PREFACE

Should Nonfinal Orders Determining Liability Be Immediately Appealable?

by Susan W. Fox

On April 1, 2000, the Appellate Court Rules Committee filed a petition with the Supreme Court of Florida identifying a variety of areas in which the appellate rules may need improvement. The committee's goal is to keep the rules clear, practical, consistent, and current, while avoiding traps for the unwary and needless delay. The current petition is a collection of points that have been raised during the past four years by court opinions, judges, and individual lawyers.

Perhaps the most substantial proposed change included in the current petition is repeal of rule 9.130(a)(3)(C)(iv), which allows review of nonfinal orders determining liability. This proposal was advocated by the district court of appeal judges who serve on the committee. After debating the issue over the course of several years, the committee decided that decisional law has given an expansive reading to this rule, allowing nonfinal appeals in situations not intended to be reviewable and contrary to the underlying philosophy of the rules. The committee feels the rule should be repealed altogether. Alternatively, the committee proposes amending the rule to allow appeal of orders determining liability only "if entered prior to trial." The Board of Governors of The Florida Bar agreed, although not without debate.

The two articles which follow were written by appellate lawyers who are passionate advocates for and against repeal of the rule. The articles were prepared in order to advocate their respective positions before the court, but are being published here so that others who may wish to be heard on the subject can fully understand the debate and be heard also.

Anyone interested in advocating for or against this or any other proposal addressed in the petition may file comments with the court. To ascertain the deadline for filing comments, please check the Florida Bar *News* or the Supreme Court's web site at www.FLCOURTS.org. The court will set oral argument in May or June 2000, and the oral argument date is usually the cut-off date for filing comments.

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Opposing viewpoints by Joel D. Eaton and David B. Pakula begin on page 19.

The Uncertain Future of Rule 9.130(a)(3)(C)(iv)

by Joel D. Eaton

For the present at least, jury verdicts finding liability in bifurcated trials are immediately appealable as "nonfinal orders" under Fla. R. App. P. 9.130(a)(3)(C)(iv). Although the Rules of Civil Procedure do not appear to permit post-trial motions to be directed to such verdicts and the Rules of Appellate Procedure do not provide that rendition of such verdicts can be tolled by such motions, the Supreme Court of Florida recently concluded that post-trial motions *can* be directed to such verdicts and that the motions *will* toll their rendition. *Meyers v. Metropolitan Dade County*, 24 Fla. L. Weekly S135 (Fla. March 18, 1999). The court also asked the Appellate Court Rules Committee to recommend revisions to the appellate rules to incorporate these conclusions.

I have long been a proponent of repealing rule 9.130(a)(3)(C)(iv) altogether. I, therefore, proposed to the committee that it respond to the Supreme Court's request by recommending repeal of the rule in its entirety. And I argued for repeal of the rule in a submission to the committee, which I titled "Justification for Repeal of Rule 9.130(a)(3)(C)(iv)." The text of the submission follows:

Prior to 1977, Rule 4.2 permitted appeals from "orders granting partial summary judgment on liability in civil actions." In 1977, this provision was reworded to permit interlocutory appeals from nonfinal orders that determine "the issue of liability in favor of a party seeking affirmative relief." Rule 9.130 (a)(3)(C)(iv). The reason for the change in wording is not set forth in the 1977 committee notes. All that the committee notes reveal is that, generally, rule 9.130 "substantially alters current practice" and that it was designed to limit interlocutory appeals to "the most urgent interlocutory orders." It is probable that the rule was reworded to exclude summary judgment orders disposing of collateral liability issues, like orders disposing of affirmative defenses or less than all counts of a plaintiff's complaint. It is improbable that it was designed to expand the number of reviewable interlocutory orders.

In an early construction of rule 9.130(a)(3)(C)(iv), the Supreme Court read the rule very narrowly, with the following explanation: "The thrust of rule 9.130 is to restrict the number of appealable nonfinal orders. The theory underlying the more restrictive rule is that appellate review of nonfinal judgments serves to waste court resources and needlessly delays final judgment." *Travelers Insurance Co. v. Bruns*, 443 So. 2d 959, 961 (Fla. 1984) (holding that a summary judgment order determining that a defendant/insurer's policy provided coverage for a co-defendant/insured was not appealable under the rule).

Even narrowly read, the rule is somewhat of an anomaly. It has no counterpart in the federal system and few, if any, counterparts in the remaining states. As a general rule, interlocutory rulings relating to resolution of the merits of the controversy are reviewable only after final judgment, when all the bits and pieces of the merits of the controversy have been resolved. Rule 9.130 is generally consistent with this philosophy. All but one of the

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The Proposal to Repeal Rule 9.130(a)(3)(C)(iv)

Penny Wise, Dollar Foolish

by David B. Pakula

By entering into the debate over the future of Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), I may be stepping into a political minefield. District court of appeal judges would prefer that the rule be repealed to ease their workload, as well as to avoid some practical difficulties they encounter in applying the rule. Plaintiffs' lawyers agree with the district court judges, but for another reason: They hope to proceed directly to final judgment without being derailed by a nonfinal appeal. Defense attorneys, on the other hand, seek to save their clients from a judgment for damages in cases in which liability has been erroneously determined in favor of the plaintiff.

Each of these viewpoints is legitimate. However, for the Supreme Court of Florida, which will decide the fate of rule 9.130(a)(3)(C)(iv), it is not a matter of choosing one viewpoint over another. The court must determine what is best for the overall functioning of our judicial system. I believe the correct decision will be to retain the rule in its present form.

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. 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 consists of those 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, the Supreme 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 Hosp. 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 presuit 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

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orders listed in rule 9.130 deal with threshold defenses and interlocutory matters unrelated to resolution of the merits of the controversy; rule 9.130(a)(3)(C)(iv) is the sole exception.

The apparent justification for the exception is that an adjudication of liability on a motion for summary judgment, without a trial of the facts, is one of those "most urgent interlocutory orders" deserving of immediate review. While this proposition is debatable, summary judgments in favor of parties seeking affirmative relief are infrequent, and permitting appeals from them, therefore, does not overburden the appellate courts. And if the rule had been limited in that fashion, as its predecessor was, it would not have been particularly burdensome or problematical. Unfortunately, litigants began to use the rule for other purposes.

The issue came to a head in *Dauer v. Freed*, 444 So. 2d 1012 (Fla. 3d DCA 1984). In that case, the trial court bifurcated the case and tried the liability issues to a jury, which returned a verdict against the defendants. The transcript of the trial was 18,000 pages in length. The defendants invoked the rule and appealed the verdict. The district court concluded that the rule—which required that the record consist of a mere appendix and that briefs be filed within 15 days after filing the notice of appeal—neither contemplated nor permitted such an appeal. *See also Peters v. Menendez*, 491 So. 2d 1300 (Fla. 3d DCA 1986).

In 1990, the committee considered a proposal to codify these decisions and limit the rule to orders that determine "the issue of liability in favor of a party seeking affirmative relief, *if entered prior to the commencement of trial*. . . ." This proposal failed. Instead, primarily because of the urging of several district court judges on the committee, the committee voted to repeal the rule altogether. Before this recommendation was considered, however, the Supreme Court overruled *Dauer v. Freed*. In *Metropolitan Dade County v. Green*, 596 So. 2d 458, 459 (Fla. 1992), the court concluded that jury verdicts in bifurcated trials were immediately appealable under "the plain language of the rule." Turning the reasoning of the *Bruns* decision on its head, the court observed that judicial resources would be wasted if interlocutory appeals of such verdicts were not allowed. Subsequently, and without explanation, the court rejected the committee's recommendation that the rule be repealed. *See In re Amendments to the Florida Rules of Appellate Procedure*, 609 So. 2d 516, 517 (Fla. 1992).

In *Green*, the court left unanswered the knotty problems of whether post-trial motions could be filed after a verdict finding liability in a bifurcated trial, whether such motions would toll rendition of the verdict, what aspects of the proceedings were reviewable in an appeal from the verdict, and the like. In 1997, at the request of several district court judges on the committee, the committee explored ways in which to reduce the workload of the appellate courts. Once again, finding no substantial justification for the anomalous rule, and in an effort to reduce the number of interlocutory appeals, the committee voted to repeal the rule. That recommendation is scheduled for submission to the Supreme Court at the end of the current cycle, in June 2000.

Recently, in *Meyers v. Metropolitan Dade County*, 24 Fla. L. Weekly S135 (Fla. March 18, 1999), and apparently unaware of the committee's pending recommendation, the Supreme Court concluded that post-trial motions could be directed to jury verdicts in bifurcated proceedings, and that such motions will toll rendition of the verdict. Although this conclusion was contrary to the plain language of rule 9.020(h) (and a score of decisions holding that rendition of interlocutory orders cannot be tolled by motions directed to them), the court concluded that "the current appellate rules do not specifically address the unique issues presented by this case," and it directed the committee to "recommend appropriate revisions to the rules." The question that remains is whether the committee should adhere to its recommendation to repeal the rule altogether, which will moot the problem entirely, or whether it should undertake the drastic revisions contemplated by *Meyers*.

If the rule had been narrowly read and limited to summary judgment orders determining liability, it probably would have been palatable. Even in that circumstance, however, the rule is frequently used for little purpose other than to derail and delay the proceedings in the trial court, often adding up to a year to resolution of the controversy. And because such orders are cautiously granted in the first place, reversals are rare in any event. But the real difficulty with the rule is that it has not been read narrowly, and the expansive reading it has been given has rendered it highly problematical in application, confusing and difficult to square with other rules in operation, and unduly burdensome on the appellate courts.

For example, in its short existence, the rule has required the Supreme Court to resolve conflicts in and questions concerning its inter-

pretation on at least six occasions. In addition to *Bruns*, *Green*, and *Meyers, see Doctor's Hospital of Hollywood, Inc. v. Madison*, 411 So. 2d 190 (Fla. 1992); *Sunny South Aircraft Service, Inc. v. Inversiones*, 1120 C.A., 417 So. 2d 676 (Fla. 1982); *Canal Insurance Co. v. Reed*, 666 So. 2d 888 (Fla. 1996). And the district courts have spent an *inordinate* amount of time writing opinions resolving motions to dismiss directed to appeals taken from the rule, often with inconsistent results. *See* the numerous decisions collected in Padovano, *Florida Appellate Practice*, §22.9 (2d ed. 1997).

The most difficult problems created by the expansive reading of the rule arise in the context of orders determining liability during the course of a trial of the merits. For example, if a trial court were to direct a verdict on liability in favor of a plaintiff at the close of the evidence, the present construction of the rule would appear to permit an immediate interlocutory appeal of that order. If such an appeal were taken, then a motion to stay further proceedings would lie in the trial court under rule 9.130(f), and the trial court's ruling would be reviewable in the district court under rule 9.310(f)—all notwithstanding that the case is ready for submission to the jury for a determination of damages. And even if the motion to stay were denied, the trial court would still be prohibited from entering a final judgment on the subsequent jury verdict by rule 9.130(f), until the interlocutory appeal was decided with finality. What usually follows in this circumstance is a motion to relinquish jurisdiction to permit the trial court to enter a final judgment on the jury verdict, which moots the interlocutory appeal and requires a second, plenary appeal of the final judgment, and the entire exercise amounts to a vast shuffling of papers with little purpose but delay, confusion, and the waste of time and resources.

A similar scenario is presented when a trial court bifurcates the liability issues from the damage issues, but intends to try the damage issues to the same jury if the plaintiff receives a favorable verdict on liability (as all trial courts now must do in every case in which punitive damages are in issue). Upon return of a verdict favoring the plaintiff on liability, the defendant may immediately appeal, leading to the same rounds of motion practice and shuffling of papers which arise in the prior example.

And even in the situation in which interlocutory appeals are authorized by *Green*—a verdict on liability in a bifurcated trial where the damages are to be tried to a separate finder-of-fact in the future—the problems are enormous. At present (with the exception of *Meyers*), the case law uniformly holds that motions directed to interlocutory orders do not toll their rendition, and rule 9.020(h) is rather explicit on this point. The Rules of Civil Procedure are also somewhat ambiguous as to whether post-trial motions can be filed in such a circumstance, or whether they must await resolution of the entire controversy. Post-trial motions directed to the verdict must be filed in order to preserve certain issues for appeal, of course, so the appeals recognized in *Green* will require a drastic rewrite of both the appellate rules and the Rules of Civil Procedure (which must logically require that post-order motions directed to *any* order determining liability in favor of a party seeking affirmative relief, like a summary judgment order to that effect, toll rendition of such orders as well). In addition, permitting an appeal of a verdict in this circumstance inevitably stops the case in its tracks, because it is the rare circuit court judge who will try the damage issues while an interlocutory appeal of the liability verdict is pending and entry of a final judgment is prohibited. The result is typically a delay of a year or more in resolution of the merits of the controversy.

Moreover, in all three of the circumstances sketched above, a complete record and a transcript of the trial will be required, and rule 9.130—which limits the record to a mere appendix and requires service of the appellant's brief within 15 days of filing the notice of appeal—is obviously not designed for such an appeal. The inevitable result is a motion to treat the appeal as a plenary appeal under rule 9.110, which is usually granted, and the purpose of rule 9.130's form of expedited review is entirely defeated. If such appeals are to be treated as plenary appeals in any event, as they ordinarily are, it would make far more sense to allow the trial court to complete its labors and then review the entire case in a plenary appeal from the final judgment.

It should also be observed that permitting appeals from jury verdicts in bifurcated trials finds no support in the apparent justification for the rule. As noted previously, the apparent justification for the rule is that an adjudication of liability on a motion for summary judgment, without a trial of the facts, is one of those "most urgent interlocutory orders" deserving of immediate review. But once the liability issues have been tried to resolution by a jury in a bifurcated trial, that justification no longer exists. The only other arguable justification for permitting such appeals is to save the parties and the trial court the additional time and expense of a trial of the damage issues if the verdict is ultimately overturned on appeal. Courts have routinely rejected this as a justification for permitting interlocutory review by way of certio-

rari, however, so it would appear to be a poor justification for the interlocutory review authorized by *Green*. *See, e. g., Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1100 (Fla. 1987).

The foregoing conundrums are not the only conundrums created by an expansive reading of the rule. After *New Deal Cab Co. v. Stubbs*, 90 So. 2d 614 (Fla. 1956), and *Davis v. Sobik's Sandwich Shops, Inc.*, 351 So. 2d 17 (Fla. 1977), trial courts are permitted to enter summary judgments and grant directed verdicts in favor of a plaintiff but against no particular defendant, leaving it to a jury to determine which of the several defendants is ultimately to be found liable to the plaintiff. District courts have reviewed such orders under rule 9.130(a)(3)(C)(iv). *See, e. g., Jartran, Inc. v. Abel*, 500 So. 2d 638 (Fla. 3d DCA 1986). Review of such orders is entirely anomalous, however, because it permits interlocutory appeals by defendants who may never be found liable to the plaintiff at all.

And what of the circumstance of the multi-count action in which a plaintiff receives a summary judgment, a directed verdict, or a jury verdict in a bifurcated trial on the issue of liability on one count of the action but not on the others? According to the dissenting judge in *Miami Columbus, Inc. v. Ramlawi*, 687 So. 2d 1378 (Fla. 3d DCA), *review denied*, 697 So. 2d 511 (Fla. 1997), the plain language of the rule and the expansive reading given to it by *Green* authorizes an appeal of such an order. According to the majority, however, the rule "applies only to orders which determine 'the' rather than 'an' issue of liability" (687 So. 2d at 1379), and it, therefore, does not authorize an interlocutory appeal of such an order. *See also Yelner v. Ryder Truck Rental*, 683 So. 2d 655 (Fla. 4th DCA 1996), and *Winkelman v. Toll*, 632 So. 2d 130 (Fla. 4th DCA 1994), which reach similar conclusions in analogous circumstances. A rule which is subject to such hair-splitting has little to recommend it, and creates an inordinate burden on the appellate courts that is plainly undesirable—and the result in *Ramlawi* (and similar cases) was most likely motivated in any event by a desire to rigorously restrict the reach of the rule rather than expand it further, which is recommendation enough for repeal of the rule altogether.

And what of the circumstance in which a defendant counterclaims against a plaintiff and the liability issues on both claims are bifurcated and tried, the plaintiff wins on its claim, the counter-plaintiff loses on its claim, and an appeal is taken from the verdict finding in favor of the plaintiff? Is such an appeal to be dismissed under the reasoning of *Ramlawi*, or is it to be entertained under the "plain language of the rule" and the expansive reading given to it by *Green*? And if the appeal is entertained, what is the scope of review in the interlocutory appeal? Can the district court review errors affecting both claims in the single trial, or is it limited to reviewing errors affecting only the plaintiff's claim and must review errors affecting the defendant's counterclaim in a separate plenary appeal from the final judgment entered on the counterclaim? At present, there is no answer to this conundrum in the decisional law. And additional conundrums are certain to appear in the future as the limits of the rule are probed and tested for various tactical and strategic purposes by ever-inventive counsel.

As the majority noted in *Ramlawi*, it is the "general principle that piecemeal appeals in pending litigation are undesirable" (687 So. 2d at 1379).Yet that is precisely what rule 9.130(a)(3)(C)(iv) now permits, in numerous circumstances, at a level of complexity that has consistently taxed the acumen of the appellate courts and taken up an inordinate amount of their time. All of the orders that are now appealable under rule 9.130(a)(3)(C)(iv) can be reviewed in a plenary appeal from a final judgment under rule 9.110, which is the rule they typically end up being reviewed under in any event—and which is where they are reviewed in nearly every other jurisdiction in the nation.

To permit review of such orders in the courts of this state causes substantial delays in resolution of the merits of controversies, and, on balance, wastes a considerable amount of time and judicial resources. It also reflects a level of cynicism in the trial courts of this state that is entirely unwarranted. At minimum, the rule should be limited, as its predecessor was, to summary judgments finding liability prior to the commencement of trial, but there is really very little reason to justify even this limited type of piecemeal review. And because the workload of the appellate courts deserves to be pared wherever it can reasonably be reduced without substantial prejudice to litigants, the rule should be repealed in its entirety.

At its June 1999 meeting, the committee voted (with near unanimity) to stick to its previous recommendation that rule 9.130 (a)(3)(C)(iv) be repealed in its entirety. It also voted to recommend as an alternative that the rule at least be limited to its apparent initial intent—to review of nonfinal orders determining the issue of liability in favor of a party seeking affirmative relief, "if entered prior to trial." The recommendation is scheduled for submission to the Supreme Court at the end of the current rules cycle, in June 2000. It remains to be seen whether the recommendation will be accepted. All that can be said at the moment is that the future of rule 9.130 (a)(3)(C)(iv) is uncertain, and that it may not survive the turn of the century. In the meantime, don't forget to send your $250 check with your notice of appeal. ❑

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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 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 presuit requirements. *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).

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. As a result of 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 deter-

minations 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. The Supreme 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 the Supreme Court's interpretation of it. On two occasions, the Supreme Court has held that allowing ap-

peals 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.

Green, 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 Supreme 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.

Green, 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*, the Supreme 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.

Meyers, 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 that were not contemplated by the Supreme Court. But 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 "non-continuous" 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 its 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," 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.

Amerada Hess, 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. I am 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 Common v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. 2d DCA), *rev. denied*, 645 So. 2d 452 (Fla. 1994); *Froward County v. Wakefield*, 636 So. 2d 123 (Fla. 4th DCA 1994); *State, Dept. 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.

In my opinion, 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 in 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 the Supreme 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. ❑

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