaning. Brown, 715 So. 2d at 243; Southtrust Bank, 886 at 395.

Rule 1.525 clearly, unambiguously, and without qualification **requires** that a motion to tax costs **shall** be served within thirty (30) days after the filing of a judgment. The First, Second and Fifth District Courts of Appeal have all held that the term "shall", as used in this and other court rules, is mandatory, and requires that a motion to tax costs be filed within that time period, absent an extension of time granted by the trial court. See, e.g., Williams v. State, 378 So. 2d 902, 903 (Fla. 5th DCA 1980)("the word 'shall' as used by the Supreme Court when establishing rules of court procedure means exactly what it usually means and as defined in an accepted dictionary"); Atkins v. Eris, 873 So. 2d 1264 (Fla. 1st DCA 2004)(rule 1.525 is mandatory); Ulico Casualty Co. v. Kennedy Const. Inc., 821 So. 2d 452 (Fla. 1st DCA 2002)(use of word "shall" in Rule 1.525 is interpreted to be mandatory in application) . The Third and Fourth Districts, on the other hand,

have found the rule permissive by engrafting into it an automatic indefinite extension of time whenever the trial court enters a final judgment reserving jurisdiction to tax costs and fees. See, Saia Motor Freight Line, Inc. v. Reid, 888 So. 2d 102 (Fla. 3d DCA 2004); Wilkinson v. Wilkinson, 874 So. 2d 1291 (Fla. 4th DCA 2004)(reservation of jurisdiction to tax fees and costs was "tantamount to an enlargement of time under Florida Rule of Civil Procedure 1.090(b); Fisher v. John Carter and Assoc., Inc., 864 So. 2d 493 (Fla. 4th DCA 2004). By doing so, the latter two Districts have undermined the sole and obvious purpose of the rule, which is to provide a "bright-line" test to determine the timeliness of a motion to tax costs and fees. See, Moss v. Moss, 29 Fla. L. Weekly D2369 (Fla. 2d DCA, Oct. 22, 2004)(rule 1.525 is a "bright-line" rule designed to provide predictability and consistency in postjudgment fee requests); Swann v. Dinan, 884 So. 2d 398 (Fla. 2d DCA 2004)(Rule 1.525 must be strictly enforced if it is to remain a "bright-line" rule as intended); Molloy v. Flood, 884 So. 2d 256 (Fla. 2d DCA 2004)("bright-line" rule requires a separate written motion for fees to be filed within thirty days of entry of final judgment and reserving jurisdiction in judgment does not automatically extend time); McFarland & Son, Inc. v. Royal Mende Basel, 877 So. 2d 964, 965 (Fla. 5th DCA 2004)(Rule 1.525 "was designed to establish a "bright-line" rule to

resolve uncertainty concerning the timing of post-trial motions and to bring them to a timely conclusion"). There is simply no good reason for such a sweeping and illogical exception to what is a clear and unambiguous mandate.

In Gulliver, 694 So. 2d 675, on which both the trial court and Third District relied, this Court held that where the trial court reserved jurisdiction in the final judgment, that reservation was procedurally an enlargement of time under rule 1.090(b), which could allow a party to file an otherwise untimely motion to tax fees. Id. The Court observed that "any other interpretation would make the trial court's reservation in the final judgment not only a nullity but a procedural trap." Id.

As previously mentioned, Rule 1.525 was not in effect at the time of this Court's decision in Gulliver and therefore, Gullliver is not dispositive to the issue in this case. Given that the rule is phrased in mandatory terms and given that this Court was undoubtedly aware of its own decision in Gulliver at the time that it approved the rule, it would appear that no longer is a reservation of jurisdiction sufficient, in and of itself, to toll the time for filing a motion to tax fees and costs. See, Wentworth v. Johnson, 845 So. 2d 296 (Fla. 5th DCA 2003)(declining to apply Gulliver to a post-Rule 1.525 untimely request for fees). To hold otherwise would render the new rule a virtual nullity and would once again require courts to

determine on a case-by-case basis whether an untimely motion was unreasonably delayed such that it should be denied. See, Lyn v. Lyn, 884 So. 2d 181 (Fla. 2d DCA 2004); Gulf Landings Assoc., Inc. v. Hershberger, 845 So. 2d 344 (Fla. 2d DCA 2003).

This is not to say that there may be instances where an extension of time to file a motion to tax fees or costs is appropriate. As this Court in Gulliver and other courts addressing this issue have found, the mandatory language of Rule 1.525 does not preclude an enlargement of time under Rule 1.090(b) "for cause shown". Id., State Dept. of DOT v. Southtrust Bank, 886 So. 2d 393 (Fla. 1st DCA 2004); Lyn, 884 So. 2d 181; Wentworth v. Johnson, 845 So. 2d 296 (Fla. 5th DCA 2004). That Rule provides, in pertinent part:

> When an act is required or allowed to be done at or within a specified time by order of court, by these rules, or by notice given thereunder, for cause shown the court at any time in its discretion (1) with or without cause, may order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made and notice after the expiration of the specified period, may permit the act to be done when failure to act was the result of excusable neglect . . . .

Id. This rule does not automatically extend the time for filing a motion under Rule 1.525, especially where, as here, there has been no motion made before or after the

expiration of the thirty (30) day time period and there is no evidence in the record establishing the parties' excusable neglect. It does, however, permit the trial court to extend the time for filing the motion for good cause.

It is respectfully requested that this Court accept jurisdiction to resolve the conflict between the District Courts of Appeal and to hold that Rule 1.525 requires a timely motion to tax costs or fees, absent a request for an enlargement of time under Rule 1.090(b). Application of the rule in this case mandates that the cost judgment, based as it was on an untimely motion for which no enlargement of time was sought, be reversed.

CONCLUSION

For the foregoing reasons, the Petitioners SAIA MOTOR FREIGHT LINE, INC. and RAY CHARLES SELLARS respectfully request that this Court accept jurisdiction and reverse the cost judgment on the grounds that the motion to tax costs was untimely filed.

Respectfully submitted,

HINDA KLEIN, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27th day of January, 2005, to: Marc Cooper, Esquire, Counsel for Plaintiff, Colson, Hicks, Eidson, Colson, Matthews, Martinez & Mendoza, 255 Aragon Avenue, Second Floor, Coral Gables, Florida 33134-5008; Patrick S. Cousins, Esquire, Cousins & Associates, 330 Clematis Street, Suite 218, West Palm Beach, Florida 33401-4602; Barbara Silverman, Colson, Hicks, Eidson, Colson, Matthews, Martinez & Mendoza, 255 Aragon Avenue, 2nd Floor, Coral Gables, Florida 33134-5008; Scott C. Murray, Esquire, Ricci, Hubbard, Leopold, Frankel & Farmer, P.A., 2925 PGA Boulevard, Suite 200, Palm Beach Gardens, Florida 33410.

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CERTIFICATE OF TYPEFACE COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in the Times New Roman, 14-point font.

BY:_____

Hinda Klein, Esquire
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