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.
_____/

INITIAL BRIEF OF PETITIONER/APPELLANT, CANAL INSURANCE COMPANY

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INTRODUCTION

Petitioner/Appellant, CANAL INSURANCE COMPANY, shall at all times be referred to as "CANAL," Respondent/Appellee, RICHARD DEWEY REED, shall at all times be referred to as "REED." Plaintiff, MICHAEL YORK, shall at all times be referred to as "YORK." Citations to the Appendix shall be designated as (A-).

STATEMENT OF THE CASE AND FACTS

On or about the 22nd day of November 1988, Plaintiff, YORK, filed an Amended Complaint in the Circuit Court of the Eighth Judicial Circuit, in and for Union County, Florida against Richard D. Reed. The Amended Complaint and demand for jury trial filed by YORK sought damages for personal injuries sustained while a passenger as a result of a motor vehicle accident. YORK's alleged injuries were caused by REED's negligent operation of a truck while on an abandoned railroad line in Kansas. CANAL continues to provide REED defense counsel pursuant to a reservation of rights.

REED brought a third-party action against CANAL and HODGES INSURANCE AGENCY (HODGES) for misrepresentation in the issuance of CANAL's insurance policy. CANAL filed a counterclaim against REED for declaratory relief because CANAL was and is in doubt as to its obligations under Policy No. 149456 which was issued to REED. This policy was for commercial motor vehicle insurance, including liability insurance. It was issued to REED as a named insured, effective October 23, 1986 through October 23, 1987. The policy was in full force and effect, subject to the exclusions and conditions contained therein, at the time of the alleged loss.

On January 29, 1991, the trial court severed the underlying suit brought by YORK against REED from the third-party action. The court order reflects that all parties agreed that the claims should be tried separately. By order of Judge Mickle dated November 21, 1991, the third-party action was bifurcated into a jury trial portion to determine the disputed factual questions and a non-jury

portion to determine the issue of coverage arising from the issuance of the insurance contract by CANAL to REED. On May 7, 1993, the trial court, through an order on the same date, recognized three (3) causes of action, the first being YORK's claim against REED for personal injuries; the second being REED's suit against HODGES for failure to provide insurance coverage as requested; and third being REED and CANAL's action for declaratory judgment. The court order reflected that all parties agreed that the above claims should be tried separately. Pursuant to this agreement, the trial court ordered that the declaratory judgment action between CANAL and REED be tried first, with the negligence claim of YORK against REED being tried after the claim of REED against HODGES, if the later claim was not rendered moot.

Lastly, on May 10, 1993, the trial court ordered that Florida law was to apply to all issues of fact and law during the jury and non-jury trials of the proceedings between CANAL and REED. In addition, the order acknowledged that the declaratory judgment action would be tried in two (2) parts. The first action would be a jury trial to determine YORK's employment status at the time of the accident. Second, in a non-jury proceeding, the court, would rule on the enforceability of the employee exclusion contained in the policy issued by CANAL.

On May 27, 1993, a jury trial was held in the Circuit Court in and for Union County, Florida before the Honorable Stan Morris, Case No.: 88-106-CA, styled Canal Insurance Company v. Richard

Dewey Reed. The jury found, via special interrogatory, that YORK was an employee of REED at the time of the July 2, 1987 accident.

On March 21, 1994, the trial court, in a non-jury proceeding, heard argument and took evidence regarding the employee exclusion contained within CANAL's motor vehicle liability insurance policy issued to REED. The relevant policy language states:

> I - **COVERAGE - A. Bodily Injury Liability**
>
> **Exclusions:** This insurance does not apply to:
>
> . . .
>
> (c) to **bodily injury** to any employee of the **insured** arising out of and in the course of his employment by the **insured** or to any obligation of the **insured** to indemnify another because of damages arising out of such injury . . .

By order dated May 12, 1994, the trial court ruled that the employee exclusion contained within CANAL's policy was void, as against public policy. Furthermore, the court ordered CANAL to provide liability coverage to YORK.

On June 10, 1994, CANAL filed a timely Notice of Appeal to the First District Court of Appeal from the May 12, 1994 Order invalidating the employee exclusion contained within CANAL's motor vehicle liability insurance policy. The Notice of Appeal was in two parts. The first being an appeal of a Final Order Denying Canal's Declaratory Judgment as to an employee exclusion clause under its policy pursuant to Florida Rules of Appellate Procedure, 9.030(b)(1)(A) and 9.110(a)(1). In the alternative, CANAL appealed

the trial court's order to the First District Court of Appeal as an appealable non-final order, pursuant to Florida Rules of Appellate Procedure, 9.030(b)(1)(B) and 9.130(a)(3)(C)(4). (A-1, A-2) The appeal was assigned case number 94-1881 on the docket of the First District Court of Appeal.

Also, on June 10, 1994, CANAL petitioned the First District Court of Appeal for a writ of certiorari. Jurisdiction of the First District Court of Appeal was predicated upon Article 4, §4(b)(3), of the Florida Constitution (1968), and Florida Rules of Appellate Procedure, 9.030(b)(2)(A) and 9.100. (A-3 - A-22) The petition was assigned case number 94-1854.

The First District Court of Appeal by way of Order on July 8, 1994, required REED to show cause why Canal Insurance Company's Petition for Writ of Certiorari should not be granted. REED filed his Compliance with the Order to Show Cause on August 1, 1994. Thereafter, on the 16th day of August, 1994, CANAL filed its Reply Brief to REED's Compliance with Order to Show Cause.

The Initial Brief of Canal Insurance Company filed in the First District Court of Appeal in Case No. 94-1881 was timely filed on August 19, 1994. REED moved to dismiss CANAL's appeal on August 30, 1994. The Motion to Dismiss was directed solely toward Case No. 94-1881. Furthermore, the Motion to Dismiss only attempted to dispose of that portion of Case No. 94-1881 which sought review by the First District Court of Appeal by way of Review of a Non-Final Order determining the issue of liability in favor of a party seeking affirmative relief. On September 15, 1994, pursuant to the

Appellate Court's Order, CANAL filed its Response to the Court's Order to REED's Motion to Dismiss.

The First District Court of Appeal, by way of Order dated October 5, 1994, deferred its consideration of REED's Motion to Dismiss pending disposition of CANAL's Petition for Writ of Certiorari in Case No. 94-1854. Furthermore, the Court upon its own motion, stayed all further briefing in Case 94-1881 until further order. On April 13, 1995, the First District Court of Appeal filed its opinion which addressed both CANAL's Petition for Writ of Certiorari, Case No. 94-1854, and Notice of Appeal, Case No. 94-1881. The First District Court of Appeal denied CANAL's Petition for Certiorari in Case No. 94-1854 and further granted REED's Motion to Dismiss CANAL's Appeal Case No. 94-1881. (A-23 - A-36) In so doing, the First District Court of Appeal certified the following question to the Florida Supreme Court as one of great public importance:

> 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?

On May 3, 1995, CANAL filed its timely Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court pursuant to the question certified by the First District Court of Appeal to be of great public importance. (A-37, A-38)

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 THE NON-FINAL ORDER PURSUANT TO RULE 9.130, OR APPEAL OF A FINAL ORDER?

SUMMARY OF ARGUMENT

The certified question posed by the First District Court of Appeal should be answered in the affirmative. Furthermore, CANAL would submit that the trial court's order directing CANAL to provide liability coverage entered in the declaratory judgment action should be subject to an immediate appeal as a final order pursuant to Florida Rules of Appellate Procedure, 9.030(b)(1)(A) and 9.110(a)(1). Once the trial court found the employee exclusion void as against public policy and ordered CANAL to provide liability coverage, there remained no further judicial action as to Canal Insurance Company.

In the alternative, CANAL believes that the trial court order directing CANAL to provide liability coverage is subject to immediate appeal as an interlocutory order pursuant to Florida Rules of Appellate Procedure, 9.130(a)(3)(B) and 9.130(a)(3)(C)(iv). The affirmative relief sought by REED and CANAL was a determination of coverage. That relief has been determined in favor of REED. Furthermore, the trial court's order mandates that CANAL provide a defense to REED throughout the pendency of the underlying suit. The trial court's order determines an issue in favor of a party seeking affirmative relief, or at the very least, operates as a mandatory injunction.

Lastly, if the trial court's order is not immediately reviewable by way of plenary or interlocutory appeal, the order should be subject to immediate review through common law petition for writ of certiorari. CANAL has demonstrated that the order

departs from the essential requirements of law and causes material and irreparable injury with no adequate remedy upon later appeal. It is clear CANAL would suffer material and irreparable injury with no adequate remedy on a later appeal by having to continue to provide a defense to REED in the underlying litigation. CANAL suffers irreparable injury regardless if REED prevails in the underlying suit or not.

The trial court's order departs from the essential requirements of law. Florida case law is clear that an employee exclusion clause contained within a motor vehicle liability insurance is violative of Florida's public policy when the subject policy was not certified as proof of financial responsibility under the laws contained within Chapter 324, Florida Statutes. In addition, the case law is clear that REED had the burden in showing that the employee exclusion clause contained within CANAL's policy violated Florida's financial responsibility laws. REED provided no record evidence to carry his burden.

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 THE NON-FINAL ORDER PURSUANT TO RULE 9.130, OR APPEAL OF A FINAL ORDER?

REVIEW AS A FINAL ORDER

It is CANAL's contention that the trial court's June 10, 1994 Order directing CANAL to provide liability coverage pursuant to Policy No. 149456 issued to REED is reviewable as a final order. The touchtone determination in deciding whether an appeal is to be made from a final order is whether the trial court's judicial efforts have concluded as to a particular claimant. Clearly, the trial court's mandate that CANAL provide coverage pursuant to its Policy concludes any and all judicial efforts against CANAL on the declaratory judgment action which had been severed for separate trial in the Circuit Court. There is no further determination to be made against CANAL, as CANAL has not been, and cannot be sued directly in the underlying case styled YORK v. REED. See §627.4136, Fla. Stat. (1993).

In Georgia American Ins. Co. v. Rios, 491 So.2d 1290 (Fla. 2d DCA 1986), the Second District Court of Appeal determined that an appeal brought by an insurer based upon a determination of coverage is to be treated as a plenary appeal. Id. at 1291. The facts underlying Rios are strikingly similar to those of the instant

case. In Rios, the injured occupant of an automobile brought suit for her injuries and in her representative capacity, for injuries to her children, against the owner and the operator of a second automobile for damages. Id. at 1290. Thereafter, the defendants filed a third-party action against their insurer, Georgia American Ins. Co. Id. at 1291. The parties stipulated that the third-party action for bad faith against Georgia American would precede the underlying lawsuit. Id. Thereafter, after a jury trial, a verdict was returned finding Georgia American guilty of bad faith, the trial court entered an order which stated that Georgia American was jointly liable with its insured to pay any judgment for damages for which the insured might be found liable to the plaintiff.

The Second District Court of Appeal in Rios distinguished the case which the First District Court of Appeal relied on in the instant case, to wit: Travelers Insurance Co. v. Bruns, 443 So.2d 959 (Fla. 1984). The Second District Court of Appeal pointed out that Bruns involved a suit for personal injuries by the plaintiff against an allegedly negligent driver and the driver's liability insurer. Id. at 1291.

The distinction between Bruns and Georgia American is that the incident in Bruns occurred prior to the effective date of §627.7262, Florida Statutes. (currently §627.4136, Fla. Stat. (1993). This statute, referred to as the non-joinder statute, prevents the plaintiff from including in its lawsuit against the alleged tort-feasor, the tort-feasor's liability insurer. The passage of the non-joinder statute is critical in determining

whether the trial court's decision as to coverage is a final order. In Bruns, because the insurance company was a party to the direct action of the plaintiff against the alleged tort-feasor, the trial court's adverse decision as to coverage did not conclude all judicial efforts. There still remained a determination as to the plaintiff's direct claim against the insured. Id. at 1291.

However, due to the non-joinder statute, the plaintiff in Rios was precluded from suing Georgia American directly. Therefore, the only pending action against Georgia American was brought by its insured in a third-party action. Id. The Second District Court of Appeal in Rios held that since the only claim pending against Georgia American had been decided by the trial court's determination as to coverage, the appeal by Georgia American should be by way of plenary appeal. Id. The court stated . . . "there is no further order to be entered with respect to Georgia American. Therefore, Georgia American must now appeal or pay any judgment finally entered against Kennedy (underlying defendant)." Id. The court further stated:

> "The posture of this case is analogous to a situation in which the plaintiff sues the defendant for damages and because the defendant's insurance coverage is in dispute, the defendant and his insurer litigate the question of coverage in a separate suit for declaratory judgment. If the insurer suffers an adverse judgment on the question of coverage, it must necessarily appeal that judgment rather than trying to raise the coverage issue in a later appeal from a judgment which might be entered against its insured in the primary action."

Id.

Similarly, as this court stated in the special concurrence by Justice Shaw in Bruns, the incident in Bruns having occurred prior

to the effective date of the non-joinder statute allowed the trial court to enter one judgment as to all parties, including the tort-feasor's insurer. Bruns at 961. As Justice Shaw predicted, §627.7262 (currently §627.4136, Florida Statutes (1993)) produces several lawsuits where insurance coverage is disputed. Justice Shaw stated:

> ". . . In the first action plaintiff A will sue defendant B (alleged insured) on the issue of negligence and damages. Simultaneously, if coverage is disputed, either B or C (alleged insurer) will be obliged to seek a declaratory judgment against the other in a second action. . . . (Alternatively B could bring a third-party action against C in the first action but this would not change the rights or positions of the parties). If A wins against B in the first action, C wins against B in the second action, and A then sues C in a third action . . ., we will have the ingredients of a very interesting law school problem, particularly if one or the other of the actions involving B is a 'sweetheart suit' which B does not aggressively or competently pursue."

Id. at 961, 962.

Therefore, it is CANAL's position the majority's opinion in Travelers Ins. Co. v. Bruns does not apply to the instant case. Travelers Ins. Co. v Bruns does not take into account that which is faced by the Second District Court of Appeal in Rios, to wit: the non-joinder statute. In the instant case, YORK sued REED for negligence and damages. YORK could not bring a direct action against CANAL due to the non-joinder statute.[1]

Also similar to Rios, the instant case involved a stipulation and order. In CANAL, the parties agreed and the court ordered that

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[1] In fact, YORK attempted to sue CANAL directly in his initial complaint. CANAL was dismissed as a first-party defendant on November 21, 1988.

the CANAL's declaratory judgment action would be tried first, the claim against HODGES second, and finally, the claim brought by YORK against REED last. CANAL's sole involvement, based upon the Stipulation and Orders of the trial court is in the third-party action for declaratory relief. The June 10, 1994 Order of the trial court resolved this issue adversely to CANAL; therefore, there remained no further judicial action to be taken in the third party action with respect to Canal Insurance Company. There being no further determination and no further judicial efforts as to CANAL, the Order of June 10, 1994 entered by the trial court is a final order reviewable by way of plenary appeal pursuant to Florida Rules of Appellate Procedure, 9.030(b)(1)(A) and 9.110(a)(1).

REVIEW BY WAY OF INTERLOCUTORY APPEAL

CANAL next contends that the June 10, 1994 Order directing CANAL to provide liability coverage is appealable as a non-final order pursuant to Florida Rules of Appellate Procedure, 9.130(a)(3)(C)(iv) in that the trial court's order determines an issue of liability in favor of a party seeking affirmative relief.

In Insurance Co. of North America v. Querns, 562 So.2d 365 (Fla. 2d DCA 1990) the Second District Court of Appeal held that the ruling of coverage by the trial court, specifically, to defend an insurance company, is appealable as a non-final order which determines an issue of liability in favor of a party seeking affirmative relief. Id. at 365, 366. The facts in Querns indicate that the insured had been sued for an alleged sexual assault and

battery on a minor plaintiff while the insured was employed as a mathematics teacher. Id. at 365. The insured then filed a separate action against its insurer (INA), seeking declaratory relief, including the enforcement of the insurer's duty to defend and the right to indemnification. Id. at 366. It was not disputed that the right to indemnification had to await the determination of liability in the original action. Id.

The trial court entered a partial summary judgment finding INA had a duty to defend its insured in the original action. The appellate court in Querns accepted jurisdiction pursuant to Florida Rule of Appellate Procedure, 9.130(a)(3)(C)(iv). Id. In the court's view, the order directing INA to defend the insured is an order which determines an issue of liability in favor of a party seeking affirmative relief. Id. The court's opinion distinguished Bruns in that Bruns was an attempted appeal from an order finding coverage between an insurer and an insured, but did not determine an issue of liability in favor of a party seeking affirmative relief. Id. at 366. The decision in Bruns did not determine an ultimate issue of liability because the plaintiff had sued the insurance company directly. Id. The posture of Bruns at the time of appeal, was that there remained a determination as to liability of the insured and insurer to the injured plaintiff. Id. The court in Querns based jurisdiction upon the fact that the trial court's determination that INA had a duty to defend its insured was ". . . a final determination of that issue of liability in favor of Querns [insured], a party seeking affirmative relief. Id. See

also American States Ins. Co. v. Baroletti, 566 So.2d 314 (Fla. 2d DCA 1990).

CANAL would respectfully submit that the rationale relied on in Bruns is of such doubtful value that this Court should abandon the Bruns holding in favor of a more literal application of Rule 9.130(a)(3)(C)(iv) and 9.130(a)(3)(B). This is in part due to the application of Florida Statutes, §627.4136, non-joinder of insurers. The Bruns court stated that the policy underlying Rule 9.130 is to severely restrict the number of appealable non-final orders and thereby reduce needless appellate proceedings. Bruns at 961. If indeed the order terminating the coverage issue can be considered non-final, the policy underlying Bruns is valid only if, by deferring the review of the coverage decision, there might arise some scenario where the need to review the coverage decision can be mooted. There is really no such scenario, unless one party or the other decides to abandon its right to judicial relief.

In fact, denial of immediate judicial review may prolong the underlying litigation. An immediate and final review of a coverage decision, whether adverse to the insurer or not, will necessarily motivate the insurer and the plaintiff to bring the case to a conclusion, because both parties will have a firm understanding of their right and responsibilities. Should an immediate and final review of a coverage decision hold that there is no coverage available for a potential defendant, a plaintiff is able to evaluate his/her case knowing full well there is no potential deep pocket. There is a very real possibility that a case will be

settled for a nominal amount where the only potential payoff would have been vis-à-vis a defendant's liability insurer.

Likewise, if an immediate and final determination by a reviewing court indicates that there is coverage available, or at the very least, the insurance company must provide a defense to the underlying defendant, the insurer is then able to fully evaluate its exposure based on a known quantity. To delay review of a trial court's order determining coverage, or a lack thereof, not only prolongs the final determination as to the coverage, but also may prolong the underlying lawsuit. (The court in Bruns may not have considered this dilemma solely for the reason that the insurer was involved in the direct action by the plaintiff, a situation now precluded by the passage of the non-joinder statute.)

The trial court order requires CANAL to provide REED defense counsel throughout the pendency of the underlying suit. This is tantamount to a mandatory injunction which could exist for an unknown length of time. Currently, the underlying suit has been pending for seven (7) years. At the very least, the trial court's order should be subject to review as an injunction pursuant to Florida Rules of Appellate Procedure 9.130(a)(3)(B).

REVIEW BY PETITION FOR WRIT OF CERTIORARI

Lastly, CANAL contends that the June 10, 1994 Order directing it to provide liability coverage to REED is reviewable by this court by a common law Petition for Writ of Certiorari. Jurisdiction for review by way of a Writ of Certiorari is

predicated upon Article IV, Section 4(b)(3) of the Florida Constitution, 1968, and Florida Rules of Appellate Procedure, 9.030(b)(2)(A) and 9.100. Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987) 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, and causes material and irreparable injury with no adequate remedy upon later appeal. Id. at 1099.

The trial court's order invalidates the employee exclusion contained within CANAL's policy and further orders CANAL to provide liability coverage to REED. Thus, CANAL is required to provide a defense to REED in the underlying action.[2] CANAL suffers material and irreparable injury for which there is no adequate remedy on a later appeal by being required to provide REED defense counsel in the underlying suit. CANAL would be materially and irreparably injured in having to provide a defense throughout the underlying litigation regardless if REED is found liable or not. CANAL can certainly not recover intangible services provided, and its monetary remedy is speculative at best, if an appeals court should later find for CANAL on the coverage issue.

Furthermore, in this case and in similar cases, the First District Court of Appeal seems to assume that an insurer will not

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[2] Providing a defense where there is no legal obligation to do so, constitutes an irreparable injury in and of itself. See Merchants and Businessmen's Mutual Ins. Co. v. Bennis, 636 So.2d 593 (Fla. 4th DCA 1994), Indem. Ins. Co. of N. Am. v. Ridenour, 629 So.2d 1053 (Fla. 2d DCA 1993); State Farm Fire and Casualty v. Nail, 516 So.2d 1022 (Fla. 5th DCA 1987).

require an appellate review of a coverage issue if the insured wins the underlying action. In fact, the First District Court of Appeal's opinion in CANAL at Page 13 states: ". . . no opportunity for appellate review arises until final judgment has been entered against the insured in the underlying action." Applying this scenario to the instant case reveals that CANAL will be materially and irreparably injured, because without an immediate review of the adverse coverage ruling, CANAL will be forced to abandon any claim for the cost of defense should REED prevail an underlying suit. The cost of defense remains regardless of the result of the underlying action.

In Florida Insurance Guaranty Assoc. v. Sechler, 478 So.2d 365 (Fla. 5th DCA 1985) the Fifth District Court of Appeal treated the review of a coverage question as a petition for writ of certiorari. The facts in Sechler are vastly similar to the instant case. Sechler involved the construction of an exclusion clause in a liability insurance policy. A contractor performed excavation work. The adjacent landowners, Sechlers, sued the contractor alleging the contractor's excavation damaged the structure of their home. Id. at 366. Thereafter, the contractor filed a third-party claim against its insurer, with the insurer answering affirmatively that the policy contained exclusions as to the loss sought by the homeowner/plaintiff in the underlying suit. The trial court entered summary judgment against the insurer on the issue of coverage. The Fifth District Court of Appeal cited to this court's opinion in Bruns in recognizing that a summary judgment determining

the availability of insurance coverage is not an order which determines an issue of liability in favor of a party seeking affirmative relief. However, the Sechler court treated the insurer's notice of appeal as a petition for writ of certiorari based on that court's earlier ruling of Sunshine Dodge, Inc. v. Ketchem, 445 So.2d 395 (Fla. 5th DCA 1984). See also Jefferson Ins. Co. v. Sea World of Fl., Inc., 586 So.2d 95 (Fla. 5th DCA 1991).

Ketchem involved the shifting of primary liability coverage pursuant to an automobile lease agreement. The injured driver sued the operator of the leased vehicle, the lessee and lessor. The lessor crossclaimed against the lessee, alleging a shifting of primary liability insurance coverage. Id. at 396. The trial court entered a summary judgment against the lessor, solely on the crossclaim. Id.

The court in Ketchem recognized this court's ruling in Bruns, "that a trial court's determination of a disputed issue of coverage which precedes its determination of liability owing to the claimant . . . cannot serve as the basis for a plenary appeal under Rule 9.100 or for an appeal of a non-final order under Florida Rule of Appellate Procedure, 9.130(a)(3)(C)(IV)." Id. The Fifth District Court of Appeal, however, treated the appeal as a petition for writ of certiorari and reviewed the coverage issue. Id. The petition for writ of certiorari in Ketchem was predicated upon the fact that the court's trial determination of the primary insurer,

obligated the carrier to continue to defend and indemnify the operator of the leased vehicle.

This is the exact situation in which CANAL now finds itself. Pursuant to the lower court's order dated June 12, 1994, CANAL will be required under its contract of insurance to provide a defense and indemnify REED for any loss or liability. This is so, because CANAL's sole ability to deny coverage, the employee exclusion clause, has been rendered null and void by the trial court's order. As explained above, without an immediate review of coverage, CANAL will be forced to expend the cost of defense without an adequate remedy by way of subsequent appeal.

The second requirement for review by certiorari is that the trial court's order departs from the essential requirements of law. This requirement of review was fully briefed in the First District Court of Appeal; however, that Court did not reach the substantive issue of whether the employee exclusion clause within CANAL's insurance policy violates Florida law.

Florida case law is clear that an employee exclusion clause contained within a motor vehicle liability insurance policy is not violative of Florida's public policy where the subject insurance policy was not certified as proof of financial responsibility under the laws contained within Chapter 324, Florida Statutes. See McRae v. Snelling, 303 So.2d 670 (Fla. 4th DCA 1974). Furthermore, Florida case law holds that the burden of proof in a declaratory judgment action to assert that an employee exclusion violates public policy rests with the insured. See SAFECO Ins. Co. v.

Hawkeye, 218 So.2d 759 (Fla. 1st DCA 1969). REED provided no record evidence to carry his burden. As such, the exclusionary clause contained within CANAL's policy should have been given full force and effect. See Lynch Davidson v. Griffin, 182 So.2d 7 (Fla. 1966); Yakelwicz v. Barnes, 330 So.2d 810 (Fla. 3d DCA 1976), appeal dismissed 341 So.2d 1087 (Fla. 1976). The trial court's failure to do so was a departure from the essential requirements of law.

If this Court concludes review by petition for writ of certiorari is the correct avenue of review, there remains a determination as to the departure of the essential requirements of law. This determination should first be made by the First District Court of Appeal. The First District Court of Appeal has not reached a decision as to whether the trial court's order was in err. Furthermore, the parties have fully briefed the issues before the First District Court of Appeal.

CONCLUSION

For the foregoing reasons, Appellant/Petitioner, Canal Insurance Company, respectfully requests this Court to answer the certified question in the affirmative, so that CANAL may seek immediate review of the order entered in the declaratory judgment action.

In addition, Canal Insurance Company would respectfully submit that the order of the trial court requiring CANAL to provide coverage should logically be treated as a final order subject to direct appeal under Rule 9.030(b)(1)(A), Florida Rules of Appellate Procedure. In the alternative, a review of the trial court's order entered in the declaratory judgment action should be considered appealable as an interlocutory order under Florida Rules of Appellate Procedure 9.130(a)(3)(C)(iv) or 9.130(a)(3)(B). As a final alternative, CANAL would respectfully request this Court to find that the order of the trial court is subject for immediate review by way of common law writ of certiorari pursuant to Article IV, Section 4(b)(3) of the Florida Constitution, (1968) and Florida Rules of Appellate Procedure, 9.030(b)(2)(A) and 9.100.

Lastly, should the certified question be answered in the affirmative, Canal Insurance Company would respectfully request this Court to enter an order as to the proper method of direct and immediate appeal of the order in the declaratory judgment action and remand this proceeding to the First District Court of Appeal for a decision on the propriety of the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery on this 2nd day of June, 1995 to: **THOMAS A. LARKIN**, 3630 Rogero Road, Jacksonville, Florida 32277; **BEN ANDREWS**, Post Office Box 1739, Tallahassee, Florida 32302; **ANDREW VLOEDMAN**, Post Office Box 1109, Gainesville, Florida 32601-1109; **CARL STAAS**, 231 East Adams Street, Jacksonville, Florida 32202; and **STEVEN TURNAGE**, 200 N.E. 1st Avenue, Gainesville, Florida 32601.

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