IN THE SUPREME COURT OF FLORIDA

CASE NO.: 85,680
District Court of Appeal
1st District - Nos. 94-1854
94-1881

CANAL INSURANCE COMPANY,

Petitioner,

v.

RICHARD DEWEY REED,

Respondent,

CANAL INSURANCE COMPANY

Appellant,

v.

MICHAEL YORK,

Appellee.

_____/

ANSWER BRIEF OF RESPONDENT/APPELLEE, RICHARD DEWEY REED

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES: Page

STATUTES:

PREFACE

Respondent/Appellee, RICHARD DEWEY REED, will be referred to as "REED". Petitioner/Appellant, CANAL INSURANCE COMPANY, will be referred to as "CANAL". Plaintiff, MICHAEL YORK, will be referred to as "YORK". Citations to Reed's Appendix shall be designated as (RA -).

STATEMENT OF ADDITIONAL FACTS

The facts as stated by Canal are insufficient to adequately present Reed's side of this case. The additional facts presented below have been included to convey a sense of the complexity of the coverage question, which the First District Court of Appeal refers to as "prosaic", and to fully reflect Canal's continuing involvement in Reed's third-party suit against Hodges and Canal for misrepresentation in the issuance of the insurance policy.

On October 23, 1986, Canal, through an insurance agent, David L. Hodges, issued to Reed an automobile insurance policy with bodily injury limits of $750,000.00, but which contained an employment exclusion. (RA 3,4). Because of Reed's previous DUI conviction, Canal charged an excess premium of $16,929.00 for an assigned risk policy. (RA 4).

In response to York's negligence complaint, Reed brought a third-party misrepresentation suit against Canal and Hodges alleging that they inserted the employee exclusion into his policy without his knowledge, failed to timely furnish him with a copy of the policy as required by Section 627.421, Florida Statutes, and knew of the need to certify his policy as proof of financial responsibility, but failed to do so. (RA 9-13). Reed requested that Canal assume the liability for any damage award to York. (RA 9-13). Reed's third-party action against Canal and Hodges has never been tried.

Canal then counterclaimed for a declaratory judgment on the

coverage question. In its ruling of May 12, 1994, the trial court invalidated the employment exclusion on the basis of Makris v. State Farm Mutual Automobile, 267 So. 2d 105 (Fla. 3rd DCA 1972. (RA 7). In reaching its holding, the trial court found that Canal knew of Reed's previous DUI and could have requested and obtained certification of the policy through the SR-22 procedure had they chosen to do so. (RA 6). The court noted that Florida's Financial Responsibility Law did not require Reed to certify his own policy and that there is authority in other jurisdictions that an insurer who issues a policy with the knowledge that the insured is bound by the requirements of a financial responsibility law will be considered to have issued a policy in full compliance with that law. (RA 5-7).

The trial court's order required Canal to provide coverage to Reed, but is silent as to whether Canal must provide a defense. (RA 7).

ISSUE ON APPEAL

WHEN AN INSURANCE COVERAGE ISSUE HAS BEEN DECIDED IN A THIRD PARTY DECLARATORY JUDGMENT ACTION BETWEEN AN INSURER AND ITS INSURED, PRIOR TO A FINAL DETERMINATION OF LIABILITY IN THE UNDERLYING ACTION, AND, AS A RESULT, THE INSURER MUST PROVIDE LIABILITY COVERAGE FOR THE INSURED IN THE UNDERLYING ACTION, MAY THE INSURER SEEK IMMEDIATE REVIEW OF THE ORDER ENTERED IN THE DECLARATORY JUDGMENT ACTION AND, IF SO, WHAT CONSTITUTES THE PROPER AVENUE OF REVIEW: PETITION FOR WRIT OF CERTIORARI, APPEAL OF A NON-FINAL ORDER PURSUANT TO RULE 9.130, OR APPEAL OF A FINAL ORDER?

SUMMARY OF ARGUMENT

The certified question should be answered in the negative. Canal should not be allowed to appeal the trial court's order mandating coverage.

Other than those appeals authorized by Rule 9.130, Fla.R.App.P. and Section IV(b)(1) of the Florida Constitution, appeals to the district courts lay only from "final" orders. This Court has held that a final order is one which finally determines the rights of the parties and disposes of the cause on the merits. The rationale is that piecemeal review is not favored and successive appeals should be avoided whenever possible.

In the instant case, a final resolution of the coverage question does not resolve the lawsuit as to Canal. The lower court may still find Canal liable to Reed if there was misrepresentation in the issuance of the policy, a determination which has never been made. Therefore, Canal will continue to suffer the financial strain of litigation regardless of whether they choose to defend Reed in the tort action or not.

As for review as an interlocutory order, the district courts have carefully followed Bruns in finding that non-final orders deciding coverage are not reviewable under Rule 9.130, Fla.R.App.P. The posture of the instant case is identical to Bruns. Even assuming that the trial court's order required Canal to defend Reed, which it does not, the Bruns policy of severely restricting piecemeal review should apply because Canal's duty to defend would

place upon it no more hardship than that experienced by other litigants who fail to gain dismissals or summary judgments. Further, since the order does not require Canal to furnish a defense, Canal is free to choose between providing a defense or leaving that responsibility to their insured.

Through Bruns, this court has also restricted certiorari as an expedient method to attack interlocutory rulings not falling within the narrow confines of Rule 9.130. Such orders are reviewable by certiorari only when they depart from the essential requirements of law, cause material and irreparable injury to the petitioner throughout the remainder of the lower court's proceedings, and leave no adequate remedy on a later appeal.

Following Bruns, the appellate courts have consistently held that certiorari is unavailable to review coverage determinations when no judgment has been rendered against the insured. This position is entirely consistent with the notion that Canal is required to defend only if it chooses to do so. Since Reed may ultimately prevail in the underlying negligence suit, with or without the assistance of his insurer, Canal may never be injured by the ruling on coverage if they choose not to provide a defense. Of course, Canal risks a breach of contract/bad faith litigation in the future, but this is a risk that is firmly placed with the liability insurer who is in a better position than most defendants to assess the gamble and to pass its expenses along to its insureds as a cost of doing business.

When the coverage question is difficult and the insurer has been named as a direct party, restricting immediate appellate review prior to a determination of the underlying liability would conserve the appellate courts' diminishing resources and encourage insurers to defend their insureds vigorously through an actual trial of the cause. Conversely, immediate appellate review would encourage insurers to focus on debatable coverage exclusions and defense in the hope of removing themselves, at the most critical stage, from their duty to defend their insureds.

ARGUMENT:

WHEN AN INSURANCE COVERAGE ISSUE HAS BEEN DECIDED IN A THIRD PARTY DECLARATORY JUDGMENT ACTION BETWEEN AN INSURER AND ITS INSURED, PRIOR TO A FINAL DETERMINATION OF LIABILITY IN THE UNDERLYING ACTION, AND, AS A RESULT, THE INSURER MUST PROVIDE LIABILITY COVERAGE FOR THE INSURED IN THE UNDERLYING ACTION, MAY THE INSURER SEEK IMMEDIATE REVIEW OF THE ORDER ENTERED IN THE DECLARATORY JUDGMENT ACTION AND, IF SO, WHAT CONSTITUTES THE PROPER AVENUE OF REVIEW: PETITION FOR WRIT OF CERTIORARI, APPEAL OF A NON-FINAL ORDER PURSUANT TO RULE 9.130, OR APPEAL OF A FINAL ORDER?

I. ARGUMENT AGAINST REVIEW AS A FINAL ORDER

Existing precedent is clear that the determination of a coverage issue, prior to a determination of the underlying liability in the original lawsuit, is not an appealable final order under Rule 9.030(b)(1)(A) Fla.R.App.P. Contrary to Canal's argument, the Florida legislature did not intend by the passage of the non-joinder statute, F.S. 627.4136 (formerly F.S. 627.7262), to override existing precedent and to grant an insurer the right to bring a plenary appeal from a preliminary adverse coverage determination. The plenary appeal allowed by the Second District Court of Appeal in Georgia American Insurance Company v. Rios, 491 So. 2d 1290 (Fla. 2nd DCA 1986), was occasioned by the posture of the insurer as a defendant in a bad faith action and does not control in the instant case.

Other than those appeals authorized by Rule 9.130 Fla.R.App. P. and Article V, Section 4(b)(3) of the Florida Constitution, appeals to the district courts lie only from "final" orders. Rule 9.030(b)(1)(A), Fla.R.App.P. The Florida Supreme Court has held

that a final order is one which finally determines the rights of the parties and disposes of the cause on the merits. As this court stated in S.L.T. Warehouse Company v. Webb, 304 So. 2d 97 (Fla. 1974):

> "Generally, the test employed by the appellate court to determine finality of an order, judgment, or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected." Id. at 99.

The rationale underlying Webb is that piecemeal review is not favored and successive appeals should be avoided whenever possible. Id.

Florida courts have consistently ruled that the determination of a coverage question is not reviewable as a non-final order determining the issue of liability in favor of a party seeking affirmative relief under Rule 9.130 Fla.R.App.P. Travelers Insurance Company v. Bruns, 443 So. 2d 959 (Fla. 1984); Liberty Mutual Insurance Company v. Lonestar Industries, Inc., 556 So. 2d 1122 (Fla. 3rd DCA 1990); Ogur v. Mogel, 390 So. 2d 105 (Fla. 3rd DCA 1980).

In Bruns, plaintiff sued Bruns and her insurer, Travelers Insurance Company, on an action arising out of an automobile accident. A dispute arose over the insurance coverage available and the trial court issued a summary judgment against Travelers that coverage existed. Id. at 960. Travelers subsequently sought review under Rule 9.130. Id. The district court held that the summary judgment did not determine an issue of liability in favor

of a party seeking affirmative relief. Id. The district court, however, recognizing a conflict with cases from other jurisdictions, certified the conflict for resolution to the Florida Supreme Court. Id.

In upholding the district court's decision, this Court held that the resolution of a coverage issue does not determine the issue of liability in favor of a party seeking affirmative relief. Id. at 960. In reaching its holding, the Supreme Court stated that the 1977 revisions to Rule 9.130 were meant to restrict the number of appealable non-final orders on the theory that appellate review of non-final judgments generally serves to waste court resources and needlessly delays final judgment. Id. at 961. The Court went on to state that the 1977 revisions worked a substantial change in the previous rule which had been interpreted to allow appeals from partial summary judgments on the issue of insurance coverage. Id. at 960.

The judicial economy principal stated in Bruns is equally applicable whether we attempt to classify an interlocutory order determining coverage as either a non-final order or as a final order. Logically, if the determination of a coverage question does not determine an issue of liability in favor of a party seeking affirmative relief, as stated by this court in Bruns, then such a determination should not be considered a final order for the purposes of appellate review. To consider a bare coverage determination as a final order would completely destroy the

judicial economy rule announced in Bruns. Clearly, the Florida Supreme Court did not severely restrict Rule 9.130 review so that more interlocutory coverage determinations could be reviewed instead as final orders.

Canal cites Georgia American Insurance Company v. Rios, 491 So. 2d 1290, (Fla. 2nd DCA 1986) for the proposition that an insurer may bring a plenary appeal from an adverse coverage determination. Canal's position dramatically overstates the limited holding in Rios. Because of the unique procedural of posture of Rios, it is clearly distinguishable from Bruns and the instant case.

In Rios, an injured motorist brought personal injury and wrongful death actions against the owner and operator of another motor vehicle. Id. at 1290. Prior to trial, attorneys for the plaintiff and the defendants, joined by attorneys for the alleged tortfeasor's liability insurer, entered into an unusual written stipulation which was ratified by the trial court. Id at 1291. In the stipulation, the parties and the tortfeasor's liability insurer agreed as follows:

1. The defendants were to file and diligently prosecute a third party action against Georgia American.

2. Georgia American would not raise as a defense the fact that no judgment in the principal action had yet been entered against any of the defendant insureds.

3. Georgia American would pay to the plaintiffs $12,000.00.

4. In the event that it was finally determined that Georgia American was not liable in the third party action, the plaintiffs

would execute a full release of all claims and dismiss their action with prejudice.

5. In the event it was determined that Georgia American was liable in the third party action for bad faith, "such determination would bind the insurance company to pay any judgment in which may be entered in the main action described above" and the plaintiffs would not execute on any judgment against the individual defendants.

6. No party to the agreement waived any right of appeal. Id. (emphasis added).

After the written stipulation was approved by the Court, a jury trial was held on the third party bad faith claim, and the jury returned a verdict finding the liability insurer guilty of bad faith. Id. The trial court then entered an order stating that the liability insurer was jointly liable with the defendant to pay any judgment for damages which might later be determined. Id. The liability insurer then initiated a plenary appeal. Id. The plaintiff and defendant filed motions to dismiss on the premise that the appeal was from a non-appealable order under the rationale of Bruns. Id.

In holding that the trial court's order was a final order, the Rios court noted that the distinction between Bruns and Rios was that Rios arose after the effective date of F.S. 627.7262 (1985), (currently F.S. 627.4136), the non-joinder statute. Id. The court stated erroneously that the liability insurer could never have been made a party to the lawsuit, except for the written stipulation. Id. The court surmised that since the judgment provided that the liability insurer was to pay any damage judgment entered against

the tortfeasor, there was no further order to be entered with respect to the liability insurer. Id. The court failed to note that the liability insurer could have been made a party to the suit by way of a third-party action without contravening the non-joinder statute. Tindall v. Travelers Indemnity Co., 613 So. 2d 1369 (Fla. 2nd DCA 1993).

The distinction between Rios and Bruns is not, as stated by Canal, that Bruns occurred prior to the effective date of Section 627.4136. Rather, the unique stipulation entered into by the parties and the liability insurer in Rios provides the real distinction between the two cases. Because of its potential bad faith exposure, the liability insurer in Rios apparently struck an all or nothing bargain with its insured and the Plaintiffs. Under this risky arrangement, a final determination that the liability insurer was not required to indemnify its insureds, would require the Plaintiffs to dismiss their underlying tort action with prejudice, apparently after the receipt of $12,000.00. Conversely, however, if the jury determined that the liability insurer had acted in bad faith towards its insureds, such a determination would bind the insurer to pay any judgment ultimately entered against its insureds, even a judgment exceeding the insurance limits. Clearly, an ultimate determination of bad faith would essentially end the litigation as to the liability carrier who had bargained away their ability to contest the underlying claim.

In the instant case, on the other hand, the court has simply

ordered Canal to indemnify Reed, to the limits of their coverage, in the event he is liable for York's injuries. Canal, of course, remains a party to the lawsuit, disputes York's claim entirely due to the uncertain liability, and remains in a position to fully protect its interests. Canal is now free to vigorously defend its insured and, perhaps, vindicate his position entirely at trial; a course of action which would eliminate Canal's further exposure to a subsequent breach of contract actin and ensure a zealous defense of its insured. Likewise, Canal is also free to provide no further defense to Reed, thereby avoiding any continuing expenses on his behalf throughout the remainder of the lower court proceedings.

The non-joinder statute should have no bearing on an insurer's ability to appeal an adverse interlocutory coverage determination as a final order. The statute simply requires that a non-insured first obtain a settlement or verdict against an insured before initiating a direct action against a liability insurer. F.S. 627.4136 (1992). The statute does not forbid an insured or an insurance company from bringing a third-party action to determine coverage, thereby allowing an insurer to become a party to the lawsuit. Tindall at 1370. As pointed out by the First District Court of Appeal, Canal retained its status as a party in the lawsuit. If money damages are ever assessed against Reed, the final judgment could provide for Canal's obligation to pay, thereby ensuring Canal's right to appeal the final judgment and to raise any and all questions concerning the initial coverage determination. Since Canal is a third-party defendant in this

lawsuit, such a procedure does not violate the non-joinder law.

Because the entire lawsuit remains unresolved, and Canal remains intimately involved, having waived none of their rights to either defend or settle this suit, it can hardly be said that no further judicial efforts are to be taken with respect to Canal.

II. ARGUMENT AGAINST REVIEW AS A NON-FINAL ORDER

The District courts have carefully followed Bruns in finding that non-final orders deciding insurance coverage questions are not revealable under Rule 9.130, Fla.R.App.P. Liberty Mutual Insurance Company v. Lonestar Industries, Inc., 556 So. 2d 1122 (Fla. 3rd DCA 1990); Ogur v. Mogel, 390 So. 2d 105 (Fla. 3rd DCA 1980).

The posture of the instant case is identical to Bruns. The trial court's order simply requires Canal to indemnify Reed should York ever prevail on the liability issue. The order is silent as to whether Canal must provide a defense. Canal, therefore, is free now to either provide a defense or not, weighing the risk that their failure to defend might ultimately be considered a breach of their contract with their insured should he ever wish to pursue the issue in a separate lawsuit. Nevertheless, the Bruns policy of severely restricting piecemeal review should apply equally to those interlocutory orders determining a duty to defend.

As the First District Court of Appeals noted in its opinion, "The burden of defending after an adverse coverage determination is a financial one, similar to that resulting from other non-appealable interlocutory orders, e.g. denial of a motion to

dismiss." 20 FLW (D) 950, 952 (Fla. 1st DCA 1995). There are numerous cases where non-appealable interlocutory orders subject a party to the continuing financial burden of defending a lawsuit. Denials of motions to dismiss, for instance, clearly do not provide the avenue of an immediate 9.130 appeal, although such rulings subject the losing litigant to the financial strains of a continuing defense. RD & G Leasing, Inc. v. Stebnicki, 626 So. 2d 1002 (Fla. 3rd DCA 1993); Agency Rent-A-Car, Inc. v. Brauerman, 480 So. 2d 121 (Fla. 4th DCA 1985). Canadian Home Insurance Company v. Norris, 471 So. 2d 217 (4th DCA 1985).

The rule of restrictive review is analogous where a final summary judgment is entered on one count of a multi-count complaint were inter-related counts remain. Welch v. Resolution Trust Corporation, 590 So. 2d 1098 (Fla. 5th DCA 1991).

The result is the same for 9.130 appeals from partial summary judgments. Interamerican Car Rental v. O'Brien, 618 So. 2d 760 (3rd DCA 1993); and Dixon v. Allstate Insurance Co., 609 So. 2d 71 (1st DCA 1992).

Similarly, immediate non-final appeals cannot be taken from interlocutory orders setting aside default judgments. Caribbean Agencies, Inc. v. Agri-Export, Inc., 384 So. 2d 281 (4th DCA 1980); Security Motors, Inc. v. Fiat Motors of North America, Inc., 373

So. 2d 396 (Fla. 1st DCA 1979).

Canal has cited Insurance Company of North America v. Querns, 562 So. 2d 365 (Fla. 2nd DCA 1990), for the proposition that an interlocutory order requiring an insurance company to defend its insured is appealable as a non-final order under Rule 9.130. Querns is factually dissimilar from the instant case in at least two respects. First, Querns involved a separate action against the liability insurer seeking a declaratory judgment. Id. at 366. In the instant case, on the other hand, Canal has also been named as a third-party defendant in an action based on misrepresentation in the issuance of the subject insurance policy. Second, the issue of indemnification in Querns had become moot because of subsequent developments in the third-party action, leaving only the issue of the liability insurer's duty to defend at issue. Id.

In contrast to Querns, a final resolution of the coverage question in the instant case does not resolve the lawsuit as to Canal. The lower court may still find Canal liable to Reed if there was misrepresentation in the issuance of the insurance policy. Therefore, Canal will continue to suffer the financial strain of further litigation regardless of whether they choose to defend Reed in the tort action or not.

Even assuming that the procedural posture of the instant case was identical to Querns (i.e. the duty to defend was the only issue remaining), the sound policy rationale of Bruns to limit needless appellate proceedings should still apply. Whereas Canal has argued

that the denial of immediate judicial review on the question of duty to defend may prolong the underlying litigation, in many instances the opposite will be true. By allowing an insured to bring a plenary or non-final appeal from a duty to defend determination shifts the lawsuit from the trial arena to a lengthy appeals process.

The better procedure is for the initial coverage and duty to defend determination to be made at the trial level subject to a plenary appeal only after the trier of fact has determined liability in the underlying tort suit. After an adverse coverage determination, an insurer may either elect to defend or not, basing its decision on its assessment of its chances of ultimately prevailing on the coverage issue. This process would conserve the resources of the appellate courts and compel plaintiffs to assess their chances of recovery on the merits of their cause of action and the resources of the alleged tortfeasor rather than the "deep pocket" supposedly offered by the insurance coverage. This is consistent with the spirit of the non-joinder statute which was meant to preserve insurers' status as indemnitors rather than as actual litigants.

III. ARGUMENT AGAINST REVIEW BY PETITION FOR WRIT OF CERTIORARI

It is clear from the 1977 Committee notes to Rule 9.130 that the common law writ of certiorari is available only in the most extraordinary of situations and should be largely unavailable as an expedient method to attack interlocutory rulings not falling

within the narrow confines of Rule 9.130.

> "The Advisory Committee was aware that the common law Writ of Certiorari is available at anytime and did not intend to abolish the Writ. However, because that Writ provides a remedy only if the Petitioner meets the heavy burden of showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm, it is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law Writ of Certiorari. It is anticipated that because the most urgent interlocutory orders are appealed under this rule, there will be very few occasions upon which common law Certiorari will provide relief." (emphasis added)

Florida courts have been careful not to unnecessarily broaden the common law writ of certiorari when it is apparent that Rule 9.130 was promulgated to restrict it. The appropriate standard of review is found in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987), where this Court held that a non-final order from which no appeal has been provided by Rule 9.130 is reviewable by certiorari only when the order departs from the essential requirements of law, causes material and irreparable injury to the Petitioner throughout the remainder of the lower court proceedings, and leaves the Petitioner with no adequate remedy on a later appeal. Id. at 1099.

In Dairyland Insurance Company v. McKenzie, 251 So. 2d 887 (Fla. 1st DCA 1971), the First District Court of Appeal held that common law certiorari was unavailable to review an interlocutory order finding that an insurance company was legally bound to afford coverage when no judgment had yet been rendered against the insured. Id. at 888. In Dairyland, Plaintiff sued a defendant and

her insurance company for the negligent operation of a motor vehicle. Id. In the course of the action, the trial court found that Dairyland was legally bound to afford coverage to its insureds despite the insurance company's contention that the non-owners clause of the insurance policy excluded coverage. Id. In holding for the insureds, and denying the insurance company's petition for writ of certiorari, the court stated:

> "From the record before us it appears that no judgment has yet been rendered against either Petitioner or its insured, the Willises. Until such an event occurs, no injury will be suffered by Petitioner. If such contingency does eventuate, Petitioner will then have an adequate and complete remedy by appeal for correcting the trial court's erroneous ruling if such ruling constitutes a departure from the essential requirements of law as contended." Id.

The posture of the instant case and Dairyland is identical. There has been no judgment rendered against the insured and therefore, no injury has been suffered by Petitioner. See also Sapp v. LaViolette, 242 So. 2d 483, 485 (Fla. 1st DCA 1970).

Under similar facts, the First District Court of Appeal has recently held that an interlocutory order requiring a party to indemnify another party is not reviewable by certiorari when the issue of liability has not yet been determined. BE+K, Inc. v. Seminole Kraft Corp., 583 So. 2d 361 (Fla. 1st DCA 1991). In Seminole Kraft, the Plaintiffs filed a premises liability suit against Seminole Kraft who subsequently filed a third party complaint against BE+K seeking indemnification pursuant to a hold harmless agreement purportedly relieving Seminole Kraft from

liability. Id. at 362. BE+K denied liability, alleged that Seminole Kraft was not entitled to indemnification because the hold harmless provision failed to comply with 725.06, Florida Statutes, and urged that the Plaintiffs' injury was caused by Seminole Kraft's sole negligence. Id. Seminole Kraft's motion for partial summary judgment on the indemnification issue was granted. Id. at 363. BE+K then appealed the interlocutory ruling as a non-final order "determining liability in favor of a party seeking affirmative relief" pursuant to 9.130 (a)(3)(C)(iv), and, alternatively, as a petition for common law writ of certiorari. Id. The appellate court dismissed BE+K's Rule 9.130 appeal and denied its request for a writ holding that:

> "Just as liability after determining that coverage exists remains conditional on a judgment against the insured, so also is the determination that a right of indemnity may exist in this case conditional upon a determination of Seminole Kraft's ultimate liability to the Brickers. Hence, in neither case does the partial summary judgment determine 'the issue of liability in favor of a party seeking affirmative relief.' The Supreme Court in Travelers emphasized that the purpose of Rule 9.130 is to limit review of non-final orders to prevent the waste of judicial resources, a consideration that becomes even more compelling as the case filings in the appellate courts of this state continue to increase at an incredible rate. Piecemeal review of non-final orders prior to final disposition of all issues must be strictly limited as much as possible to conserve the sparse judicial resources available at the appellate level. This is especially true of non-final orders awarding conditional affirmative relief that may never result in a final judgment against the defendant." (emphasis added) Id. at 364.

In rejecting BE+K's petition for certiorari, the First District Court of Appeal noted that the only prejudice alleged by the Petitioner was that it had been temporarily deprived of its right

to raise the validity of the indemnity agreement, an issue that could be rectified on appeal from a final judgment should one ever be entered against BE+K. Id. at 365.

The Florida Supreme Court and the First District Court of Appeal have consistently held that common law certiorari is an extraordinary remedy and not one of expediency to be used to circumvent the narrow rule authorizing appeal from only a few non-final orders. This principal is clearly stated in Bruns, which was approvingly cited by the First District Court of Appeals in Seminole Kraft. The policy argument in favor of restricting Rule 9.130 appeals of coverage determinations is equally applicable to petitions requesting common law certiorari. Since the 1977 committee notes refer to the desirability of restricting the availability of the common law writ of certiorari, the holding in Bruns applies equally to common law certiorari review.

In the instant case, Canal claims it will be irreparably harmed if it has to provide a defense to Reed regardless of the outcome of the underlying litigation. The potential harm Canal fears is no different than the burden placed upon the appellants in Bruns, Lonestar, Ogur, and Seminole Kraft. In fact, it is potentially less harmful than the financial burden experienced by most other defendants who are unable to extricate themselves from difficult litigations at an early stage. As an insurer, Canal can pass at least some of its expenses along to its insureds as a cost of doing business.

Further, Canal's assertion that it will be required to provide a defense and indemnify Reed for any loss of liability is simply incorrect. Canal has not been ordered to provide a defense for Reed. Should Canal choose not to provide a defense, Reed can later sue Canal for the full amount of any judgment entered against him, including an amount in excess of the available policy limits. Caldwell v. Allstate Insurance Company, 453 So. 2d 1187 (Fla. 1st DCA 1984).

Unlike the situation in Querns, where the insurer's duty to indemnify was not at issue, Canal continues to have a significant stake in the outcome of the litigation and, presumably, the continued protection of their insured who paid premiums for both coverage and defense. Making immediate appellate review of either coverage or duty to defend determinations easily available to insurers could likely lead them to focus exclusively on debatable coverage defenses in the hope of removing themselves, often at an early stage, from their duty to defend their insured. Such an outcome would be detrimental to the cause of justice because insurers would likely shift their attentions away from fully investigating the occurrence, procuring evidence, identifying witnesses, and performing all the other tasks essential to a vigorous defense. Evidence of this type of behavior is fully evident in Thomas v. Western World Insurance Company, 343 So. 2d 1298 (Fla. 2nd DCA 1977), where the insurer denied coverage and failed to defend an insured based solely on the brief report of an

agent while failing to consider the actual complaint which clearly stated a cause of action Id.

Canal's request for a writ of certiorari was properly denied by the Appellate Court. Since Reed may ultimately prevail in the underlying negligence suit, particularly if he is assisted by his insurance company, Canal may never be injured by the ruling on coverage. As this court stated in Savage:

> "Even when the order departs from the essential requirements of the law, there are strong reasons militating against certiorari review. For example, the party injured by the erroneous interlocutory order may eventually win the case, mooting the issue, or the order may appear less erroneous or less harmful in light of the development of the case after the order." Id. at 1100.

CONCLUSION

Appellee/Respondent, Reed, respectfully requests this court to answer the certified question in the negative so as to foreclose the possibility of a final appeal, an interlocutory appeal, or a writ of certiorari prior to a final determination of liability in the underlying tort action.

In the alternative, Reed requests that the appropriate vehicle for review of coverage determinations would be through the writ procedure, but only after a compelling showing on the part of an insurer that the lower court's order departs from the essential requirements of law, causes material and irreparable injury to the petitioner throughout the remainder of the lower court proceedings, and leaves the petitioner with no adequate remedy on later appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Answer Brief of Respondent/Appellee Richard Dewey Reed has been send to **THOMAS A. LARKIN,** 3630 Rogero Road, Jacksonville, FL 32277; **BEN ANDREWS,** P.O. Box 1739, Tallahassee, FL 32302; **ANDREW VLOEDMAN,** P.O. Box 1109, Gainesville, FL 32601-1109; **CARL STAAS,** 231 East Adams Street, Jacksonville, FL 32202; and **GEORGE J. DRAMIS,** P.O. Box 2809, Orlando, FL 32802, this 26th day of June, 1995.

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INDEX TO RESPONDENT/APPELLEE'S APPENDIX