SUPREME COURT OF FLORIDA

CASE NO. 00-718

IN RE: PROPOSED AMENDMENTS TO FLORIDA RULES OF APPELLATE PROCEDURE

COMMENTS

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INTRODUCTION

The undersigned, an interested member of the Florida Bar, is submitting these comments in opposition to the proposed repeal of Fla. R. App. P. 9.130(a)(3)(C)(iv) concerning appeals of non-final orders "determining the issue of liability in favor of a party seeking affirmative relief." These comments are adapted from an article which appears in the May 2000 issue of the Florida Bar Journal, titled "The Proposal to Repeal Rule 9.130(a)(3)(C)(iv): Penny Wise, Dollar Foolish."

Fla. R. App. P. 9.130(a)(3)(C)(iv) Should Be Retained In Its Present Form; Alternatively, the Rule Should Be Amended to Allow Review of Liability Verdicts As If They Were Final Judgments.

In the undersigned's opinion, the proposed repeal of rule 9.130(a)(3)(C)(iv) is ill advised and will have an adverse effect on the functioning of our judicial system. Those who advocate the repeal of the rule support their arguments with overblown assertions about the alleged flooding of the district courts of appeal with nonfinal appeals which serve only to delay the resolution of cases. The assertions of the rule's critics are without merit. The rule has in the past allowed appeals from only a few types of nonfinal orders. These nonfinal appeals have served the interests of judicial economy and have not overburdened the judicial system.

Rule 9.130(a)(3)(C)(iv) authorizes appeals of nonfinal orders "determining the issue of liability in favor of a party seeking affirmative relief." Since its promulgation in

1977, appellate courts have dismissed a number of appeals involving orders not disposing of all liability issues in the case. See e.g., Travelers Ins. Co. v. Bruns, 443 So. 2d 959 (Fla. 1984); Heritage Paper Co., Inc. v. Farah, 440 So. 2d 389 (Fla. 1st DCA 1983). The rule plainly allows appeals only of orders determining "the" issue of liability, as opposed to "an" issue of liability. See Yelner v. Ryder Truck Rental, 683 So. 2d 655 (Fla. 4th DCA 1996); Winkelman v. Toll, 632 So. 2d 130 (Fla. 4th DCA 1994).

In view of that limitation, the rule has been applied to only a few types of nonfinal orders. The largest proportion by far of rule 9.130(a)(3)(C)(iv) appeals are taken from default orders. Prior to 1977, rule 4.2 authorized nonfinal review of "orders granting or denying motions to vacate defaults." See In re Florida Appellate Rules, 211 So. 2d 198, 199 (Fla. 1968). When rule 9.130 was promulgated, it did not specifically address defaults. However, this court held that an order refusing to set aside a default is appealable under rule 9.130(a)(3)(C)(iv) because it has the effect of an order determining the issue of liability in favor of a claimant. See Doctor's Hospital of Hollywood, Inc. v. Madison, 411 So. 2d 190 (Fla. 1982). The rule has also been held to authorize appeals of orders striking a party's pleadings for a discovery violation, see Paramount Advisors, Inc. v. Schwartz, 591 So. 2d 671 (Fla. 4th DCA 1991), Cadwell v. Cadwell, 549 So. 2d 1133 (Fla. 3d DCA 1989), or for a violation of pre-suit requirements in a medical malpractice case, see Preferred Medical Plan, Inc. v. Ramos, 742 So. 2d 322 (Fla. 3d

DCA 1999), Pagan v. Smith, 705 So. 2d 1034 (Fla. 3d DCA 1998).

Opponents of rule 9.130(a)(3)(C)(iv) are curiously silent about default appeals. Appellate courts have been flooded with them, but no one seems to be complaining. The reason is that nonfinal review of default orders has proven enormously successful. The orders are generally entered early in the litigation before significant resources have been committed to the case. The reversal rate of default orders is uncommonly high.

Immediate review of default rulings promotes the longstanding public policy of favoring resolution of cases on their merits rather than on nonintentional procedural mistakes. See e.g., Lindell Motors, Inc. v. Morgan, 727 So. 2d 1112 (Fla. 2d DCA 1999); Florida West Coast R.R. v. Maxwell, 601 So. 2d 298 (Fla. 1st DCA 1992); Apolaro v. Falcon, 566 So. 2d 815 (Fla. 3d DCA 1990). In medical malpractice cases, nonfinal appellate review also prevents an unconstitutional denial of access to courts that occurs when a trial court erroneously strikes a party's pleadings for failure to comply with pre-suit requirements. See Preferred Medical Plan, Inc. v. Ramos, supra; Pagan v. Smith, supra.

In addition, nonfinal review of default orders saves a huge amount of time and expense in both the trial and appellate courts. Consider the following "worst case" scenario:

The plaintiff sues ABC Corporation for injuries allegedly sustained in a

collision with an automobile negligently operated by an ABC employee in the course and scope of her employment. ABC immediately assigns the case to outside counsel. Due to a calendaring mistake, however, the attorney fails to timely respond to the complaint and a clerk's default is entered. ABC's attorney unsuccessfully moves to set aside the default. The attorney cannot appeal the trial judge's refusal to set aside the default because rule 9.130(a)(3)(C)(iv) has been repealed. He will have to wait until the end of the case to appeal the judge's ruling.

After two years of discovery, a trial is held on damages during which the issue of causation is hotly contested. Several medical experts are called to testify and the trial drags on for five days. The jury awards the plaintiff $2,000,000. ABC appeals and posts a supersedeas bond to stay execution of the judgment. ABC feels confident it will obtain a reversal because of the trial judge's erroneous refusal to set aside the default. However, in order to avoid a waiver of appellate rights, ABC must also raise several viable issues arising from the damages trial.

The appellate court reverses the final judgment based on the erroneous default ruling, holding that ABC showed excusable neglect and a meritorious defense. After another year of discovery, a six-day trial is held on liability and damages. The only liability issue is whether ABC's employee was acting within the scope of her employment when the accident occurred. Less than a day of trial time is spent on that

issue. The jury renders a defense verdict, finding that ABC's employee was not acting in the course and scope of her employment. A final judgment is entered and it is affirmed on appeal.

As a result of being denied immediate review of the erroneous default ruling, the plaintiff, ABC and the court system all suffered. Most of the damages discovery, as well as a lengthy trial and appeal of damages issues, could easily have been avoided.

For ABC, the "worst case" scenario can actually get worse. A defendant such as ABC can effectively lose the right to appeal an erroneous default or other liability ruling without nonfinal review. Suppose ABC is underinsured, has a poor credit rating and low cash reserves. As a result, the company is unable to post a sufficient cash or surety bond to obtain an automatic stay of execution of the $2,000,000 judgment. See Fla. R. App. P. 9.310(b)(1). The plaintiff begins collection efforts which, if successful, will drive ABC out of business. ABC is pressured into a monetary settlement, thereby forfeiting its legitimate liability defense on the merits.

Aside from default appeals, rule 9.130(a)(3)(C)(iv) generates a relatively small volume of pretrial appeals. Even critics of the rule admit that trial judges rarely enter summary judgments or similar orders that completely determine the issue of liability in favor of a claimant. Yet the critics complain about the large number of appellate decisions determining what constitutes "the" issue of liability.

It is true that there have been a number of appellate decisions concerning the wording of the rule. But that does not justify repealing it. Think of what would happen if we eliminated every rule or statute that has required judicial interpretation. There would be precious few rules and statutes remaining.

Moreover, it is unlikely that there will be a significant volume of appellate litigation in the future over what constitutes "the" issue of liability. After more than 20 years of testing the limits of rule 9.130(a)(3)(C)(iv), its parameters are now well defined.

One area of the law in which the immediate review of summary judgments determining liability is fairly common and has yielded positive results is the field of inverse condemnation. Rule 9.130(a)(3)(C)(iv) authorizes appeals of partial summary judgments determining that a "taking" has occurred. These determinations are frequently reversed on appeal, thereby avoiding the necessity of proceeding with a trial on complex valuation issues. See e.g., State, Dep't of Transp. v. Miccosukee Village Shopping Ctr, 621 So. 2d 516 (Fla. 1st DCA 1993), approved, 638 So. 2d 47 (Fla. 1994); State, Dep't of Transp. v. Weisenfeld, 617 So. 2d 1071 (Fla. 5th DCA 1993), approved, 640 So. 2d 73 (Fla. 1994); State, Dep't of Envtl Regulation v. Schindler, 604 So. 2d 565 (Fla. 2d DCA), rev. denied, 613 So. 2d 8 (Fla. 1992). Everyone benefits from the procedure: the landowner, the governmental entity and ultimately the taxpayers who must foot the bill.

Probably the fewest number of 9.130(a)(3)(C)(iv) appeals are taken from liability verdicts in bifurcated trials. Nonetheless, these appeals have drawn more criticism than any other application of the rule. This court has held that the rule authorizes nonfinal review of liability verdicts that are "rendered" for appellate purposes when the verdict form or an order denying a timely post-trial motion is filed with the clerk's office. See Meyers v. Metropolitan Dade County, 24 Fla. L. Weekly S135 (Fla. March 18, 1999); Metropolitan Dade County v. Green, 596 So. 2d 458 (Fla. 1992).

Those who advocate the elimination of liability verdict appeals contend that rule 9.130(a)(3)(C)(iv) was never intended to apply to liability rulings made after trial commences. However, the history of the rule's promulgation and the committee notes do not support that contention. The committee notes state vaguely that the review of nonfinal orders under the rule is "based on the necessity or desirability of expeditious review." What would cause expeditious nonfinal review to be "necessary" or "desirable" is not specified. The notes also refer at one point to "urgent interlocutory orders." Yet, once again there is no guidance as to what makes an order "urgent."

The rule's history does not provide any guidance either. The committee notes observe that rule 9.130 "replaces former rule 4.2 and substantially alters current practice." Rule 4.2 authorized nonfinal review of orders "formerly... cognizable in equity," "relating to venue or jurisdiction over the person," "granting partial summary judgment," and

"granting or denying motions to vacate defaults." See In re Florida Appellate Rules, 211 So. 2d at 199. The wording of rule 9.130 is different from its predecessor's: in some respects, it is broader; in other respects, it is narrower. Thus, one could debate endlessly about the meaning of the broadening or narrowing of nonfinal review without reaching any firm conclusions.

The only real guidance comes from the language of the rule and this court's interpretation of it. On two occasions, this court has held that allowing appeals of liability verdicts under rule 9.130(a)(3)(C)(iv) is consistent with the plain language of the rule and its underlying purpose of promoting judicial economy. See Meyers, 24 Fla. L. Weekly at S135; Green, 596 So. 2d at 458-59. In Green, the court enforced the plain language of the rule:

> We thus only need to ask whether an issue of liability was determined here.... [The term "liability"] obviously includes a jury determination of liability not yet reduced to a dollar sum. Accordingly, the jury's verdict here meets the plain language of the rule of procedure, because it has determined an issue of liability.

596 So. 2d at 458.

The court in Green went on to reject two arguments made by opponents of liability verdict appeals. The court first addressed the argument that rule 9.130(a)(3)(C)(iv) contemplates an expedited form of review which is inconsistent with allowing review of liability verdicts in bifurcated trials. The court disagreed with that argument for the

common sense reason that the courts are flexible enough to accommodate deviations from the ordinary type of nonfinal appeal:

> [T]he shorter time limitations for interlocutory appeals do not necessarily imply expedited review in every case. The appellate court has complete discretion to devote whatever resources are necessary to resolve the issues at hand once it obtains jurisdiction of the cause. Likewise, we find it difficult to believe that the parties in a complex case would not submit the full record; and even if they did not, the appellate court has jurisdiction to order up the record whenever necessary.

596 So. 2d at 459 (emphasis in original text).

The court then addressed the argument that allowing appeals of bifurcated liability verdicts wastes judicial resources by potentially allowing two appeals in the same case. The court acknowledged the possibility of two appeals, but found that the potential benefit of allowing review of liability verdicts outweighs, or at worst balances out, the potential burden of two appeals:

> If interlocutory appeals of this type are not allowed, then judicial resources will be wasted in those cases in which the liability phase was flawed, since the proceeding on damages would be rendered pointless. If interlocutory appeals are allowed, however, then we risk encouraging two separate appeals arising from a single case. At worst, the disadvantages of these two methods balance each other out.

Id. (emphasis in original text).

In Meyers, this court reaffirmed its commitment to allowing appeals of liability verdicts in bifurcated trials. The court suggested that appeals from liability verdicts in

bifurcated trials are merely the logical extension of the trial judge's determination that the case warrants bifurcation in the interests of judicial economy:

> [Allowing review of liability verdicts in bifurcated trials] furthers the purpose of a bifurcated proceeding and the interlocutory appeal rule, which are to promote judicial economy and to permit immediate review of the determination of liability before the case proceeds any further.

24 Fla. L. Weekly at S135.

Opponents of rule 9.130(a)(3)(C)(iv) assert that the rule will be used to appeal all kinds of rulings which were not contemplated by this court. However, that has not occurred in the past, and there is no reason to conclude that it will occur in the future.

As a practical matter, the rule permits appeals only in the context of a "noncontinuous" bifurcated trial, i.e., one in which issues of liability and damages will be tried before two different juries, or before the same jury on two separate occasions. Theoretically, directed verdicts and jury verdicts in continuous trials may be appealed under the rule. However, mid-trial directed verdict rulings are rarely, if ever, reduced to a written order and thereby "rendered" for appellate purposes. Liability verdicts in continuous trials may be technically "rendered," but they are generally nonappealable due to time constraints. An aggrieved litigant cannot appeal the verdict unless the trial judge stays the damages trial. A request for a discretionary stay in the middle of a continuous trial is not likely to be granted.

Another limitation of rule 9.130(a)(3)(C)(iv), as it applies to liability verdicts, is that it allows review only of the jury's determination of liability itself. The rule does not authorize review of previous interlocutory rulings. See Amerada Hess Corp. v. National R.R. Passenger Corp., 746 So. 2d 1095 (Fla. 4th DCA 1999).

In Amerada Hess, the court lamented that its review was limited to the liability verdict itself, thus precluding review of a previous interlocutory ruling. Hess sued the railroad for damages in connection with environmental cleanup and claims paid to third parties following a train-truck collision. The railroad counterclaimed against Hess for damages the railroad incurred. A bifurcated trial on liability was held during which the trial judge granted a directed verdict in favor of the railroad on one of Hess's theories that the railroad was negligent. The jury found Hess to be 100 percent at fault.

Hess appealed the liability verdict pursuant to rule 9.130(a)(3)(C)(iv) and Green. One of the issues Hess raised was that the trial court erred in granting a directed verdict in favor of the railroad on Hess' theory that the railroad was negligent. Arguably, the directed verdict affected the jury's determination that Hess was 100 percent at fault and, therefore, was pertinent to the appellate court's review. Nonetheless, the Fourth District Court of Appeal found itself unable to review the directed verdict ruling because it did not determine "the issue of liability in favor of a party seeking affirmative relief."

The court observed that judicial economy might be better served if rule

9.130(a)(3)(C)(iv) were expanded to allow review of previous interlocutory orders:

> Because the purpose of allowing review of verdicts on liability in bifurcated trials is to "promote judicial economy," Meyers[, supra], our supreme court may wish to consider expanding our scope of review so that we can review these verdicts as if they were final judgments.

746 So. 2d at 1095 (citation omitted).

In view of the limitations of liability verdict appeals, it is unlikely that appellate courts will ever be inundated by them. When appellate review occurs, it will be justified from a cost-benefit viewpoint. Appealable liability verdicts are rendered only after a trial judge has already determined that a damages trial should be delayed pending a trial on liability. Presumably, trial judges make such determinations only when they believe a noncontinuous bifurcated trial will serve the interests of judicial economy.

Trial judges typically order noncontinuous bifurcated trials in cases in which the damages issues are complex and will take several days or weeks to try. Litigants on both sides often agree to the procedure in the interests of saving the time and expense of trying damages. Cases frequently settle once liability has been correctly determined.

Without a right of immediate review of an erroneous liability determination, the benefits of bifurcation are lost. The defendant is forced to proceed with a trial on damages for the sole purpose of returning to the position it occupied before the erroneous liability determination was rendered. The plaintiff must finance the costs of a damages

trial even though it may ultimately be a losing proposition because liability is weak or nonexistent.

Rule 9.130(a)(3)(C)(iv)'s detractors contend that liability verdict appeals needlessly delay the entry of final judgment. However, if the liability determination is erroneous, then rushing to judgment is a worthless endeavor. The undersigned is not aware of instances in which defendants are abusing the rule by filing meritless appeals for the purpose of delaying the entry of judgment. In any event, it is up to trial judges to curb such potential abuses in the first instance by granting discretionary stays of damages trials only in cases in which such relief is warranted. In addition, appellate courts will no doubt impose appropriate sanctions against litigants who abuse the nonfinal appeal rule.

In the past, bifurcation and nonfinal review together have provided an ideal remedy in inverse condemnation cases. See e.g., South Florida Water Management Dist. v. Basore of Fla., Inc., 723 So. 2d 287 (Fla. 4th DCA 1998), rev. denied, 740 So. 2d 527 (Fla. 1999); Town of Jupiter v. Alexander, 747 So. 2d 395 (Fla. 4th DCA 1998); City of Key West v. Berg, 655 So. 2d 196 (Fla. 3d DCA), rev. denied, 663 So. 2d 629 (Fla. 1995); Florida Game and Fresh Water Fish Commission v. Flotilla, Inc., 636 So. 2d 761 (Fla. 2d DCA), rev. denied, 645 So. 2d 452 (Fla. 1994); Broward County v. Wakefield, 636 So. 2d 123 (Fla. 4th DCA 1994); State, Dep't of Envtl Regulation v. MacKay, 544 So. 2d 1065 (Fla. 3d DCA 1989). If review of liability verdicts is eliminated, an

increased number of valuation trials will be held at the taxpayers' expense.

CONCLUSION

It is respectfully submitted that rule 9.130(a)(3)(C)(iv) should not be repealed either in whole or in part. For the price of some additional nonfinal appeals, the judicial system runs more efficiently and the substantive rights of litigants are afforded greater protection under the rule's current version. If a change of the rule is to be made, the change should be in accordance with the Fourth DCA's suggestion in Amerada Hess that liability verdicts should be reviewed as if they were final judgments, in order to allow review of previous interlocutory rulings.

If the rule is left intact, an amendment of the definition of "rendition," as set forth in rule 9.020, to conform with this court's decision in Meyers will not be difficult. Rule 9.020 simply needs to say that a liability verdict is rendered when a signed verdict form is filed with the clerk of the lower tribunal, and that rendition is postponed until an order disposing of a timely motion for new trial or judgment notwithstanding the verdict is filed with the clerk. Likewise, if rule 9.130(a)(3)(C)(iv) is expanded along the lines suggested in Amerada Hess, the necessary appellate rules amendment can be accomplished without overtaxing the collective acumen of the appellate bench and bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 2nd day of April, 2000 to **Susan Whaley Fox, Esq.,** P.O. Box 1531, Tampa, Florida 33601 and **John Harkness, Esq.**, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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