FILED
SID J. WHITE
AUG 16 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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.
_____/

REPLY BRIEF OF PETITIONER/APPELLANT, CANAL INSURANCE COMPANY

GEORGE J. DRAMIS
Florida Bar No. 935549
HARRY W. LAWRENCE
Florida Bar No. 0094767
JOHN A. REED
Florida Bar No. 0065522
LOWNDES, DROSDICK, DOSTER, KANTOR
& REED, PROFESSIONAL ASSOCIATION
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802
Telephone: (407) 843-4600
Fax: (407) 423-4495
Attorneys for Petitioner/Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES: **Page**

STATUTES:

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 FACTS

The facts contained within REED's Statement of Additional Facts need to be clarified. As stated by REED, REED, in a third-party action, filed suit, via an Amended Complaint, against CANAL and HODGES for misrepresentation. (A3 - A7)

CANAL filed a Counterclaim for declaratory relief because CANAL was in doubt as to its obligations under Policy No. 149456 issued to REED. (A-10 - A-14) The trial court severed the claim of York v. Reed from the third-party action by Order dated January 29, 1991. (A-15, A-16) On November 21, 1991, the trial court ordered that all issues between CANAL and REED will proceed as framed by the Counterclaim for declaratory judgment. (A-17 - A-19) The trial court addressed the various claims brought by all parties, including the original underlying suit, in an Order dated May 7, 1993. (A-20 - A-22) The trial court, upon all parties being present for a status conference, ordered that there remained only three causes of action. (A-20 - A-22)

The only three causes of action recognized by the trial court were as follows: (1) a negligence action filed by YORK against REED; (2) a misrepresentation suit filed by REED against DAVID L. HODGES d/b/a HODGES INSURANCE AGENCY for failure to provide insurance coverage; finally, (3) CANAL's action for declaratory relief against REED. (A-20 - A-22)

Additionally, the trial Order dated May 10, 1993 discussed the procedure to be followed in the claim between CANAL and REED. (A-23 - A-25) That is, that Florida Law would apply to all issues

of fact and law and the action between CANAL and REED would be tried in a jury and a non-jury proceeding. There is no mention of an additional claim pending against CANAL for misrepresentation. The trial court only recognized the claim between CANAL and REED for declaratory relief. (A-23 - A-25)

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 offered by the First District Court of Appeal should be answered in the affirmative. The order entered by the trial court should be classified as a final order subject to plenary appeal. The only claim between CANAL and REED was that for declaratory relief so as to determine the parties' rights and responsibilities under the policy of liability insurance issued to REED. Pursuant to the trial court's previous orders, there are no other claims between CANAL and REED. Therefore, there remains no judicial labor between the claim of CANAL and REED.

Secondly, the trial court's order, which holds that CANAL shall provide liability coverage to REED, requires CANAL to provide REED defense counsel in the underlying suit. Therefore, the trial court's order determines an issue in favor of a party seeking affirmative relief.

Lastly, the trial court's order should be subject to immediate review through a common law petition for writ of certiorari. It is clear CANAL must provide defense counsel to REED in the underlying suit. It is also clear that an employee exclusion is not violative of Florida public policy where an insurance policy is not certified as proof of financial responsibility. These two factors satisfy the test for jurisdiction to wit: CANAL suffers irreparable injury by having to provide a defense and the trial court's order departs from the essential requirements of law.

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?

I. REVIEW AS A FINAL ORDER

CANAL does not disagree with the test cited by REED to define a "final order." This Court stated in S.L.T. Warehouse Co. 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 touchstone determination is whether there remains no further judicial efforts as to a claim between two parties.

The only claim between the parties to this appeal, REED and CANAL, was a determination of coverage pursuant to CANAL's claim for declaratory relief. The trial court did not recognize any other claims. (A-20 - A-22)

REED contends that there still remains a pending claim brought by REED against CANAL for misrepresentation in the issuance of the insurance policy. Stated simply, this is incorrect. The only remaining claims pending in the trial court are REED's claim for

misrepresentation against DAVID HODGES d/b/a HODGES INSURANCE AGENCY and YORK's claim against REED for negligence. (A-20 - A-22) Therefore, all judicial efforts have concluded as to the claim between CANAL and REED.

REED argues that due to the judicial economy principle stated in Travelers Insurance Co. v. Bruns, 443 So.2d 959 (Fla. 1984) it matters not as to whether the appealed from order is classified as a non-final or final order. It is REED's contention that judicial economy is best served by only allowing one final appeal at the conclusion of YORK's claim against REED. However, to state that because an order not reviewable as a non-final order should also not be reviewed as a final order solely due to the judicial economy principle does comport with the test outlined by this Court in S.L.T. Warehouse and adopted by REED in his Answer Brief. That is, if an order ends judicial labor, between two parties, it is considered to be a final order subject to immediate and plenary appeal pursuant to Florida Rules of Appellate Procedure, 9.030(b)(1)(A) and 9.110(a)(1).

Further, REED attempts to distinguish Georgia American Ins. Co. v. Rios, 491 So.2d 1290 (Fla. 2d DCA 1986) as authority for allowing an insurer to bring a plenary appeal from an adverse coverage determination. It is contended that Rios is limited to its facts due to the stipulations of the parties and, therefore, does not apply to the instant case.

Quite the contrary. The stipulations entered into by the parties in Rios, place Rios in an analogous posture to the instant case.

1. As in Rios, REED filed and diligently prosecuted a third party action against CANAL.

2. In the event it is to be finally determined that CANAL is not liable on the third-party action (is not required to provide coverage, including a defense) the Plaintiff's sole claim would be for a personal judgment against REED.

3. In the event it is determined that CANAL is liable in the third-party action (the employee exclusion does not apply) CANAL shall provide liability coverage to REED.

4. No party has waived any right of appeal.

In the instant case, the trial court has entered an Order providing that CANAL must provide liability coverage to REED for the July 2, 1987 automobile accident. CANAL is now forced to defend REED as its Insured without the right to have the trial court's order immediately reviewed. Due to this final determination by the trial court, if immediate review is not available, CANAL must simply await the outcome of the underlying suit. CANAL cannot, as stated by REED, provide no further defense. To do so, would violate the trial court's order which requires CANAL to provide liability coverage. One of the requisites in providing liability coverage is the duty of an insurer to provide its insured a defense.

REED contends that the non-joinder statute should have no bearing on the right of an insurer to appeal an adverse coverage determination. REED cites to the First District Court of Appeal's opinion, in the instant case, that CANAL remains a party to the lawsuit and a final judgment entered against REED could provide for CANAL's obligation to pay.

However, the non-joinder statute provides in pertinent part:

> Florida Statute, Section 627.4136
>
> . . .
>
> (4) At the time a judgment is entered or a settlement is reached during the pendency of litigation, a liability insurer may be joined as a party defendant for the purposes of entering final judgment or enforcing the settlement by the motion of any party, unless the insurer denied coverage under the provisions of s.627.426(2) or defended under a reservation of rights pursuant to s.627.426(2). A copy of the motion to join the insurer shall be served on the insurer by certified mail. If a judgment is reversed or remanded on appeal, the insurer's presence shall not be disclosed to the jury in a subsequent trial. [emphasis added]

CANAL presently defends REED in the underlying suit subject to a reservation of rights. (A-13, 14). To include CANAL on the judgment against REED and in favor of YORK would violate the non-joinder statute. Therefore, the only opportunity to enter an order against CANAL is when the third-party action for declaratory relief has been decided. This clearly has occurred. There are no further opportunities for the trial court to enter an order or judgment against CANAL.

CANAL is no longer intimately involved as stated by REED. Quite the contrary, CANAL, as a party, is a spectator to the remaining claims. Utilizing this Court's definition of a final

order, there remain no further judicial efforts as to the claim between CANAL and REED and, specifically, there remain no judicial efforts as to CANAL in the entire lawsuit. Therefore, CANAL is entitled to immediate review by way of plenary appeal.

II. REVIEW AS A NON-FINAL ORDER

REED cites and relies heavily on this Court's decision in Travelers Insurance Co. v. Bruns, 443 So.2d 959 (Fla. 1984) in its contention that the trial court's order should not be reviewable as a non-final order. CANAL sufficiently addressed why the Bruns decision and its policy considerations do not apply to the instant case in CANAL's Initial Brief at Pages 11 through 17. CANAL does not offer any additional argument in this regard.

However, in attempting to distinguish Insurance Co. of North America v. Querns, 562 So.2d 365 (Fla. 2d DCA 1990) REED again states that CANAL "has also been named as a Third-Party Defendant in an action based on misrepresentation in the issuance of the subject insurance policy." As stated previously, the trial court disposed of any potential claim against CANAL brought by REED for misrepresentation in its Order of Status Conference dated May 7, 1993. The only cause of action which the trial court recognized and determined between REED and CANAL was an action for declaratory relief which sought to determine the lack of coverage due to an employee exclusion contained within the subject insurance policy. (A-20 - A-22) Therefore, REED's attempt to distinguish Querns on this basis fails.

The rationale espoused in Querns applies to the instant case. The Querns court distinguished Bruns in that in Querns the trial court's determination that the insurer had a duty to defend its insured is a final determination of liability in favor of a party seeking affirmative relief and subject to appeal as a non-final order pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv). As in Querns, CANAL now must recognize its duty to defend REED in the underlying suit due to the trial court's order prescribing that CANAL will provide liability coverage to YORK. To argue that the court order does not state CANAL has a duty to defend when it does state that CANAL must provide liability coverage to REED is nonsensical. The duty to defend REED is subsumed within the obligation of CANAL to provide liability coverage to REED pursuant to the trial court's order.

III. REVIEW BY PETITION FOR WRIT OF CERTIORARI

Again, CANAL does not dispute REED's general recitation of the law with respect to review by way of petition for writ of certiorari. Indeed, the parties both cite to this Court its decision in Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987) for the principle of law 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.

Clearly, REED's cited cases of Dairy Land Ins. Co. v. V. McKenzie, 251 So.2d 887 (Fla. 1st DCA 1971) and Sapp v. La

Violette, 242 So.2d 483 (Fla. 1st DCA 1970) do not apply to the instant case. Both of these appellate decisions were decided prior to the passage of the non-joinder statute. Both of these decisions were based on the premise that a judgment had yet to be entered against the insurer or insured. However, in the instant case there currently is an Order entered against the Insurer, CANAL and there being no further recognized claims asserted against CANAL, it would be proper to allow a writ of certiorari to go forward so that immediate review may be had.

REED cites BE+K, Inc. v. Seminole Craft Corp., 583 So.2d 361 (Fla. 1st DCA 1991) for the contention that an interlocutory order which requires a party to indemnify another party is not reviewable by certiorari when the issue of liability has yet to be determined. This proposition of law simply does not apply to the instant case.

For argument sake, CANAL will concede that the duty to indemnify REED is not the subject matter of the instant appeal. The subject matter of the instant appeal, which the BE+K, Inc. court did not address, is the Insurer CANAL's requirement to provide liability coverage and to defend REED in the underlying case. In fact, the BE+K, Inc. court, in distinguishing Bruns from Querns, recognized that there is "clear and valid distinction between the two cases." BE+K, Inc. at 365.

The BE+K, Inc. court held that the valid distinction was that Bruns only decided the question of coverage and there remained pending the claim of the plaintiff against the insured and the insurer. Whereas, Querns determined the duty to defend.

Therefore, because BE+K, Inc. only discussed the effect of a decision regarding indemnity and distinguished situations in which a court finds a duty to defend, it has no application in the instant case. The BE+K, Inc. opinion seems to limit its holding to instances of indemnity so as not to be dispositive where CANAL is required to defend REED in the underlying suit.

REED contends that CANAL, may even at this time, reject its duty to defend REED. Not only does CANAL risk the likelihood of an adverse verdict being entered against REED in the underlying suit, but also the chance of an excess verdict for which CANAL may be liable in a bad faith action. Not to mention the fact that REED may enter into a "sweetheart deal" or not aggressively defend itself, all the while knowing the potential to sue CANAL for bad faith. However it is more than the potential for a bad faith suit which prevents CANAL from declining to offer defense counsel to REED. If CANAL does not defend REED in the underlying suit, not only does it subject itself to a potential bad faith suit, but CANAL would be ignoring the trial court's order to provide REED liability coverage. As stated previously, as part and parcel of CANAL's obligation to provide REED liability coverage is the insurer's duty to defend.

As REED points out in its Answer Brief on Page 23, insureds pay premiums for liability coverage which contain both the duty to indemnify and defend. REED argues that an insurer will not adequately investigate coverage issues if an immediate appeal is available regarding the duty to defend. It makes no sense for an

insurance company not to adequately investigate a potential claim and merely to deny coverage to its insured. This would increase the likelihood of a viable bad faith action against an insurer. In addition, an immediate review regarding an insurer's duty to defend would also allow an insured to appeal the decision of a trial court, holding that an insurer did not have to defend. It is submitted, REED would not be so quick to argue against an immediate right of appeal if he were seeking the review of an adverse ruling (i.e., that CANAL did not have to provide liability coverage in the requisite duty to provide defense counsel).

Lastly, REED argues in support of denying CANAL's writ of certiorari that REED may ultimately prevail in the underlying negligence suit, particularly if he is assisted by the insurance company. Thereby, it is argued, the issues presented in this present appeal would be rendered moot. However, it is for the very reason that CANAL must now provide a defense to REED so that REED may "ultimately prevail" in the underlying negligence suit that CANAL would be irreparably injured with no adequate remedy upon later appeal. CANAL should have the ability to have the trial court's order reviewed because the provision of a defense by CANAL where there is no legal obligation to do so is 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).

CONCLUSION

For the reasons stated in CANAL's Initial and Reply Briefs, CANAL respectfully requests this Court to answer the certified question in the affirmative, so that CANAL may seek immediate review of the trial court's order.

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,

GEORGE J. DRAMIS
Florida Bar No. 935549
HARRY W. LAWRENCE
Florida Bar No. 0094767
JOHN A. REED
Florida Bar No. 0065522
LOWNDES, DROSDICK, DOSTER, KANTOR
& REED, PROFESSIONAL ASSOCIATION

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 _____ day of _____, 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.

GEORGE J. DRAMIS
Florida Bar No. 935549
HARRY W. LAWRENCE
Florida Bar No. 0094767
JOHN A. REED
Florida Bar No. 0065522
LOWNDES, DROSDICK, DOSTER, KANTOR
& REED, PROFESSIONAL ASSOCIATION
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802
Telephone: (407) 843-4600
Fax: (407) 423-4495

Attorneys for Petitioner/Appellant
CANAL INSURANCE COMPANY